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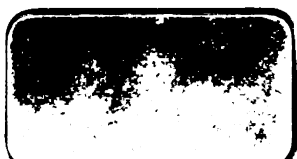
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CASES

DECIDED IN

THE COURT OF SESSION,

FROM

NOV. 12, 1844, TO JULY 19, 1845.

REPORTED BY

J. M. BELL, JOHN MURRAY, GEORGE YOUNG, AND
H. L. TENNENT, ESQUIRES, ADVOCATES.

VOL. VII.

EDINBURGH :

PRINTED FOR THOMAS CLARK, LAW-BOOKSELLER ;

AND

W. BENNING AND CO., LONDON.

1845.

**EDINBURGH: PRINTED BY BALLANTYNE AND HUGHES,
PAUL'S WALK, CANONGATE.**

JUDGES

OF THE

COURT OF SESSION

DURING THE PERIOD OF THESE REPORTS.

FIRST DIVISION.

Lord President BOYLE.

Lord MACKENZIE.

Lord FULLERTON.

Lord JEFFREY.

SECOND DIVISION.

Lord Justice-Clerk HOPE.

Lord MEDWYN.

Lord MONCREIFF.

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Lord ROBERTSON.

**DUNCAN M'NEILL, Esquire, Lord Advocate and
Dean of Faculty.**

ADAM ANDERSON, Esquire, Solicitor-General.

INDEX OF NAMES

IN

VOLUME VII.

	Page
A B, Montgomerie v.	553
A v. B,	595
A B v. C D,	556
Adam v. McRobbie, &c.	276
Advocate, Her Majesty's, v. Graham, &c.	183
Aitken v. Galloway,	996
Alexander,	884
Alexander v. M-Gregor,	915
Alexander, &c. (Alexander's Executors) v. Barclay (Judicial Factor on Russell's Estate),	264
Allan v. Fleming,	908
Allardice v. Lantour and Mandatary,	362
Anderson and Others, Cameron (Anderson's Trustee) v.	92
Anderson, Garrow, and Company v. Forth Marine Insurance Company,	268
Anderson, Officers of State v.	542
Anderson and Company v. Taylor,	913
Anderson v. McIntosh,	947
Angus and Company v. Scottish Marine Insurance Company,	603
Anstruther, &c., Wood v.	212
Anstruther Easter, Magistrates and Town-Council of, Davidson v.	342
Ashley Brothers and Mandatory v. Muir, (Reid's Trustee,)	524
Baillie, Clelland v.	461
Baillie, King v.	228
Baine and Others, (Lang's Trustees,) v. Craig,	845
Baird or Monro and Husband, Hobbs or Baird v.	492
Baird's Trustees v. Mitchell,	1001
Balmaclellan, Heritors and Kirk-Session of, Halliday v.	1057
Barclay, Ritchie or Alcock, &c. v.	819
Barclay (Judicial Factor on Russell's Estate), Alexander, &c. (Alexander's Executors) v.	264
Barrow, &c., Telfer v.	170
Baxter v. Smeal or Baxter,	639
Beattie and Others, Paterson and Others v.	561

	Page
Belhaven, Lord v. Presbytery of Hamilton,	1061
Bell, &c v. Cheape, &c.	614
Berwick and Others, Mitchell v.	382
Bett and Others v. Murray,	447
Blantyre, Lord, v. Dunn,	299
Boyack and Others, Miln and Others v.	888
Bradley, &c., Gowan, &c. v.	433
Brash and Brothers v. Steele and Others,	539
Brock v. Speirs, &c.,	858
Brodie and Others (Bell's Trustees), Clelland (Walker's Assignee) v.	147
Brown, &c., (Ogilvie's Trustees,) v. Robertson,	745
Buccleuch, Duke of, v. M'Turk,	927
Budge, Munro v.	1044
Burgess v. M'Intosh,	1085
Buxton v. Buxton,	1063
Caddell v. Caddell's Trustees,	1014
Cairns, Denovan v.	378
Campbell v. Cruickshank,	548
Campbell (Judicial Factor on Blair's Estate,) Forbes and Company v.	1068
Campbell and Others, Fleming v.	935
Campbeltown, Magistrates of, v. Galbreath,	220, 255, 482, 828
Cameron, (Anderson's Trustee,) v. Anderson and Others,	92
Carnegie v. M'Tier,	826
Chalmers,	865
Chanter and Company v. Thoms,	465
Cheape, &c., Bell, &c. v.	614
Clarke v. Wardlaw,	268
Clason and Others, Livingstone v.	554
Clelland v. Baillie.	461
Clelland (Walker's Assignee) v. Brodie and Others (Bell's Trustees),	147
Clyde Trustees, Connell, &c. and Mandatary v.	829
Connell, &c. and Mandatary v. The River Clyde Trustees,	829
Cormack v. Tod,	812
Cowan, (Curator Bonis for Turnbull,) v. Turnbull's Trustees,	872
Cowie and Mandatary, M'Morine and Others v.	270
Craig, Raine and Others, (Lang's Trustees,) v.	845
Cruickshank, Campbell v.	548
Cruickshank v. Mackay or Ewing and Husband,	1084
Currie v. M'Nair,	746
Darnley or Ranken v. Kirkwood,	595
Davidson v. Magistrates and Town-Council of Anstruther Easter,	342
Dawson, Rutherford v.	162
Denovan v. Cairns,	378
Dobson, Marshall and Mandatary v.	232
Donald v. Hart,	273
Drummond and Others, Wilson and Others v.	249
Drysdale, Lawson v.	153
Dunbar, Sinclair and Others (Wemyss's Trustees) v.	1085
Dundee Gas-Light Co. and Others v. Dundee New Gas-Light Co. and Others,	109
Duff and Others, (Morton's Trustees,) Laing, (Berrie's Trustee,) v.	556
Dunlop, Scott v.	493
Dunn, Lord Blantyre v.	299
Dykes, Struthers v.	436
Edinburgh and Glasgow Railway Company, Magistrates and Town-Council of Linlithgow v.	1071
Edinburgh, Ministers of, v. Magistrates and Council of Edinburgh,	663

INDEX OF NAMES.

iii

	Page
Edmonstone and Others, Montrose, Duke of, v.	759
Eglinton, Trustees of Hugh Earl of, College of Glasgow v.	965
Fisher's Trustees v. Fisher and Others,	129
Fisken and Company v. Thomson, (J. S. Robb & Co.'s Trustee,)	842
Fleming, Allan v.	908
Fleming v. Campbell and Others,	935
Forbes (Curator Bonis for Morrison) v. Morrison, &c.	856
Forbes, White v.	886
Forbes and Company v. Campbell (Judicial Factor on Blair's Estate,)	1068
Forth Marine Insurance Company, Anderson, Garrow, and Company v.	268
Galbreath, Magistrates of Campbeltown v.	220, 255, 482, 828
Gallie and Others v. Wylie,	235
Gallie and Others v. Wylie (Wilson's Trustee),	301
Galloway v. Scrivens,	355, 403
Galloway, &c., Treacher and Mandatary v.	1099
Galloway (Marshall's Trustee) v. Moffat,	1088
Galloway, Aitken v.	996
Gardner v. Trinity House of Leith,	286
Gibson, Mackenzie v.	560
Gibson,	581
Gilchrist and Husband v. Gilchrist, &c.	214
Glasgow, College of, v. Trustees of Hugh Earl of Eglinton,	965
Glasgow and Others,	178
Gordon v. Gordon and Others,	357
Gordon v. Scott,	883
Gordon, Innes v.	141
Gowan, &c. v. Bradley, &c.	433
Graham and Trustees of George Lewis, Her Majesty's Advocate v.	183
Graham v. Mackay,	515
Grant v. Wishart,	274
Grant,	182
Grant v. Innes, &c.,	226
Grant v. Johnston,	390
Gregor, Preston v.	942
Guthrie, &c.	637
Halliday v. Heritors and Kirk-Session of Balmaclellan,	1057
Hamilton, Presbytery of, Lord Belhaven v.	1061
Hamilton, M'Grigor v.	532
Hamilton, Smith v.	499
Hamilton, Lumsden v.	300
Hamilton and his Trustee v. M'Queen's Trustees,	295
Hart, Donald v.	273
Hart and Others, Montgomerie or Hart v.	1081
Hastings, The Marquis of, &c. v. Lord Henry Hastings and Others,	1
Harvey v. Miller and Mandatary,	398, 604, 950
Hay, Jopp v.	260
Hobbs or Baird v. Baird or Monro and Husband,	492
Hogg v. Landles,	594
Hume and Mandatary v. Menzies,	1010
Hood or Chambers, Muir v.	1009
Hutchison and Others, (Armstrong's Assignees,) v. The National Loan Fund Life Assurance Society,	467
Innes, &c., Grant v.	226
Innes v. Gordon,	141

	Page
Jarvis v. Wotherspoon,	128
Johnston, Grant v.	390
Johnstone v. Maxwell's Trustees,	1066
Johnstone (J. and H. Smith's Trustee) v. Owen,	1046
Jopp v. Hay,	260
 Ker v. M'Ewan,	 400
Ker, (Dunlop's Trustee,) v. M'Kechnie,	494, 809
Kennoway, Ranking and Sale of,	1014
Kilgour and Others v. Kilgour and Others,	451
Kilmodan, Heritors and Kirk-Session of, Weir or Mitchell v.	638
King, &c., Pollock and Others, v.	172
King v. Baillie,	228
King v. King,	499
King v. Patrick,	536
Kirkwood, Darnley or Ranken v.	695
 Laing, &c., Wilson v.	 113
Laing, (Berrie's Trustees,) v. Duff and Others, (Morton's Trustees,)	556
Landles, Hogg v.	594
Landell, Purves v.	810
Lang, Russell v.	919
Lantour and Mandatary, Allardice v.	362
Lawson v. Drysdale,	153
Lawson, &c. (Cattanach's Trustees) v. Thom, &c. (M'Nab's Trustees,)	960
Learnmonth v. Patton,	1094
Leith, Trinity House of, Gardner, v.	286
Leslie, Paterson v.	950
Lindsay, Longmore v.	1098
Linlithgow, Magistrates and Town-Council of, v. Edinburgh and Glasgow Railway Company,	1071
Livingstone v. Clason and Others,	554
Lockhart and Others v. Lockhart,	1045
Longmore v. Lindsay,	1098
Lowe v. Taylor and Others,	117
Lumsden v. Hamilton,	300
 Macaulay, Seaforth Trustees v.	 180
Mackay, Graham v.	515
Mackay or Ewing and Husband, Cruickshank v.	1084
Mackie, St Monance, Magistrates, &c. of, v.	582
Mackenzie,	283, 361
Mackenzie v. Gibson,	560
Manson v. National Bank of Scotland,	159
Mark,	882
Marshall and Mandatary v. Dobson,	232
Mason v. Wilson,	160
Mathews, &c., Railton v.	105, 152, 153, 748
Maxtone and Others v. Muir and Others,	1006
Maxwell's Trustees, Johnstone v.	1066
M'Ewan, Ker v.	400
M'Grigor v. Hamilton,	632
M'Gregor, M'Laurin v.	744
M'Gregor, Alexander v.	915
M'Intosh, Anderson v.	947
M'Intosh, Burgess v.	1085
M'Kechnie, Ker, (Dunlop's Trustee,) v.	494, 809
M'Laurin v. M'Gregor,	744

INDEX OF NAMES.

v

	Page
McLelland and Alexander's Trustees v. Steele, . . .	179
McMorie and Others v. Cowie and Mandatary, . . .	270
McNair, Currie v.	746
McQueen's Trustees, Hamilton and his Trustee v. . . .	295
McRobbie, &c., Adam v.	276
McTurk, Buccleuch, Duke of, v.	927
McTier, Carnegie v.	826
Mezies, Home and Mandatary v.	1010
Miller v. Oliphant,	283
Miller and Mandatary, Harvey v.	398, 604, 950
Mila and Others v. Boyack and Others,	888
Milne, (Black's Trustee), Welsh v.	213
Mitchell v. Berwick and Others,	382
Mitchell, Ransan, junior, and Mandataries v.	813
Mitchell, Baird's Trustees v.	1001
Moffat, Galloway (Marshall's Trustee) v.	1088
Monro, Strachan v.	178, 399, 998
Montgomerie v. A B,	553
Montgomerie or Hart v. Hart and Others,	1081
Montrose, Duke of, v. Edmonstone and Others,	759
Moray or Drummond and Others, Stirling v.	640
Morton, &c. v. Scott and Others,	248
Morris, &c., Pollok or Tennant and Husband v.	973
Morrison, &c., Forbes (Curator Bonis for Morrison) v. .	853
Muir, (Reid's Trustee), Ashley Brothers and Mandatary v.	524
Muir and Others, Maxtone and Others v.	1006
Muir v. Hood or Chambers,	1009
Munro v. Munro,	358
Munro v. Taylor and Others,	500
Munro, Murdoch v.	155, 1014
Munro v. Budge,	1044
Murdoch v. Munro,	155, 1014
Murray, Bett and Others v.	447
Murray v. Murray, &c.	1000
Myers,	886
Napier v. Wood,	166
National Bank of Scotland, Manson v.	159
National Loan Fund Life Assurance Society, Hutchison and Others, (Armstrong's Assignees,) v.	467
Officers of State v. Anderson,	542
Ogilvie's Trustees, &c., Robertson v.	236
Oliphant, Miller v.	283
Owen, Johnstone (J. and H Smith's Trustee) v.	1046
Patterson and Others v. Beattie and Others,	561
Patterson v. Leslie,	950
Patterson, &c., Woodrow v.	385
Paton and Others, Learmonth v.	1094
Patrick, King v.	536
Pellock and Others v. King, &c.	172
Pollok or Tennant and Husband v. Morris, &c.	973
Preston v. Heirs of Entail of Valleyfield,	305
Preston v. Gregor,	942
Parves v. Landell,	810
Ratton v. Mathews, &c.	105, 152, 153, 748

	Page
Ransan, junior, and Mandataries v. Mitchell,	813
Ritchie or Alcock, &c. v. Barclay,	819
Robertson v. Ogilvie's Trustees, &c.	236
Robertson, Brown, &c., (Ogilvie's Trustees,) v.	745
Russell v. Lang,	919
Rutherford v. Dawson,	162
Scott and Others, Morton, &c. v.	248
Scott v. Dunlop,	493
Scott,	445, 638
Scott, Gordon v.	883
Scottish Marine Insurance Company, Angus and Company v.	603
Scrivens, Galloway v.	355, 403
Seaforth Trustees v. Macaulay,	180
Simpson, Thomson v.	106
Sinclair and Others (Wemyss's Trustees) v. Dunbar	1085
Sloan,	227
Smeal or Baxter, Baxter v.	639
Smith, Wighton v.	235
Smith v. Hamilton,	499
Speirs, &c., Brock v.	858
Steele, M'Lelland and Alexander's Trustees, v.	179
Steele and Others, Brash and Brothers, v.	539
Stirling v. Moray or Drummond and Others,	640
Strachan v. Monro,	178, 399, 998
Struthers v. Dykes,	486
St Monance, Magistrates, &c. of, v. Mackie,	582
Taylor and Others, Lowe v.	117
Taylor and Others, Munro v.	500
Taylor, Williamson v.	842
Taylor, Anderson and Company v.	913
Telfer v. Barrow, &c.	170
Thom, &c. (M'Nab's Trustees,) Lawson, &c. (Cattanach's Trustees) v.	960
Thoms, Chanter and Company v.	465
Thomson v. Simpson,	106
Thomson, (J. S. Robb & Co.'s Trustee,) Fiskien and Company v.	842
Threshie v. Threshie's Trustees and Others,	403
Tod, Cormack v.	812
Treacher and Mandatary v. Galloway, &c.	1099
Turnbull's Trustees, Cowan, (Curator Bonis for Turnbull,) v.	872
Valleyfield, Heirs of Entail of, Preston v.	305
Waddel and Others v. Trustees of Waddel and Others,	605
Wardlaw, Clarke v.	268
Weir or Mitchell v. Heritors and Kirk-Session of Kilmodan,	638
Welsh v. Milne, (Black's Trustee,)	213
White v. Forbes,	886
Wighton v. Smith,	235
Williams or Erskine v. Williams and Others, (Marriage Contract Trustees,)	110
Williamson v. Taylor,	842
Wilson v. Laing, &c.	113
Wilson or Wishart v. Wishart,	125
Wilson, Mason v.	160
Wilson and Others v. Drummond and Others,	249
Wishart, Wilson or Wishart v.	125
Wishart, Grant v.	274

INDEX OF NAMES.

vii

	Page
<i>Wood, Napier v.</i>	166
<i>Wood v. Anstruther, &c.</i>	212
<i>Woodrow v. Patterson, &c.</i>	385
<i>Wotherspoon, Jarvis v.</i>	128
<i>Wylie, Gallie and Others v.</i>	235
<i>Wylie (Wilson's Trustee), Gallie and Others v.</i>	301

CASES

DECIDED IN

THE COURT OF SESSION.

1844-5.

WINTER SESSION.

THE MARQUIS OF HASTINGS.—*Sol.-Gen. Anderson—G. Bell—Mure.*

LADY SOPHIA HASTINGS.—*Rutherford—Cowan.*

LADY EDITH HASTINGS.—*H. J. Robertson.*

LORD HENRY HASTINGS.—*Lord Advocate M'Neill—Marshall.*

Mutual Declarators.

No. 1

Nov. 12, 1844.
The Marquis of Hastings, &c.

Entail—Clause.—The estate of A was entailed in a marriage contract upon the heirs of the marriage and their heirs, heirs-male being called before heirs-female, under this provision, that in the event of there being only one son "of this present marriage" who shall succeed to the estate of B, his second son, and failing a second son, his eldest daughter, should succeed to the estate of A; but in the event of there being two sons "of this present marriage," that the second should succeed to A if the eldest should succeed to B; and that the succession to A, in case any of the heirs "of this marriage" shall succeed to B, "shall take place according as is above mentioned in all time coming." An only son of the marriage succeeded to both estates, and on his death was succeeded in both by his only child, a daughter. On her death, leaving children,—Held, in conformity with the opinions of a majority of the whole Judges, 1st, That the provision and exclusion in the entail of A did not apply to her eldest son, even though he had succeeded to B; but, 2d, That having acquired right to B during his mother's life under a transaction, sanctioned by Parliament, whereby it was given in lieu of an English estate to which he had an indefeasible right of succession, he had not succeeded thereto in the meaning of the provision and exclusion in the entail; on each of which grounds he was preferred in a competition for the succession under the entail with his eldest sister, and with his second son and eldest daughter.

A

No. 1. **JANE MURE**, Countess of Glasgow, was proprietor in fee-simple of the estate of Rowallan. In 1720, on the marriage of her eldest daughter, Lady Jane Boyle, to Colonel James Campbell, brother of the Earl of Loudoun, she, with consent of her husband, entailed that estate in the marriage contract. The destination was to the Countess herself and her husband in liferent, and the heirs-male of his body in fee; which failing, to the heirs-female of such heir-male, the eldest excluding the rest; "which also failzieing, to the said Lady Jean Boyle, and the heirs-male to be lawfully procreate of her body of the said marriage, and the heirs-male of their bodies; which failzieing, to the heirs-female to be procreate of the body of the heir-male of the said marriage, the eldest always secluding the rest, and succeeding without division, as said is; which failzieing, to the heirs-female to be lawfully procreate of the said Lady Jean Boyle her body of the said marriage, and the heirs-male or female of their bodies, the eldest heir-female always secluding the rest, and succeeding without division, as said is."

Nov. 12, 1844.
1st Division.
Lord Wood.
W.

The Marquis of
Hastings, &c.

By a subsequent clause of the deed, posterior to the entailing clauses, it was provided and declared, and appointed to be contained in the infestments to follow thereupon, "that in case it should fall out that there be only one son of this present marriage procreate betwixt the said Master James Campbell and Lady Jean Boyle, who shall succeed to the honours and estate of Loudoun, though there be daughters, then and in that case it's hereby declared, that the second son of this only son of this marriage shall succeed to the said estate of Rowallan; and failzieing a second son, then the eldest daughter of this only son is to succeed to the said estate, and who shall be obliged to marrie and carrie the arms of Rowallan, in the terms and under the irritancies of the tailzie above mentioned; but if there be two sons of this present marriage, then the second son is to succeed to the estate of Rowallan, in case the eldest son shall succeed to the estate of Loudoun; and that the succession to the said estate of Rowallan, in case any of the heirs of this marriage shall succeed to the estate of Loudoun, shall take place according as is above mentioned, in all time coming; And so soon as the son of this marriage, or others aforesaid, shall accept of the honours and estate of Loudoun, then the rents of the said estate of Rowallan are to be managed and improven for the use and behoof of the next heir of tailzie, who shall succeed to the said estate of Rowallan in manner foressaid, and that at the sight and by the advice of Alexander Earl of Eglington," &c.

The Earl and Countess of Glasgow died without heirs-male, and their daughter, Lady Jane, succeeded to the estate of Rowallan under the above destination. Of her marriage with Colonel Campbell there was only one son, James Mure Campbell, who, upon his mother's death in 1733, made up titles to Rowallan under the entail. In 1782, he succeeded to the earldom and estate of Loudoun. He had only one child, Flora Adelaide, who, upon his death in 1783, succeeded him in the honours and estate of

Loudoun, and also in the estate of Rowallan, to which she made up titles under the entail. In 1804, she married Francis Earl of Moira, afterwards first Marquis of Hastings, by whom she had several children. She survived her husband, and died in 1840, in possession of the estate of Rowallan, having been divested of the estate of Loudoun in the manner after mentioned.

No. 1.

Nov. 12, 1844.
The Marquis of
Hastings, &c.

On her death, her eldest son, George the second Marquis of Hastings, succeeded to the honours, having previously, upon his father's death, acquired right to the estate of Loudoun in the manner to be immediately stated. As to the estate of Rowallan, a competition for the succession to it, under the entail in the marriage contract, arose between him, (the Marquis ; *) Lady Sophia Hastings, his eldest sister ; Lady Edith, his eldest daughter ; and Lord Henry, his second son, (born subsequent to the Marchioness's death.) The questions at issue were raised in actions of declarator at the instance of the respective claimants.

In order to explain the first and most important of these questions, it is necessary to state the manner in which the late Marquis became possessed of the estate of Loudoun.

At the time of, and for some time subsequent to, the marriage of Flora Countess of Loudoun, the estate of Loudoun was held by her in fee-simple, as it had been by her ancestor at the date of the entail of Rowallan in 1707. Some years after her marriage, however, she, with the view of providing means for paying the debts of her husband, then Earl of Moira, agreed that the estate of Loudoun should be given as an equivalent for certain English estates in which he had a life interest, and which were settled in remainder upon his issue male, so as to permit these English estates to be sold for payment of the debts. This arrangement was carried into effect by means of certain Acts of Parliament, under authority of which certain deeds were executed, whereby the estate of Loudoun was alienated from the Countess and her heirs, and settled upon the parties who had been in right of the English estates, thereby liberated from the devise in their favour, and enabled to be sold. These deeds were in the form of entails executed by the Countess, and were framed upon the principle of creating and protecting in the Earl and his issue male interests in the estate of Loudoun as nearly identical with those which they had in the English estates for which it was substituted, as the principles of conveyancing of the two countries would admit of. Accordingly, the Earl of Moira was made the institute, and brought under strict fetters, as, by the English deeds, he, holding merely a life interest, had no power to defeat the rights of his issue male in the English estates ; and his

* After the death of George, the second Marquis, which happened in the course of the suit, his son, Pauly, the present Marquis, was sisted as a party in his room.

No. 1. eldest son and other issue male were the substitutes; and there was a provision to this effect, that the Earl, with consent of his eldest son, after arriving at the age of twenty-one, should have power to dispose of the estate in any way he chose; and that, after his death, the eldest son should, on arriving at twenty-one, have full power of disposing of the estate.

Nov. 12, 1844.
The Marquis of Hastings, &c.

Under these deeds, George, the second Marquis of Hastings, succeeded to the estate of Loudoun in fee-simple upon the death of his father, the first Marquis, in 1826. In these circumstances he maintained, that not having succeeded to the estate of Loudoun under the old investitures, or as heir to his father or mother, but having right to it under the Acts of Parliament and relative deeds as an equivalent for the English estates, in which he had, by the terms of the English deeds, an independent right of property which his father could not defeat, (to which effect he produced the opinion of English counsel,) he was not disqualified from succeeding to Rowallan, the clause of exclusion in the entail of that estate referring to the taking of Loudoun by succession alone.

This and the other questions raised were thus stated by Lord Jeffrey at the final advising of the cause:—

“The *first* question is, Whether the late Marquis (George) did succeed to, or become possessed of, the honours and estate of Loudoun, in such circumstances as to be in any way affected by the clauses of exclusion in the Rowallan entail? or was not, on the contrary, entirely exempted and relieved from their operation, by the true nature of his right to the Loudoun property?”

“The *second* question is, Whether the terms of these clauses can be held, on a just construction of them, to have any application to the case of females succeeding to both estates, or to any of their descendants, who (of whatever sex they may be individually) are so called in the destination, as to be all heirs-female in the eye of law, and entitled to all the immunities which may attach to that character by the settlements of their estate?”

“The *third* question is, Whether the whole of the said clauses were not limited to the two first generations of heirs (or, as I would put it, heirs-male) of the marriage, who might be called to the succession of Rowallan after Loudoun had previously devolved on them; and whether they had not been consequently worked off, sopite and exhausted, by the legal union of the two estates in the persons of heirs falling under this description, for two such generations previous to the succession opening to the late Marquis?”

“And the *fourth* and last question is, Whether, supposing the decision to be adverse to him (the Marquis) on all the preceding points, the terms of the said clauses are not still such as to prevent them from applying to

the particular case of the late Marquis, and his place in the destination, or from importing his exclusion?" *

No. 1.

The Lord Ordinary reported the cause upon cases, and the Court (19th July 1843) appointed the papers to be laid before all the Judges for their opinion.

Nov. 12, 1844.
The Marquis of Hastings, &c.

The following opinions were returned :—

LORD CUNINGHAME.—The questions presented for consideration of the Court in this important case, arise upon the terms of an investiture, and on statutory enactments, which, if doubtful or difficult in their legal construction, are at least not involved in any complicated detail of facts. As the first and leading action now in dependence was commenced at the instance of the Marquis of Hastings, immediately after his mother's death in 1841, he shall be referred to as pursuer in the observations now to be made on the case.

The estate of Rowallan, in Ayrshire, appears long to have stood on titles which carried the fee both to male and female heirs. Prior to the commencement of the eighteenth century, the succession had devolved on Jean Mure, who was first married to Fairlie of Fairlie, and afterwards became second wife of David, first Earl of Glasgow.

There being no sons of that last marriage, Lady Glasgow appears to have resolved to settle her estate on Lady Jane Boyle, her eldest daughter by Lord Glasgow, on her marriage, in 1720, to Colonel James Campbell, of the Royal Regiment of Grey Dragoons, brother of Hugh, then Earl of Loudon. The antenuptial marriage-contract executed on that occasion, contained as usual such provisions as the husband could settle on his wife, which were of no great amount, and are of no consequence in the present question. Thereafter it contained a settlement by Lady Glasgow of her estate of Rowallan on her daughter and her issue, and a series of other heirs; and as this deed still forms the subsisting title of this estate, the clauses which more particularly deserve to be kept in view in the present discussion, are these :—

In the first place, the destination of the estate was expressed in the following terms :—After the usual clause of resignation, with a view to a new investment, the same was authorized "to be made, given, and granted to the said Jean Countess of Glasgow, and the said David Earl of Glasgow, her husband, and longest liver of them two, in liferent, for the liferent use alienably after mentioned, and the heirs-male lawfully to be procreate betwixt them in fee; which failzieing, to the heirs-female of the body of the said heir-male, the eldest always secluding the rest, and succeeding without division; which also failzieing, to the said Lady Jean Boyle, and the heirs-male to be lawfully procreate of her body of this present marriage, and the heirs-male of their bodies; which failzieing, to the heirs-female to be procreate of the body of the heir-male of this marriage, the eldest always

* In this case, where the opinions of the Judges are so comprehensive, it has been thought more advisable simply to state the questions presented for decision in the authoritative language of one of their Lordships, than to give a summary of the arguments submitted for the several parties in their cases.

No. 1. secluding the rest, and succeeding without division, as said is ; which failzieing to the heirs-female to be lawfully procreate of the said Lady Jean Boyle her body of this present marriage, and the heirs-male or female of their bodies, the eldest heir-female always secluding the rest, and succeeding without division, as said is," &c. &c. ; which failing, to the heirs-male and female of Lady Jean by any subsequent marriage ; and failing them, to her sister Lady Ann, second daughter of Lady Glasgow, and her heirs, and thereafter to a multitude of substitutes in a series unnecessary to be here specified.

Nov. 12, 1844.
The Marquis of
Hastings, &c.

After a variety of clauses regulating the amount of the provisions and annuities to be payable out of the estate in different events, and after insertion of the prohibitory, irritant, and resolutive clauses, the contract contained the provision on which one of the chief questions now at issue is raised. It may be properly called the excluding, or conditional clause as to the succession of substitutes, and was manifestly designed to provide for a separation in the succession to the estates of Rowallan and Loudoun, in certain specific cases, an union of these inheritances having been considered probable in the then state of the Loudoun family :—" AND in like manner, it's hereby expressly provided and declared, and appointed to be contained in the infeftments to follow hereupon, that in case it should fall out that there be only one son of this present marriage procreate betwixt the saids Master James Campbell and Lady Jean Boyle, who shall succeed to the honours and estate of Loudoun, though there be daughters, then and in that case it's hereby declared, that the second son of this only son of this marriage shall succeed to the said estate of Rowallan ; and failzieing a second son, then the eldest daughter of this only son is to succeed to the said estate, and who shall be obliged to marrie and carrie the arms of Rowallan, in the terms and under the irritancies of the tailzie above mentioned ; but if there be two sons of this present marriage, then the second son is to succeed to the estate of Rowallan, in case the eldest son shall succeed to the estate of Loudoun ; and that the succession to the said estate of Rowallan, in case any of the heirs of this marriage shall succeed to the estate of Loudoun, shall take place according as is above mentioned, in all time coming ; And so soon as the son of this marriage, or others aforesaid, shall accept of the honours and estate of Loudoun, then the rents of the said estate of Rowallan are to be managed and improven for the use and behoof of the next heir of tailzie, who shall succeed to the said estate of Rowallan in manner foressaid, and that at the sight and by the advice of Alexander Earl of Eglintoun," and thirteen other friends of the family named in the contract.—See p. 10 of contract.

The legal import and effect of the preceeding clause shall be afterwards considered, and the grounds shall be explained, on which it is conceived that it would have been inapplicable to the noble pursuer as the son of a female heir, even if he had succeeded to Loudoun on the ancient title contemplated in the contract. In the mean time, it is proper to observe, that there was no room for the operation of the excluding clause for many years after the date of the tailzie.

There was only one child born of the marriage between Colonel Campbell and Lady Jane Boyle ; and as the Colonel never succeeded to Loudoun, the excluding clause did not in any view affect his succession. The only child born of the marriage who survived infancy was James Mure Campbell. His mother, Lady Jane, died in 1732, and his father, Colonel, afterwards General Campbell, (according to

Douglas's Perrage,) was killed at the battle of Fontenoy in 1745;—whereupon his son, James Mure, entered immediately into possession of Rowallan as heir of entail. No. 1.
Nov. 12, 1844.
The Marquis of Hastings, &c.

In 1782, James Mure Campbell, on the death of his cousin, John Earl of Loudoun, succeeded to the honours and estate of Loudoun. Then, according to one very plausible reading of the excluding clause before-quoted, it might have been contended that Rowallan devolved on the next heir of tailzie; but no such claim was preferred against James Mure Campbell on his accession to the honours of Loudoun.

In like manner, when the noble Lord died in 1786, leaving an only child, Flora, his Countess of Loudoun and Marchioness of Hastings, her Ladyship succeeded to the title and estate of Loudoun, without any dispute being stirred as to her right to Rowallan.

The Countess of Loudoun was married to Earl Moira, afterwards Marquis of Hastings, in 1804;—and as her Ladyship held the estates of Loudoun in fee-simple, she, soon after her marriage, resolved to make them available for the relief and use of her husband. That was effected in the manner described in the record. There were estates in Leicestershire settled on Lord Moira and his heirs, under trusts created by his uncle, the deceased Francis, Earl of Huntingdon. In order to obtain the power of disposing thereof, Lady Loudoun resolved to exchange her estates in Scotland, for those belonging to Lord Moira situated in England; and two Acts of Parliament were passed in 1808 and 1813, to authorize the exchange, and render valid new settlements of the Scots estates, so that the same should be as effectual securities to the devisees under the will of Lord Huntingdon, as these had previously been constituted over the English estates; and therefore, by the first Act passed in 1808, sect. 4, it was enacted, "That from and immediately after the passing of this Act, all and singular the castle, farm, lands, and hereditaments mentioned and enumerated in the said second schedule to this Act annexed, together with their rights, royalties, members, easements, and appurtenances, and the reversion and reversions, remainder and remainders, rents, issues, and profits of all and singular the same premises, shall be absolutely freed and discharged of and from, all the present estate, right, title, interest, claim, and demand of her the said Flora Mure, Countess of Loudoun, and her heirs, and be vested in and settled upon the said Charles Hope and William Adam, their heirs and assigns, upon trust, to convey, settle, and assure the same, to and for such uses and estates," &c. &c., as the English estates were previously subject to.

By the other Act passed in 1813, a similar exchange was authorized of the remainder of the Countess's Scots estates, for other lands in England, over which the same trustees also held securities, and it was provided, "That the English estates therein mentioned, devised as aforesaid, should be vested and settled in trust, and be at the disposal of the said Flora Mure, Countess of Loudoun, subject to such powers, provisos, declarations, and agreements, as she, subsequent to the 5th day of March 1813, had directed, limited, or appointed, or as she might afterwards direct, limit, or appoint; and that the parts of the lands and estate of Loudoun therein mentioned should be absolutely freed and discharged of all estate rights and interest of the said Countess and her heirs, and vested and settled in trust, to be conveyed and assured for such uses and estates, and subject to such charges as

No. 1. were subsisting in regard to the lands exchanged therefor, by virtue of the said will of Francis, Earl of Huntingdon," &c. &c.

Nov. 12, 1844.
The Marquis of Hastings, &c. It is not denied, that by virtue of the powers conferred by the said Acts of Parliament, the said English estates, so secured to Lady Loudoun, were sold and disposed of, and the prices thereof applied towards payment of the debts of her husband;—See art. 25 of summons. Further, the statement in the libel of the noble pursuer (art. 23 of summons) is not controverted, that "upon the death of the said Francis, Marquis of Hastings, his father, in the year 1826, the pursuer obtained right to the said lands and estate of Loudoun, in the lifetime of his said mother, free from any right therein in her favour, excepting a jointure of £1500 a-year, which had been secured to her over the said English estates, and was transferred to Loudoun as before mentioned, all in terms of the said Acts of Parliament and deeds therein recited."

Although her Ladyship was thus divested of Loudoun, she continued to enjoy undisputed possession of the estate of Rowallan till her death in 1841. Immediately thereafter, claims as to the succession of Rowallan were preferred for every member of the family, in whose favour a plea could be set up on the most subtle construction of the tailzie before quoted. Upon considering the whole of the able and elaborate arguments which have been presented to the Court in support of the several claims, I am of opinion that the title of the Marquis of Hastings to Rowallan is preferable on the following grounds:—

I. The noble Marquis, at the period of his mother's death, was incontestably the heir of the primary destination in this tailzie. By the marriage contract and tailzie of 1720, the estate of Rowallan was destined to heirs-male of the marriage of Colonel Campbell and Lady Jane Boyle, &c.; "whom failing, to heirs-female and their heirs-male;" the late Marchioness was an heir-female, and the present noble Marquis is her heir-male. He is thus clearly the party called by the destination, if he is not disqualified and excluded by any subsequent provision of the tailzie. But in consequence of the late Marchioness's onerous transactions, and of her conveyances of Loudoun to the parties entitled to take under Lord Huntingdon's settlement, the noble pursuer has not succeeded to that estate, in the sense, and under a sound construction of the provisions of the entail of Rowallan.

The clause of the marriage contract of 1720, upon which it is maintained that the noble pursuer is excluded from now succeeding to Rowallan, is, that whereby it is provided that "the succession to the said estate of Rowallan, in case any of the heirs of this marriage shall succeed to the estate of Loudoun, shall take place according as is above mentioned in all time coming." But the Marquis has not succeeded to that estate in the sense, and upon the right and title contemplated in the tailzie.

In order to bring the legal effect, due to such exclusions in general, to the most fair and decisive test, it shall be assumed, for the sake of argument, that the tailzie under discussion had declared—in the style of the excluding clauses in common use, and found in other tailzies, which have been under consideration of the Court in former cases—that "in case any of the heirs of Rowallan shall succeed to the estate of Loudoun, they should *ipso facto* be incapable of holding Rowallan, which in that event should devolve on the next heir;" still, even a provision in these terms, would not apply to the right under which the noble Marquis inherited Loudoun on the death of his father in 1826.

The terms of the previous Acts of Parliament, the new deeds of entail executed in terms thereof, and the titles expedite thereon at the death of the first Marquis in 1826, enumerated in the summons, show that the noble pursuer then acquired right to, and entered into possession of Loudoun, not as the heir of his mother, but as the devisee or successor of stranger purchasers, who gave Lady Loudoun the price or value of her ancient estates in English property, which she sold, and applied to her own use. The Loudoun estates thus became *surrogata* for the English estates; and the Marquis is no more disqualified from succeeding to Rowallan, because he succeeded to Loudoun by a singular title, on his father's death, than he would have been, if his mother had, by a different species of onerous transaction, sold Loudoun out and out, and thus left the Leicestershire estates to be inherited by the pursuer, in the ordinary course of the original devise under Lord Huntingdon's will.

Nov. 12, 1844.
The Marquis of Hastings, &c.

It is freely conceded, that while these clauses of exclusion or devolution in tailzies are strictly construed, so as to be limited to those parties only whom a fair construction of the words used brings within them—they are so enforced in principle, as to make them apply to all heirs fairly within the meaning and contemplation of the makers of the tailzie—as, when it is declared in a tailzie that the succession of the estate of A shall devolve on the next heir if the heir in possession succeeds to a peerage, the disqualification is held equally to apply to the case of a party claiming the estate as heir after his accession to the peerage; and other analogous cases are quoted in the papers. But here, there is no legal or reasonable presumption that the makers meant to exclude any heirs of Rowallan who might acquire Loudoun on new and singular titles. The tailzie occurred in a contract of marriage between the only brother of the then Earl of Loudoun and the heiress of Rowallan. The event provided against, was the junction of the successions then in prospect on the subsisting investitures. But that contingency has not been realized, and never can be so now; as the old titles and investiture under which alone the heir of Rowallan, or any other party, could succeed to Loudoun at the date of the entail, are abrogated and altered, and the property is alienated for ever.

Suppose the disqualification had been similar to that which occurred in the Elphinstone case, and had been declared to take effect by the succession of any of the heirs of Rowallan to the old peerage of Loudoun, and let the case be put, that this title had been extinguished by the attainder of an heir, and a patent to the same title, in the British peerage, had been granted to the family by the Sovereign in later times, surely an heir of Rowallan would not have fallen within the exclusion on succeeding to the new title.

It is equally clear, in the present case, that the Marquis of Hastings does not take the estates of Loudoun as heir under the title contemplated in the tailzie. On the contrary, these estates were onerously transferred to the trustees and heirs of Lord Huntingdon; and the Marquis, in obtaining these estates on his father's death in 1826, did not take them as her heir, but as the heir and devisee under Lord Huntingdon's trust. In taking under such a title, the Marquis in no respect represents his mother, and would not be liable for her debts, if she had left any. He is in the same situation as if the trustees of Lord Huntingdon had purchased the Loudoun estates, and settled them on his Lordship. I cannot view that, as the succession to the estate of Loudoun, which was provided in the

No. 1. deed of 1720, to disqualify an heir of destination from succeeding to Rowallan.
 Nov. 12, 1844. II. Even if the estates of Loudoun had been held by the late Marchioness of
 The Marquis of Hastings, &c. Hastings till her death, on the ancient investiture subsisting at the date of the

tailzie of 1720, I am inclined to hold that her son, the present Marquis, could not be viewed as an heir within the class of those *débarred* from succeeding to Rowallan, by the very peculiar clause of the tailzie on which the question in that case would have depended.

The clause is of unusual structure, and in some points hard to be understood. Had the makers of the tailzie intended to prevent the junction of the two estates in all cases, a very simple provision, in the most common style of form, would have sufficed; as, for instance—"that in case any of the heirs before named should succeed to the honours and estate of Loudoun, they should forfeit, or be incapable to hold the estate of Rowallan, which in that event should *ipso facto* devolve on the next heir of tailzie," &c. &c. There are many examples in the charters of Scots families of clauses to the preceding effect; and indeed some are quoted in the analogous cases cited as authorities in the pleadings in this cause. But it is impossible to give the clause in the Rowallan settlement, as framed, that extensive interpretation, or to suppose that the makers of the tailzie contemplated or meant any such general and indiscriminate exclusion, as to disqualify every heir of entail from holding the two estates at the same time.

On the contrary, the provision in question, which is so minute and specific in its terms, appears to have been framed to meet three contingencies in the male succession, anticipated as early possible occurrences in the then state of the Loudoun family:—(1.) It provides for the case of their being only one son of the marriage, and of that son succeeding to the honours and estate of Loudoun; in which event, it is directed, that (though there be daughters, for which case no provision was made) the second son of this only son shall succeed to Rowallan. (2.) In the event of the only son of the marriage having no second son, but implying that he might have one son and daughters surviving him, it is provided that "the eldest daughter of this only son is to succeed to the said estate of Rowallan." (3.) If there were two sons of the first marriage, "then the second son is to succeed to the estate of Rowallan, in case the eldest son shall succeed to the estate of Loudoun." And, as applicable to all the cases before enumerated, it is declared, that "so soon as the son of this marriage, or others foresaid, shall accept of the honours of the estate of Loudoun, then the reuts of the said estate of Rowallan are to be managed and improven for the use and behoof of the next heirs of tailzie," &c.—thus making the acceptation of the honours and estate of Loudoun the commencement of that heir's incapacity to hold Rowallan.

Further, upon a minute analysis of this clause, it is thought that the first branch of it was meant only to regulate the succession of sons in the first generation, born of the contracting spouses; and that view of the case is taken by Lady Sophia Hastings, the leading defender, as affording the only probable explanation of the clause.—(See Revised Case for Lady Sophia Hastings, pp. 26, 27.) But neither the late Marchioness nor her son, the noble pursuer, fall within the description or class of any of the heirs of the first generation, whose succession is regulated by the leading branch of the excluding clause here founded on. The Marchioness herself was a female heir, the only child of an heir-male, and no pro-

vision was made for the succession of any female heirs in the first generation. This is the more remarkable, as the existence of daughters was anticipated in the very clause of the contract now under consideration. The noble pursuer, also, is the only son and heir-male of an heir-female, and the succession of such an heir, at least in the first generation, was left unregulated by the leading branch of the excluding clause.

No. 1.

Nov. 12, 1844.

The Marquis of Hastings, &c.

According to the preceding view of that clause, if the family of the contracting spouses had consisted only of daughters, without any sons, the eldest would certainly not have been disqualified under the first branch of the excluding clause from inheriting both estates—she would not have been bound, on succeeding to Loudoun, to give up Rowallan to her younger sister; and, this being admitted, the excluding clause is equally inapplicable to her issue. Indeed it can hardly be plausibly inferred that the tailziers meant to enforce any limitation on the succession of remoter heirs, which they purposely omitted to attach to the heirs of the same class (i. e. on the succession of daughters) in the first generation.

But it is said that the excluding clause has other provisions on which the defenders in the principal action place more reliance. The clause in question, after regulating the rights of the sons of the first marriage, and their children, proceeds thus:—"And that the succession to the said estate of Rowallan, in case any of the heirs of this marriage shall succeed to the estate of Loudoun, shall take place according as is above mentioned, in all time coming; and so soon as the son of this marriage, or others aforesaid, shall accept of the honours and estate of Loudoun, then the rents of the said estate of Rowallan are to be managed and improved for the use and behoof of the next heir of tailzie who shall succeed to the estate of Rowallan in manner foresaid, and that at the sight, and by the advice of Alexander Earl of Eglintoun," &c. &c.—(Printed contract, p. 11.)

The defenders, who have entered into the most elaborate argument against the noble Marquis, contend that the preceding branch of the excluding clause applied to all the heirs of the marriage, whether male or female, and whether within a similar class to those specified in the antecedent branch of the excluding clause, or not. But I cannot accede to that construction.

In the first place, if it was the meaning of the makers of the tailzie to apply the clause of exclusion or separation, in the succession of these two estates, to all the heirs of the marriage, and to devolve the succession of Rowallan in all cases to the next heir of tailzie, why provide for the exclusion of the special heirs announced in the primary and leading branch of the clause? The general words in the subsequent part of the same clause (as interpreted by the defenders) would have effected that object in the most simple and intelligible manner. It is presumable, therefore, that the exclusion from Rowallan was not meant to be general and indiscriminate on the succession of every heir of entail to Loudoun, but was only meant to apply to the special cases of the same kind and description as those enumerated in the outset of the excluding clause. This is sufficiently indicated in the subsequent part of the same clause.

In the next place, although the branch of the clause under consideration is apparently directed to the case of any of the heirs of this marriage succeeding to Loudoun, the terms and import of the succeeding part of the clause are sufficient to show that it was limited to cases similar to those mentioned in the immediately preceding branch of the excluding clause; for the succession of Rowallan was not directed to pass to the next heir in the destination, but "according as is above

No. 1. mentioned." This plainly refers to the order mentioned in the preceding part of the same clause, whereby the succession of male heirs is regulated, as in the case of a son of the marriage having two sons, or of his family consisting of a son and a daughter; but the clause was inapplicable to daughters and their issue, as to whose succession, even in the first generation, no provision was made in any part of the excluding clause.

Nov. 12, 1844.
The Marquis of
Hastings, &c.

The clause thus falls to be read as providing, that "in case any of the future heirs falling within the legal description of those before specified shall, under similar circumstances, succeed to the estate of Loudoun at any future period, during the subsistence of the tailzie, then the succession to the said estate of Rowallan shall take place according as is above mentioned, in all time coming." That provision would not comprehend the late Marchioness of Hastings, as she was not in the predicament of any of the parties "above mentioned," whose succession was specially regulated by the excluding clause.

Neither can it be assumed that it was an irrational and capricious distinction to exempt female heirs from clauses of exclusion which were imposed on male heirs under the same settlement. As Rowallan seems to have been inheritable by females from an ancient period, the maker of the tailzie (who was herself a female heir married to a Peer) evidently did not choose to make any provision to exclude daughters marrying noblemen from the succession to Rowallan; and when she did not go that length, she must have foreseen, what was very obvious, that the name and title of Rowallan, as a separate barony, would not be more lost by her inheritance of Loudoun, if that peerage descended to her, than it would be by her marrying any other peer, which was never intended to be prohibited.

In another view, it is possible that the framers of the tailzie might not be aware that the Earldom of Loudoun descended to female heirs, as there were few peerages granted to heirs whatsoever at the date of that creation (1633). It may have been under that misconception that the parties omitted any exclusion applicable to female heirs, in case of their succession to the honours of Loudoun. In fact, the phraseology of the deed itself rather tends to show that the framers of the tailzie supposed that the honours and estate of Loudoun were limited to male heirs. It has been shown that it was the succession of sons only, and their issue, in particular cases, that was regulated in the first generation. And in the exclusion clause itself, the provision is, that "so soon as the son of this marriage, or others fore-said," (it may be read grandson or second son,) "shall accept of the honours and estate of Loudoun," then the rents of Rowallan are to be managed and improved for behoof of the next heir of tailzie.

On these different grounds, it is supposed that the makers of this tailzie did not intend the second branch of the excluding clause to apply to all the heirs of tailzie enumerated in the destination of the settlement, but only to those in the same class and predicament with the heirs referred to in the outset of the particular clause in which the regulating provision occurs. Upon any other construction, it is difficult to apply and give effect to the words, that the next heirs shall succeed to Rowallan, "according as is above mentioned." These words, according to well recognised rules of interpretation, must be exhausted; and they will be so, by holding them as intended to direct that the same order of succession which is prescribed for male heirs in the first generation, should take place as to heirs-male and their issue in all time coming.

The view now taken of the provision in question, is in accordance with the

simplest rules of construction recognised in the law. It is true that Lord Eldon, No. 1.
 in a passage founded on by the defender, laid it down in the Roxburghe case, that
 "you cannot reject a phrase, except where it is absolutely necessary that you
 should reject it;" but it has never been proposed to reject the term "any heirs"
 here. It is, however, unquestionably competent to show, by the context of a
 clause, or by other expressions, in the very deed under construction, that any technical
 expression (more especially a term so flexible in its nature as "heirs") has
 been used in a limited sense. That principle of construction is manifestly necessary
 to prevent a deed from being nullified by isolated expressions, attempted to
 be enforced contrary to the general scope and sense of the deed. Accordingly,
 the noble and learned Judge, whose opinion in the Roxburghe case has been already
 quoted, fully admitted, in other passages of his speech in the same cause, the doctrine
 now laid down. After stating that effect is always to be given to the obvious
 meaning of words, his Lordship made the following important qualification:—
 "Unless you can satisfy yourself that the author of the deed did not intend that
 such should be taken to be the meaning of the words he has used, and unless you
 collect (I think I may safely add that, and I abstain from going further) that that
 is not the meaning of the language of the author of the deed, from what the
 author of that deed has himself, by the deed, told you is the meaning of his language."

This doctrine hardly required the sanction of any distinguished name to support
 it, as it is founded on principles of justice and common sense, which must be uni-
 versally adopted, and its application to the present question is alike obvious and
 decisive. A term of acknowledged flexibility in law has been used in one branch
 of the excluding clause of this tailzie, which, if understood in its most compre-
 hensive and unqualified sense, would render the deed inconsistent with other pro-
 visions of the granters in the same instrument, and even in the same clause. The
 term is not rejected, neither is any extraneous document resorted to for trying its
 meaning; but it is construed and governed by other expressions and provisions in
 the same settlement, which show that, according to every reasonable inference that
 can be drawn as to the meaning of the granters, the term was used in a limited
 sense.

Upon the whole, then, it appears to be a safe and sound interpretation of the
 clause on which the present question depends, to hold that the "heirs declared
 incapable of holding Rowallan on their succession to Loudoun," were only those
 heirs in all time coming who might be in the same predicament, and possess the
 same technical character with those of the first generation specified in the leading
 branch of the same clause. On that construction of the deed, it is evident that the
 noble purchaser would not have fallen within that class, even if he had inherited the
 estate of Loudoun as an heir of that family under the ancient investiture, on which
 the parties relied at the date of the contract. But,

III. In another view, if it could be held that the clause declaring "the suc-
 cession to the said estate of Rowallan, in case any of the heirs of this marriage
 succeeding to the estate of Loudoun, shall take place as is above mentioned," is
 to be read with reference to the order of the succession mentioned in the destina-
 tion clause of the tailzie, then the succession of Rowallan must now devolve on
 Lord Rowallan, who was undoubtedly the next heir of tailzie at the death of the
 last heir in 1841, under the primary destination of the entail. At the late
 Marquess's death, and not earlier, could the rents have been managed and im-

No. 1. proven for his behoof, as it was only then that Lord Rawdon's father should be viewed as "having succeeded to the estate of Loudoun," under the investiture subsisting and contemplated at the date of the tailzie, if the estate had not been onerously alienated by the late Marchioness long before her death.

Nov. 12, 1844.
The Marquis of
Hastings, &c.

IV. With reference to the peculiar plea of Lady Sophia Hastings, it humbly appears to me not to be maintainable. Her Ladyship seems to contend, that her position as next heir of tailzie to her mother in Rowallan, became fixed the instant that the late Marchioness entered into possession of both estates—that her Ladyship might not be obliged to denude of Rowallan during her life—but that her eldest son lost all right of succession to Rowallan whenever his mother succeeded to Loudoun; that the legal character and rights of apparency were forthwith transmitted to the eldest daughter, if there was only one son, who from that period lost his place in the destination, and would not have been entitled to claim Rowallan, at least in competition with his sisters, even if his mother had sold Loudoun to a stranger, and had consumed the price, many years prior to her death, thus leaving nothing of the ancient possession of Loudoun for her son to claim and accept of.

It is manifest that a provision so extraordinary, and so stringent for the exclusion of a constituted heir of destination, whether he should inherit the contemplated estate or not, would require very clear and unmistakable terms indeed to establish it; in so far as our books of style and reports afford any information on the subject, it has no example in Scots conveyancing; and when the plea is considered, it appears to me that her Ladyship's construction is greatly too subtle and unsound to be entitled to any weight; and in truth, that it is at variance both with the words used, and with every reasonable conjecture that can be formed, of the real intention of the entailers.

In the first place, the terms used in different parts of the excluding clause, demonstrate in the clearest manner that the incapacity of the several heirs of destination in Rowallan to claim that succession, was not meant to commence with the accession of his predecessor to both estates, but with his own acceptance and entry to the inheritance of Loudoun. Thus, had there been two sons of the first marriage, (of the contracting spouses,) it was provided that the second son should succeed to Rowallan "in case the eldest son shall succeed to Loudoun;" and the power given to manage and improve the rents of Rowallan for behoof of the next heir of tailzie, (it is presumed if in minority,) is declared to commence "so soon as the son of this marriage or others foresaid" (without any preference to daughters) "shall accept of the honours and estate of Loudoun." These words fix decisively and inflexibly the period at which the excluding clause was to come into operation against any heir holding a place in the destination of Rowallan; it was only on the actual accession of the heir himself to the estate of Loudoun, without regard to the legal character and possession of his predecessor.

To hold the excluding clause as pleadable to any other effect, would be contrary to every rational view of its object and purpose. The heirs of the marriage could only be disqualified from holding Rowallan, because they were sufficiently provided for on getting Loudoun; but if that property never reached them, and if the rights and titles thereto, subsisting at the date of the tailzie, were extinguished prior to the succession of any heir, there is no reason, either upon the words used, or upon the sense of the clause, for the exclusion of a party who, under other circumstances, would have enjoyed a valuable succession in Loudoun.

It is obvious, that provisions as to the "succession" of heirs may refer either to the prospect of succession, or to the actual accession of heirs to an inheritance. The latter is the most common and popular acceptance of the term; and it is also the sense in which it is generally used in this tailzie. It is, however, argued for Lady Sophia, that when the tailzie provided "that the succession to Rowallan should take place as is above mentioned, in case any heir succeeded to Loudoun," this was synonymous with a provision, that "when any heir of tailzie shall, from the state of the family, hold both the estates of Loudoun and Rowallan at the same time, the second son of such heir, whom failing, the eldest daughter, shall from thenceforth be entitled to succeed to Rowallan when the succession thereto opens." It is unnecessary to observe, that the clause, as actually standing in the deed, warrants no such paraphrase.

No. I.

Nov. 12, 1844.
The Marquis of Hastings, &c.

But *est*, that the clause had been expressed in the very terms now supposed, I should have held, that nevertheless a condition was implied, from the very nature and object of the provision, that the eldest son and primary heir of destination should obtain actual possession of the inheritance of Loudoun before he could forfeit his place in the destination of Rowallan. The clause would have been construed as tantamount to a provision, "that if any heir should succeed to both estates, his eldest son should inherit Loudoun; and the second son, whom failing, the eldest daughter, shall succeed to Rowallan;" and it is plain that a provision of that import could not take effect, if Loudoun had been alienated from the family before the period of the eldest son's succession arrived.

This branch of the case hardly requires or admits of further elucidation. When it is maintained for Lady Sophia, that an heir of destination, on succeeding to both estates, does by that act, and from the moment of her succession, attach a forfeiture to her eldest son—and that he is incapable of claiming Rowallan, (at least in competition with a sister,) though he has been wholly disappointed of the contemplated succession of Loudoun by onerous sales and alienations of his predecessor long before her death—that is a construction of the deed so novel, unreasonable, and inexplicable, that nothing but the most express provision in clear and unequivocal language, confirmed by the other clauses of the deed, could justify its enforcement. If it be a rule of law that clauses of forfeiture, or conditions of exclusion in settlements, are not to be stretched beyond the cases specified in the deed, or those *bona fide* falling within the same rule, it is still more clear that a construction ought not to be lightly admitted, which would exclude from an entailed succession an heir of destination, who has not got, and never can get, the consideration, in respect of which alone an exclusion was directed against the heirs. Taking the whole clauses of this deed in connexion with each other, it is apprehended that the rigid construction now contended for is not reconcilable either with the meaning of the entailers, or with the structure and expressions of the tailzie.

Upon these grounds, I am humbly of opinion that decree should be pronounced in terms of the libel, in the action at the Marquis of Hastings' instance, and that his Lordship should be assoilzied from the actions at the instance of the other competitors.

LORDS MURRAY and ROBERTSON.—We concur in the opinion of Lord Cunningham.

LORD JUSTICE-CLERK.—I am of opinion—

1. That the acquisition of the Loudoun estates by the late Marquis and the

No. 1. present, by the transaction set forth in the papers, by which these estates were exchanged and alienated by the Marchioness-Countess for estates in England, and
 Nov. 12, 1844. the Loudoun estates settled on the present Marquis in lieu of the English estates,
 The Marquis of the Loudoun estates settled on the present Marquis in lieu of the English estates,
 Hastings, &c. according to the nature and in satisfaction of his right and interest in the latter, effectually excludes the application of the clause of devolution or exclusion in the Rowallan estate, in respect of succession to the estates of Loudoun; seeing the latter were acquired in a way not within the meaning and operation of that clause under any admissible construction.

2. That the question under the clause of devolution could only arise when the Rowallan estate opened to the present Marquis, (George, second Marquis,) whose possession of the Loudoun estates is in truth the foundation of the claim of all the other parties, and who must, on some ground or other, be excluded, being the next heir of tailzie; and that, if the clause applies at all in the circumstances of the case, the competition can only be between him and his children.

3. That the claim of Lady Sophia is irreconcilable with any sound construction of the clause, and is founded on notions opposed to the most settled principles of Scotch law applicable to all questions of succession.

4. That—if the first proposition above stated is overruled—if the clause applies in the circumstances of the case, the claim of Lady Edith (the daughter of the present Marquis) could not be preferred in competition with and in exclusion of Lord Henry, his “second son,” merely by reason that she happened to be born the death of the late Marchioness, while Lord Henry was born a short time after—supposing the question to be brought to a competition under the clause between these two children of the present Marquis.

5. That the succession to the honours and title alone of Loudoun (on the supposition that the first proposition is well founded) does not bring the present Marquis within the operation of the clause of devolution, in respect—(1.) That the general part of the clause, which is founded on as extending the leading part of it to all future heirs, specifies only the event of succession to the estate of Loudoun; and (2.) That even the leading part of the clause mentions the succession to the “honours and estate” of Loudoun—not one or the other; and hence, if he has acquired the estate in a way and by a right which does not bring him within the clause, then the succession to the honours alone does not raise any question at all under any branch of the clause.

6. That the clause has not been so framed and worded as to apply at all in the circumstances which have occurred, and was applicable only to the single and simple event of the succession to Loudoun opening at first to the heir of Rowallan, and is not so framed as to apply after the estates have been united, and been held together in a way which the clause itself did not and was not intended to prevent.

7. That the clause is not so worded as to effect—and cannot, I think, fairly be presumed even as intended to effect—a separation of the estates in all time coming, although they may have become united, and been long held together in a way not excluded by the clause.

8. That there are not clear and satisfactory grounds in the actual construction and application of the clause, on any fair reading of it, for enforcing the rule of devolution at all against the present Marquis, and for excluding him from the estate of Rowallan.

9. That giving full effect to the principle adopted in the cases of Lockhart,

Bruce-Henderson, Fleming, and Stirling, that in general the operation of these clauses attaches upon the coincidence of the two events in respect of which the devolution takes place, without regard to the priority of the one before the other; yet the clauses in these cases were all specially framed, and I am not satisfied that in this case the clause will apply to a party already in possession of Loudoun, taking up, in the course of succession, the estate of Rowallan, no question being raised as to mere evasion.

No. 1.

Nov. 12, 1844.
The Marquis of
Hastings, &c.

10. That assuming that there is somehow an objection to the present Marquis enjoying the right to Rowallan, there are not clear grounds for excluding the next heir, his eldest son.

As the cases of the parties are so very full, and as other detailed opinions are to be returned by some of my brethren, with whom generally I agree, it is unnecessary to state in detail the views which I have formed on these various points. Some remarks, however, I wish to make.

1. Admitting that the doctrine of strict construction, as that is applied to the fetters of entails, does not control or regulate the construction of a clause of devolution, still there must be words adequate and sufficient, on fair interpretation, to reach the case in question; and I hold that inferences or conjectures as to the intention of the party will not warrant the application of such a clause to cases which are not within the ordinary construction and operation of the words employed, when reasonably applied to the actual facts. The intention is of the greatest importance. But there must be words adequate to effectuate, or at least to declare, the intention. It is not enough that the Court might collect or infer what the maker of the deed would have provided or declared for the case which has occurred. There must be words, which in reasonable and fair application, guided therein by intention, reach and cover the actual case.

2. In questions under clauses of devolution, I hold it to be of the utmost importance in the application of the words used, to find that the maker has inserted, in some form or other, (which in the decided cases referred to was the fact,) a general declaration or expression of his object; for then, although some of the words and terms used in the course of providing for that object might be (apparently) less comprehensive or explicit than might have been expected, the general declaration of the object to be enforced, gives a clear ground for the construction and application of the terms used in providing for that object.

3. I do not find in this case any such general declaration or expression of the object to be attained. And a comparison of this clause with the clauses in the other cases, will, I think, bring out the importance of the preceding remark, and the difficulties attending the application of the clause in this case to the actual facts. The clause consists only of two parts: first, a special provision for the case of the issue of the marriage, and then, second, a provision intended probably to apply the first to other heirs, as above mentioned; hence, in fact, in itself also a special clause, and one imperfect in expression as well as in provision. This is just the sort of case in which the operation of such a clause very naturally fails and becomes inapplicable—the Court not being guided by a separate general declaration that the estates shall never be united—for which object the rest of the clause professes to provide.

4. I apprehend it to be quite clear that the Marchioness-Countess was not within the operation of the clause. Lady Sophia wishes this question reserved; but her argument is necessarily founded on an application of the clause to the case

No. 1. of her mother, and it must be considered as to all its consequences, including (as it must do) a claim as to rents. I cannot hold that the right of the Marchioness-Countess was affected by the clause: (1.) Because I hold that such an effect cannot be given to a clause of devolution, or declared after the death of the party in possession, who has been allowed by the claimants to possess as in full right and as unaffected by the clause. No such judgment can be asked, or a retrospective or retroactive effect given to the clause, and the question must now be taken as regards the right to the estate of the next party who claims on her death. The Marchioness-Countess was allowed and admitted by all to have right to the estate of Rowallan. None of the claimants disputed it. It is not enough to say that her representatives will still have a defence against accounting for rents, on the ground of being *bona fide percepti et consumpti*; and hence that the question of her right may be considered after her death. No challenge or impeachment of her right, founded only on a clause of devolution, and which does proceed on and warrant a proper reduction of her title as inhabile or incompetent, can, I apprehend, be now admitted after her possession is over—(especially as it is admitted that there is no ground for a reduction of her title)—after she has been allowed and acknowledged to have right during her whole life. I know of no instance of a clause of devolution being applied and enforced as to any of its results after the death of the party, and when it is no longer either applicable to the actual fact, or its operation possible in its immediate and primary result, viz. the exclusion of the heir to whom it is to apply. The operation of the present clause is difficult enough. But to permit now a discussion of this right of the deceased, and to proceed on the assumption of a declarator (I know not what to call it) of forfeiture or limitation against the Marchioness-Countess after her death, and to adjudicate estates on the ground that this clause applied to her, while Lady Sophia is claiming right to be served to her as last duly vest and seised in the lands, would really be a stretch beyond any precedent of the operation of such clauses; and at all events, Lady Sophia must proceed, if such a result can be attained, in another form. There surely must be some declarator, with proper defenders found, before we can practically hold that the deceased was not in the full right which her infestment gave her, and before we adjudge the estate to Lady Sophia upon the ground that the deceased's right was affected by this clause, and is not to be measured by her un-reduced title. The competition, I think, must be judged of as it now occurs, when the present Marquis, the next heir in the tailzie, comes forward to take up the estate in common form. Ground must now be shown to exclude him, but not on a retroactive operation of the clause against the person who died vest and seised in the estate, and to whom even Lady Sophia must serve, as the undisputed proprietor. (2.) Because I hold that, even if any question as to the Marchioness-Countess's right had been raised (when alone competent) in her own lifetime, there are no terms in the clause in the entail which could have on any fair construction reached her case, and that her right to the estate of Rowallan and its rents was clear from any objections.

5. The question can arise only on the death of the Marchioness-Countess. (1.) To apply the clause in the way in which Lady Sophia contends, involves direct contradiction. She contends that the clause took effect, and that the right of succession was fixed during Lady Hastings' life. Yet, first, she admits that, under the operation of the clause itself—viz. that part of it as to the management of the rents—it was to remain uncertain who was to take until after her mother's

death, and that no divestiture in the case of the deceased Marchioness-Countess was intended; in which case most plainly the question must arise, when the present Marquis claims, in the form of an obstacle to his enjoyment of the estate, and in respect of the clause operating against him, since his mother had right to the estate, and since it is to his taking it that the objection arises. If, on the one hand, the clause was not to divest the Marchioness-Countess, and is to be pleaded on the other to exclude the present Marquis, the next heir of entail, either it is made to strike at the same time against two generations, or the question truly arises on the succession opening to him, and in competition with his right.

(2) The plea of Lady Sophia involves this great fallacy: There is no question (properly speaking) as to the succession to the Marchioness-Countess. That is indisputable. The present Marquis is the next heir of tailzie. It is a question as to the enjoyment of the estate under the clause of devolution, under which it is said that something has occurred which excludes him. Now that occurrence is the possession by the present Marquis of the estate of Loudoun. That is the event on which, in truth, Lady Sophia maintains he is to be excluded. Nothing else can exclude him. It is an incident personal to him. It is not, in truth, on his mother's possession that she contends that he could be excluded. It is, in truth, on his own possession—on facts personal and attaching to himself, that the clause is made to apply to him. Hence the real question is, whether the present Marquis can be excluded from the estate of Rowallan; and it is not only ingenious, but unsubstantial sophistry, to attempt to shift the question, as is done in Lady Sophia's case, and to convert it into one to be decided by the state of facts during his mother's lifetime, who for the last twenty-eight or thirty years of her life was not in possession of the Loudoun estates, and who for the last sixteen saw her son in possession by a right independent of her. Hence the question must be, how the clause can be applied to the present Marquis. And in every view of its application which I can take, Lady Sophia's claim seems to have no countenance. The only competition which any fair reading of the clause will warrant, is, in my opinion, between the present Marquis, against whom his own possession of the estate of Loudoun is pleaded, and his children, (he having no brother.) How his mother's possession of the estate of Loudoun—who yet, it is expressly admitted by Lady Sophia (Case, p. 52,) “remained legally vested with the estate of Rowallan until the period of her death,”—can exclude the present Marquis when he came forward as the next heir of entail, I cannot understand. It is his own possession—facts personal to himself, which alone can enable this clause to apply and attach to him. Therefore it is clear that the question is, whether he is excluded by reason of his possession of Loudoun (assuming the mode by which he acquired and held Loudoun during his mother's life to be immaterial)—and that being the question, then, whatever may be the merits of the competition, still the competition can only be between him (an only son) and his children. Of course, I am well aware that a clause of devolution may be so worded, or the general object of the maker so expressed, as to bring in at once the daughter or second son in the succession to an heir who takes another estate, although the latter may be permitted to hold both during his own lifetime, and then that the eldest son will be excluded by reason of the possession of both by his parent. That not unfrequently has happened. But then the clause in such cases has been so expressed as to declare and point to this result. If the words here are looked to—and general declaration of the object there is none—I think the present Marquis's posses-

No. 1. sion of Loudoun is essential to Lady Sophia's case; and hence I think the only question which can arise is, whether the present Marquis is excluded.
 Nov. 12, 1844. 6. But after the utmost consideration which I can give to the clause, I think
 The Marquis of the deed is defective in not containing provisions or expressions applicable to the
 Hastings, &c. special case which has occurred, after the estates have been once and fully united,
 and that the words are not sufficient to warrant the Court to decide this, as under
 terms sufficient, they did decide other cases, on the general ground—that in all
 events the estates must separate. This is the point where this clause fails—fails
 in words, provisions, and declaration of intention. The maker might have made
 the matter clear. Inference or conjecture may be formed as to his intention: But
 it is not declared, nor his object stated. Holding that the estates were legally
 united in the person of the Marchioness-Countess, I think that the clause will not
 attach, so as to compel separation at an after period.

LORD WOOD.—1st, I concur with the Lord Justice-Clerk in opinion, "That the acquisition of the Loudoun estates, by the late Marquis and the present, by the transactions set forth in the papers, by which these estates were exchanged and alienated by the Marchioness-Countess for estates in England, and the Loudoun trustees, settled on the present Marquis in lieu of the English estates, according to the nature, and in satisfaction of his right and interest in the latter, effectually excludes the application of the clause of devolution or exclusion in the Rowallan entail, in respect of succession to the estates of Loudoun, seeing the latter were acquired in a way not within the meaning and operation of that clause under any admissible construction." And, "That the succession to the honours and title alone of Loudoun (on the supposition that the first prohibition is well-founded) does not bring the present Marquis within the operation of the clause of devolution, in respect, (1.) That the general part of the clause, which is founded on an extending the leading part of it to all future heirs, specifies only the event of succession to the estate of Loudoun; and (2.) That even the leading part of the clause mentions the succession to the 'honours and estate' of Loudoun—not one or the other; and hence, if he has acquired the estate in a way and by a right which does not bring him within the clause, then the succession to the honours alone does not raise any question at all under any branch of the clause."

For the grounds of this opinion, it does not appear to me to be necessary to add any thing to what has been stated by Lord Cuninghame, who has also, I think, satisfactorily shown that the special plea is unfounded, by which it is maintained, on the part of Lady Sophia Hastings, that any effect which the transaction for the exchange of the Loudoun and English estates might have otherwise had, is excluded in the particular circumstances. Assuming her Ladyship's view of the import and operation of the qualifying or excluding clause, as it has been called, in the contract-matrimonial and entail of the estate of Rowallan, to be in other respects correct, I apprehend that it cannot be soundly contended, that its application to any particular case is to be determined by the state of matters at the date at which the heir—on whose death the question of the right to succeed to the estate of Rowallan occurs—entered into possession both of it and of the estates of Loudoun, or at any intermediate period between the said date and the death of that heir. The decision of the point must, on the contrary, I conceive, depend upon the state of matters at the death of the heir. Although the late Marchioness entered to possession of both estates, it is not said that the clause could operate to divest her of the estate of Rowallan, and it cannot be disputed that she remained absolute mis-

No. 1.

Nov. 12, 1844.
The Marquis of
Hastings, &c.

tees of the estates of Loudoun and Rowallan, with power to do with them as she thought proper. It is only at her death that the question arises, or could arise, in regard to the right of succession to the estate of Rowallan, under the original destination clause in the entail, and the clause qualifying that destination in the case therein provided for; and I am of opinion that it would be equally adverse to the words, and to the whole policy and purpose of the latter clause, to hold that, in virtue of it, the heir who, in terms of the primary destination, would be entitled to take the Rowallan estate, could be excluded from the succession, if, when the succession opened, the Loudoun estates were either no longer in the family, so as to descend to him along with the estate of Rowallan, and thereby create confusion of the estates in the person of the heir, which it was the object of the qualifying clause to prevent; or if still in the family, were so under circumstances not embraced by the clause. In the latter case, it is apprehended that the possession of the Loudoun estates cannot, upon a sound construction of the clause, have the effect of excluding the heir from the succession to the Rowallan estate, as the party called by the primary destination.

Assuming these views to be correct, it is enough for the decision of the present competition. But, on the opposite assumption, and supposing that the titles of the estates of Loudoun had continued to stand precisely as they were when the late Marchioness succeeded, and that the Marquis had taken solely as heir by that investiture, and that the competition were to be decided upon that footing, then I am further of that opinion—

2d, That in the circumstances, the present Marquis is not excluded from the succession to the estate of Rowallan, by the clause in the contract-matrimonial and tailzie, founded on by the other competing parties, which contract was made upon occasion of the marriage of Lady Jane Boyle, the eventual heiress of Rowallan, with Colonel Campbell, the cousin-german of the then Earl of Loudoun.

I do not think that that clause is a proper clause of forfeiture. It is a clause qualifying in certain cases, upon a particular contingency—but not in all cases even upon that contingency—the primary destination of the estate of Rowallan, as contained in the preceding part of the deed; and (apart from the provision in the last part of it, for the management of the rents) the only question which the clause can raise, is one as to the right to succeed to that estate—that is, who is the heir called to the succession—the solution of which must depend upon whether the qualification made by it upon the primary destination applies to the particular case presented for decision.

The clause consists of three parts. The case before the Court does not involve any matter arising directly out of the last, for the management as there provided of the rents of the estate of Rowallan. Its provisions, therefore, are of no importance, except in so far as they may be of use in construing the meaning of the other two, for which purpose they may of course be relevantly referred to. Of these two, the first contains a provision for certain specified cases in the succession to the estate; the second contains a provision to make the rules laid down in the first apply to other cases.

The present case is not one of those specifically provided for by the first part of the clause. The question raised depends upon the effect of the second part of the clause, as extending the first to other cases besides those there set down; and in considering the meaning and effect of the clause, it is of importance to keep distinctly in view—that it makes no general or absolute provision for a separation of

No. 1. the estate of Rowallan from those of Loudoun, in every case in which they might come to be united in the person of the heir called to Rowallan by the primary destination. It is not an indiscriminate exclusion affecting every heir to Rowallan that might succeed to the estates of Loudoun that is provided for, but a special exclusion in particular cases. Had a separation of the estates been intended to take place in every instance, and to apply to all the heirs of the marriage, it is impossible to suppose that the clause would have been worded as it is—a totally different and known form would have been adopted. This peculiarity in the clause must be attended to, in determining its true meaning and construction, upon which it is obvious that it has a material bearing; for—if, by the qualifying clause, the union of estates in an heir to Rowallan is not provided against in all instances—it is essential, in any particular instance, to see that it is one of those in which it is provided that a separation shall take place.

Nov. 12, 1844.
The Marquis of
Hastings, &c.

The provisions of the first part of the clause, all apply to cases to occur after the death of Lady Jane Boyle, among her descendants, either in the first degree or in the second. Lady Jane herself could not succeed to the estates of Loudoun; and although her immediate children might do so, they might not. The succession of any of her descendants to these estates might be postponed to a more remote stage in the destination of the estate of Rowallan, the object however being, that, on that event taking place, whether sooner or later, the primary destination should, at least in certain cases, but in certain cases only, be in consequence qualified or altered, the provisions of the first part of the clause, setting forth how and to what effect it should be so altered, were naturally applied to the case of the succession to Loudoun opening to the immediate descendants of Lady Jane; while, by the second part of the clause, these provisions were extended or made to apply to the posterior portion of the destination; but this second part of the clause, no more than the first, contains a general provision for effecting a separation of the estates in all instances. The second part is special, as well as the first.

The case taken for exemplification in the first part of the clause, is that of succession to the estates of Loudoun by the immediate issue of "this present marriage;" that is, the then contemplated marriage of Lady Jane Boyle with Colonel Campbell. Upon the supposition of that event occurring, the provisions are made apply to, and give rule for the succession to Rowallan, both among Lady Jane's children and grandchildren in the particular states of the family mentioned, and there they stop.

As respects the children of the marriage, if there should be two sons, the second son is to exclude the eldest from the succession to Rowallan, if the eldest shall succeed to the estates of Loudoun. But if there should be only one son, "though there be daughters," the son, although he shall succeed to the estates of Loudoun, is not excluded by a daughter. In the latter case, the succession and right to the estate of Rowallan and its rents, as by the primary destination, is in no way affected by his succeeding to the estates of Loudoun. Again, the same is the result if there should be only a daughter or daughters of the marriage. An eldest daughter, although succeeding to Loudoun, is not excluded from the succession to Rowallan by a younger. There are no words which, by any latitude of construction, can bring in a younger female to the exclusion of an elder; and if there should be one daughter only, no separation of the estates is provided for.

This is the nature of the provision in the first part of the clause, as it applies to the descendants of the then contemplated marriage in the first generation in the

case given, of one of these children succeeding to the estates of Loudoun. But the provision in the same case also applies to the descendants in the second generation. By this part of the provision, if there was an only son of the marriage, who succeeded to Rowallan and also to Loudoun, then the second son of the only son is to succeed to Rowallan; and failing a second son, "then the eldest daughter of this only son is to succeed to the said estate." The rule in the second generation is therefore the same as that in the first, in so far as a second son excludes an eldest, but different in so far as a daughter excludes an only son. But further, the succession of an only son of the marriage was to be effected only in the event of his having a second, or an eldest daughter in place of a second son. If he had, a family of daughters only, there was to be no alteration of the order of succession: An eldest daughter is called only failing a second son—that is, in the case of there being an eldest son and no other. A second daughter is not called in any event.

No. 1.

Nov. 12, 1844.
The Marquis of
Hastings, &c.

Taking the whole of this first part of the clause, it will be found that it contains no provision for the case of a daughter of the marriage succeeding to the estates of Loudoun, and that it only applies to the second generation in the case of an only son so succeeding. It is the fact of the succession of a son of the marriage to the estates of Loudoun, which gives operation to the clause. By that event, and that event alone, is it brought into play. Whether the question of who is the heir to the estates of Rowallan arose among the children of the marriage, or the grandchildren, that question, in so far as regards the operation of the qualifying clause, must have depended upon a son of the marriage having succeeded to Loudoun, and his having been affected by the clause in the manner provided, so as consequently to render a separation of the estates necessary, in conformity to its terms.

Then it is to be observed that the provision, as applied to the first generation, gives the rule for the succession to Rowallan among immediate descendants, one of whom has succeeded to the estates of Loudoun, but whose parent had not previously succeeded; while the other gives the rule for the succession to Rowallan among descendants in a degree removed from that, the descendant in which had succeeded to the estates of Loudoun—that is, for the succession among grandchildren, whose parents had succeeded to the estates of Loudoun. The latter is a provision for the case of an only son of the marriage, a male heir succeeding to the estates of Loudoun. It is said, that if he did so at the same time that the succession to the estate of Rowallan also opened to him, the latter would, in terms of the clause, immediately descend to his second son, or eldest daughter, if he had either. But passing that, and assuming that at the time he had no issue, then he would be entitled to take the estate of Rowallan, and would not be bound to demand thereof upon having issue, whatever might be his obligation under the third part of the clause in regard to the management of the rents, to the next heir entitled to succeed on his death. The question under that condition of circumstances would consequently be—Who was entitled to succeed to Rowallan at the death of an only son who had succeeded to the estates of Loudoun, and who, having children, was within the words of the clause? While the provision, as applied to the succession in the first generation, would raise a question of succession on the death of a party who had not succeeded to the estates of Loudoun, among descendants, one of whom in the same degree had succeeded to these estates. The first part of the clause, therefore, contains two provisions—the one for the case of the succession to Rowallan among the immediate descendants of a party who had not

No. 1. himself succeeded to Loudoun, the party succeeding to Loudoun being one of these immediate descendants; the other for the succession to Rowallan among the descendants of a party who had succeeded to the estates of Loudoun; and for **Nov. 12, 1844.** The Marquis of Hastings, &c. these cases, as before explained, the clause makes, to a certain extent, a different provision.

As already remarked, the specific provisions thus made in the first part of the clause stop at the grandchildren of the then contemplated marriage. Whether either of them should take effect, so as to qualify the primary destination of the estate of Rowallan, depended upon the estates of Loudoun being succeeded to by a son of the marriage, that being the condition upon which their coming into operation at all is contingent. Which of them should take effect, and how, depended on the state of the family.

The whole operation of the clause, as arising out of the provisions in this first part of it, ceased, either by the estates of Loudoun not being succeeded to by a son of the marriage; or in the event of a son succeeding, by the estate of Rowallan in consequence descending to a second son of the marriage, or to a second son or eldest daughter of an only son of the marriage, and so, by force of the clause, being separated from the estates of Loudoun; or simply by the estates of Loudoun being succeeded to by a son of the marriage; for it might be, that although an only son of the marriage did succeed to the estates of Loudoun, the provision referred to might have no effect upon his right to the estate of Rowallan, seeing, that if he had no children, in whose favour alone the provision is to operate, he could not be affected by it to any extent, not even by the third part of the clause, which provides for the management of the rents, in the event of a son of the marriage succeeding to the estates of Loudoun. Succession to the estates of Loudoun, either by a daughter of the marriage, or by any of the subsequent heirs of Rowallan, whether male or female heirs, or whether these heirs succeeded to Rowallan in the ordinary course of the primary destination clause—the estates of Loudoun not having been previously succeeded to—or through the operation of the qualifying clause, by force of which the course of the primary destination had been broken, and the estate of Rowallan separated from those of Loudoun, which had been succeeded to by a son of the marriage—are not cases provided for by the first part of the clause.

Further, in reference to the provision, as applying to the succession to Rowallan upon the death of an only son of the marriage who had succeeded to Loudoun—but who, although afterwards having children, had in the circumstances, from there being no provision for devolution, been enabled to continue in possession of Rowallan and Loudoun—the question as to the right of succession might arise in two states of fact—the one, that at the death of the only son, he still retained the estates of Loudoun, to be inherited by his son—the other, that prior to his death he had disposed of them; so that Rowallan alone remained to be inherited by his descendants. Let it be supposed that an only son of the marriage, after succeeding to Rowallan had succeeded to Loudoun, and that he had an only son and daughter. That would have been a case for the application of one of the provisions in the first part of the clause, although the estate of Rowallan having once vested in the only son, he could not have been compelled to denude himself of it during his life. The only limitation of his right would have arisen from the third part of the clause, which provides for the management of the rents “for the use and behoof of the next heir of tailzie who shall succeed to the said estate of Rowallan in man-

Nov. 12, 1844.
The Marquis of
Hastings, &c.

as foresaid;" the manner foresaid being set forth in the declaration, that if an only son of the marriage "shall succeed to the honours and estate of Loudoun, though there be daughters, then and in that case it's hereby declared, that the second son of this only son of this marriage shall succeed to the said estate of Rowallan, and failing a second son, that the eldest daughter of the only son is to succeed to the said estate." Now, the point has been raised, whether the condition of the operation of the qualification thus made upon the primary destination of Rowallan, would not under this provision have been completely purified, so as to have carried the estate of Rowallan to a second son, or eldest daughter of the only son on his death, by the mere fact of his having succeeded to the estates of Loudoun, irrespective altogether of his having continued in possession of these estates down to the time of his death. The provision says nothing in express words upon that point. From the last part of the clause for management of the rents, it appears that the case was contemplated of the estate of Rowallan remaining vested in the son of the marriage, (subject in a certain event to the condition in that part of the clause,) notwithstanding his having succeeded to the estates of Loudoun; and it may be said, that that part of the clause shows that the provision for the succession to Rowallan on his death, if the state of his family admitted of its application, was rendered absolute, by the mere fact of his having succeeded to the estates of Loudoun, whatever might afterwards become of them; the right of his second son or eldest daughter to succeed to Rowallan, under the qualification upon the primary declaration, depending simply on his having succeeded to Loudoun, and not on his descendant, his eldest son, also succeeding to that estate. I do not think that this is the sound construction of the provision. Whatever might be the case, if the succession to the estates, both of Rowallan and Loudoun, opened to the son of the marriage at the same time, and he then had two sons, or a son and a daughter, when, by force of the provision, the estate of Rowallan might at once descend to the second or eldest daughter, I apprehend that in the case of the estate of Rowallan vesting in the only son of the marriage, and consequently remaining vested in him till his death, and the question only then arising as to the right to succeed to that estate, it is to be held as implied in the provision qualifying the primary destination of Rowallan, that that destination shall only be thereby affected, if at the death of the only son of the marriage, the estates of Loudoun shall continue to be possessed by him, so as to be inherited by his eldest son. This I conceive is necessary, in order to make a case for the operation of the provision at his death, as qualifying the primary destination; for it is only by his eldest son succeeding to the estate of Loudoun that there can be any ground, with reference to the plain object and meaning of the provision, for excluding him from the succession to Rowallan, in favour of a second son or eldest daughter. The operation, therefore, of this portion of the provision in the first part of the clause, where the only son had possessed both estates, depended, in my opinion, not merely on his having succeeded to Loudoun, but of its being to be succeeded to, on his death, by his eldest son.

With these remarks, in regard to the import and effect of the first part of the qualifying clause, let us now attend to the state of the present case.

In point of fact, there was an only son (James Mure Campbell) of the marriage between Lady Jane Boyle and Colonel Campbell, and which only son having previously succeeded to the estate of Rowallan, did afterwards succeed to the honours and estates of Loudoun. But he had then no issue, and, in the circumstances, was

No. 1. not excluded from holding the estate of Rowallan, along with those of Loudoun, whatever might have been the effect of the qualifying clause at his death, had he left two sons, or one son and a daughter. He accordingly possessed both estates till his death, and, as I conceive, was in no way affected by any of its provisions.

Nov. 12, 1844.
The Marquis of
Hastings, &c.

The only issue he had that survived him was an only daughter, the late Marchioness. She was, therefore, an only child of an only son of the said marriage, who had succeeded to the estates of Loudoun. She also succeeded to Loudoun, but at the time she had no issue, and she took up and enjoyed both estates, retaining, down to her death, possession of that of Rowallan.

The late Marchioness left an only son, the present Marquis, and daughters, of whom Lady Sophia Hastings is the eldest; and the Marquis, her only son, had, at her death, issue an only son and daughter. Lord Henry, his second son, was born shortly afterwards. It is in these circumstances that the present competition has arisen for the succession to the estate of Rowallan.

There is no dispute that, according to the primary destination in the contract-matrimonial and tailzie, the Marquis of Hastings is the party entitled to succeed to the estate of Rowallan. He must, therefore, have right to take up the succession, unless it can be clearly shown that he is excluded from it by some of the subsequent clauses of the deed. That the specific provisions in the first part of the qualifying clause do not touch the case, or exclude the Marquis's right to the estate, in terms of the primary destination, is quite plain. It is true that the late Marchioness, the mother of the Marquis, was the daughter of an only son of the marriage who had succeeded to the estates of Loudoun; but even had she been an eldest daughter, taking the estate of Rowallan to the exclusion of an only son of the only son who had succeeded to the estates of Loudoun, and supposing that she had afterwards come to succeed to Loudoun, the first part of the clause contains no provision respecting the succession to Rowallan on the death of such daughter. But this was not her position. She was an only child of an only son of the marriage who had succeeded to the estates of Loudoun. In this state of the case, the operation of the first part of the clause in truth ended with James Mure Campbell, or, more correctly speaking, it never took effect at all, because the facts were not such as that part of the clause contemplated, or to which, according to its terms, it could be applied. Accordingly, notwithstanding its provisions, James Mure Campbell, who succeeded to the estates of Loudoun, continued to enjoy them till his death, altogether unaffected by the first part of the clause, or even by the third part, in regard to the management of the rents; and when the succession opened to the late Marchioness, there was no case for the first part of the clause to act upon. She was entitled to take, and did take, the estate of Rowallan under the primary destination; and at the same time took and held the estates of Loudoun also, just as if there had been no qualifying clause in the entail of the estate of Rowallan.

But then there is the second part of the clause, which, as already mentioned, contains a provision to make the rules laid down in the first, for the special cases there set forth apply to other cases, and by the operation of which, it is said, that the present Marquis is excluded from succeeding to his mother in the estate of Rowallan.

Now, it appears to me that there is much room for doubt whether the succession to the two estates of Loudoun and Rowallan, having come to stand in a position so entirely different from that which would have resulted from

the operation of the qualifying clause had it taken effect, viz. that of being united in the person, not merely of the only son of the marriage, who in no way came within the reach of any of its provisions; but in the person of the child of that son, the clause did not thereby in all its parts cease to be capable of afterwards affecting the succession to the estate of Rowallan. The second part of the clause might have been available, either in the case of the estates of Loudoun not having been inherited by a child of Lady Jane Boyle and Colonel Campbell, in respect of the succession not having opened to these estates till a remoter heir was in possession of Rowallan, or in the case of the estates having once been separated by force of the first part of the clause, and then coming to be again united in a subsequent stage of the destination, by the succession to both falling to the same person; but the case which has actually happened differs from either of these, and does not seem to be one to which the second part of the qualifying clause was intended to apply, or can apply. I am unable to see that the clause in any of its parts provides for the case that has occurred. It does not appear to me to be so worded as to apply where the estates have been held together in a manner which the clause did not, or was not intended to prevent, or to be capable of effecting a separation of the estates after that has taken place. If it was meant that it should do so, (but which I think it is not to be presumed,) it fails in providing for a separation in such circumstances. The first part of the clause contemplates a son or an only son of the marriage succeeding to the estates of Loudoun; and it further contemplates, that if he shall so succeed, the union of the estates of Loudoun with that of Rowallan shall be prevented in the manner there prescribed. According to its natural reading, the second part of the clause contemplates the possibility of the succession to Loudoun not occurring till a remoter stage of the destination, and it provides, that then the same rules shall apply for the regulation of the succession to Rowallan, as would have fallen to be observed had the succession to Loudoun opened to a son of the marriage of Lady Jane Boyle. The second part of the clause may be further held to contemplate the possibility of a recurrence of the same event, after the estates had been once separated by force of the provision for that purpose; and if so, the succession to Rowallan is to be again governed by the same rules. It has been maintained, that it is to be also held as applying the same rules in future generations to female heirs as well as to male heirs—that is, to an only daughter succeeding to the estates of Loudoun, as well as to an only son succeeding—a plea which will be afterwards more particularly adverted to. But granting all this, still I conceive that no part of the clause (which is not a general clause for the separation of the estates in all cases, but one limited to particular cases) reaches the present case, which is not one where a son, or an only son, or an only daughter—assuming an only daughter to be equally within the clause as an only son—had succeeded to the estates of Loudoun, which had not been inherited by the preceding heir of the estate of Rowallan, but one where the estates were united in the person of James Mure Campbell, the only son of the marriage of Lady Jane Boyle and Colonel Campbell, who was in no degree affected by the qualifying clause, and then all descended to his daughter, an only child, and remained united in her person till those of Loudoun were disposed of and settled under the Parliamentary arrangements mentioned in the record.

Without, however, entering more fully on this view of the case, I shall, with reference to the pleas of the respective parties, proceed to consider whether, upon

No. 1.

Nov. 12, 1844.
The Marquis of
Hastings, &c.

No. 1. any sound construction, the second part of the qualifying clause can be applied to the actual case, so as to bar the claim of the present Marquis to the estate of Rowallan, (supposing him to have inherited the estates of Loudoun under the old investitures, which is the condition of the argument,) and to carry Rowallan to some one or other of the competing parties.

Nov. 12, 1844.
The Marquis of
Hastings, &c.

Two modes of construing this second part of the clause are contended for. According to the one, the rules prescribed in the first part are by the second only extended to the same cases as those specified in the first, when occurring in stages of the succession subsequent to those mentioned in the first, the second part of the clause merely generalizing the special cases in the first part of the clause to be applied to the future destination. According to the other, the application of the special cases in the first part is by the second enlarged, so as to reach the case of heirs not comprehended within the terms of the first.

(1.) If the first or generalizing mode of construction be adopted as the sound one, the present Marquis is not, I apprehend, excluded from the succession to the estate of Rowallan by the first part of the clause, as extended by the second.

I have already explained to what particular states or circumstances the provisions in the first part of the clause for regulating the succession to Rowallan seem to apply, whether as among the children or grandchildren of the then intended spouses. Holding the second part of the clause to carry downwards to the future stages of the succession to the estate of Rowallan the provisions of the first, so as to make them apply in the same circumstances and in the same cases, when occurring in those future stages, as they would have applied to in terms of the provision in the prior stages; (and granting that this might hold good, whether the party who is to be taken as standing in the place of Lady Jane Boyle be a male or female heir,) it does not appear to me that there is any ground on which the competing claims of Lady Sophia Hastings, or Lord Henry Hastings, or any of the other parties, can be sustained.

Lord Henry Hastings, the second son of the Marquis, maintains that the late Marchioness is to be held as standing in the place of Lady Jane Boyle; and—(assuming that his not having been born till after the death of the late Marchioness cannot prejudice his right, if it would have been well founded had he been alive at her death)—he states his case as being that of a second son of an only son of the marriage of the late Marquis and Marchioness, and who, in terms of the first part of the clause, would, in similar circumstances and a like state of family, if occurring among the descendants in the first and second generations of the marriage of Lady Jane with Colonel Campbell, have excluded the only son, as well as the daughters of that marriage, and also the eldest son of that only son.

The view thus insisted in by Lord Henry is of course repudiated by Lady Sophia Hastings; and it is conceived that, in so putting the case, Lord Henry attempts to bring it under the rule given for one to which it cannot be correctly assimilated. Let the provision, as made in the first part of the clause, be taken to be applicable to the descendants of all future marriages, as well as those of the marriage of Lady Jane Boyle and Colonel Campbell, still it is thought that the late Marchioness, who had succeeded to the estates of Loudoun, cannot be stated as standing in the place of Lady Jane, to the effect of the question as to the succession to the estate of Rowallan, upon the death of the Marchioness, being re-

presented as one to be regulated by the rule given in the first part of the clause for the succession to that estate, in the event of an only son of Lady Jane succeeding to the estate of Loudoun; in which event, it is there provided, that the second son of that only son of the then contemplated marriage "shall succeed to the said estate." The only provision made in the first part of the clause applicable to the succession to Rowallan, on the death of a party who had succeeded to the estates of Loudoun, is that which relates to the succession to Rowallan, on the death of an only son of the marriage who had succeeded to the estates of Loudoun, the provision for which case is different from the provision for the succession on the death of a party who had not succeeded, in the event of the child of that party succeeding to the estates of Loudoun; for in the latter, an only son is not excluded by a daughter of the marriage, but only by a second son, whereas in the former he is excluded. In the latter, a daughter is not called to the succession to Rowallan by the qualifying clause, in order to exclude an only son, while, if there are no sons, the eldest daughter may take both estates; but, in the former, a daughter is called in preference to an only son of the only son; and if the only son have no sons, no devolution of Rowallan seems to be provided for.

Suppose that the late Marchioness herself had been the first heir in the primary destination of the estate of Rowallan who had succeeded to the estates of Loudoun, could it, in the question of succession to Rowallan upon her death, have been maintained that she was to be held as representing Lady Jane Boyle, and that the rule in the first part of the clause, which was to be referred to in regulating the succession, was that there given for the case of the estates of Loudoun being succeeded to by an only son of the marriage between Lady Jane Boyle and Colonel Campbell? Certainly not, for that is the case of an only son succeeding whose parent had not succeeded; whereas, in the case supposed, the late Marchioness, the mother of the present Marquis, had succeeded to the estates of Loudoun: That being the fact, the present Marquis, her only son, would not be in the position of James Mure Campbell in the case given in the first part of the clause, but would be the only son of an heir to Rowallan who had succeeded to the estates of Loudoun. Accordingly, if the late Marchioness had not succeeded to the estates of Loudoun, but they had only opened to the present Marquis at her death, it appears to be clear that, were the succession to Rowallan to be affected at all by the qualifying clause, it would be in that case, that the late Marchioness might be represented as holding the place of Lady Jane Boyle, and the present Marquis that of an only son of the marriage succeeding to the estates of Loudoun. But if so, then it follows that the late Marchioness having *de facto* succeeded to and enjoyed the estates of Loudoun, she cannot, under the second part of the clause, extending the application of the first to remoter stages of the destination, be taken as standing at a remoter stage in the place occupied by Lady Jane Boyle in the earlier one, in the case given in the first part of the clause, as a model case for regulating the succession in all time coming.

If, therefore, by the adoption of a generalizing construction of the second part of the qualifying clause, the present case can be assimilated at all to any of the cases specially mentioned in the first part of the clause, it can only be by stating the late Marchioness—who did succeed to the estate of Loudoun, and who was the only daughter of James Mure Campbell—as having stood (although at a lower point in the destination of the estate) in the same position as an only son of Lady

Nov. 12, 1844.
The Marquis of
Hastings, &c.

No. 1.

Nov. 12, 1344.
The Marquis of
Hastings, &c.

Jane's marriage with Colonel Campbell, so that on the death of the Marchioness, who had succeeded to the estates of Loudoun, the succession to Rowallan is to be regulated in the manner directed by the first part of the clause, in the event, for which provision is there specially made, of an only son of Lady Jane succeeding to the estates of Loudoun. This, accordingly, is the plea of Lady Sophia Hastings. But if the sound construction of the second part of the clause be, that it merely generalizes the first, so as to make it apply throughout the course of the succession to the like cases as those described in the first, the provision in the first—which relates to the succession to Rowallan, on the death of an only son of the then contemplated marriage who shall succeed to the estates of Loudoun—would not apply so as to exclude the Marquis, that provision relating only to the succession to a male heir, that is, the succession to a son. There is no provision for the case of a daughter, or of an only daughter, succeeding to these estates, and regulating the succession on her death. There is no provision to exclude, in that case, the son of the daughter, in favour of, and to bring in preferably, either the second son or the daughter of that daughter. In fact, there is no provision in the first part of the clause which is applicable to the case of the succession to a female heir, except it be that for the succession to Lady Jane herself by her immediate children. But even there, a female heir has no benefit from the clause to the exclusion of a son; and throughout all the rest of the first part of the clause, the provision is for the succession to a male heir. There is throughout not only no indication of an intention that the clause should apply to a female heir, in the event of the former having succeeded to the estates of Loudoun; but the cases provided for imply that such was not the intention of the maker of the entail of Rowallan, inasmuch as, in providing for the succession down to the second generation of the descendants of the marriage of Lady Jane Boyle and Colonel Campbell, although the possibility of a female heir succeeding to Rowallan must have been in view, the clause is not so framed as, on the one hand, to strike against such female heir, or, on the other, to benefit her, except in the single case of an only son of the marriage not having two sons, but only one son and a daughter, when it is provided, that if the only son shall succeed to Loudoun, his eldest daughter is to succeed to Rowallan in preference to his only son.

Holding, then, that a correct view has been taken of the nature and effect of the first part of the clause, as respects the cases to which it is specifically applied, and that the second part of the clause is to be construed as merely generalizing the first, it is thought that the Marquis of Hastings cannot be excluded from inheriting the estate of Rowallan as the heir under the primary destination, the case in which he claims not being the same as any of those mentioned in the first part of the clause, or to which, therefore, the qualifications thereby made upon the primary destination apply.

(2.) But it is contended that the second part of the clause must receive a more enlarged construction, it being thereby provided, "that the succession to the said estate of Rowallan, in case any of the heirs of this marriage shall succeed to the estate of Loudoun, shall take place according as is above mentioned in all time coming." By this provision, it is said that it is rendered of no importance whether the question of succession to the estate of Rowallan shall occur on the death of a female heir or of a male heir; that a female heir is an heir of the marriage referred to, and that the succession on the death of a female heir is, by the terms

of this second part of the clause, to be ordered in the same manner as the succession on the death of a male heir. In this way, Lady Sophia Hastings maintains that the model case in the first part of the clause for that which is now before the Court, is that of the succession on the death of an only son of the marriage of Lady Jane Boyle and Colonel Campbell, who shall succeed to the estate of Loudoun, in which it is provided that the second son of the only son shall succeed to Rowallan, and, failing a second son, then the eldest daughter of the only son; that this provision, which in the first part of the clause is applied to an only son or male heir, is, by the extending words of the second part, which comprehend "any of the heirs of this marriage," applied also to a female heir; and that, therefore, the succession to Rowallan, on the death of the late Marchioness, who succeeded to the estates of Loudoun, is to "take place" in the same manner as the succession on the death of James Mure Campbell would have taken place in terms of the first part of the clause alone, had he, at his death, had only one son and a daughter or daughters, in which case the eldest daughter—who, in the present instance, is Lady Sophia—would have succeeded to Rowallan to the exclusion of the only son, the present Marquis.

Nov. 12, 1844.
The Marquis of
Hastings. &c.

Now, in the first place, upon this enlarged construction of the second part of the clause, it is sought that the succession to the estate of Rowallan shall, in a remoter generation, be regulated in a different manner from that in which it would have been, had the succession to the estates of Rowallan and Loudoun opened to a female heir in the generation, in reference to which the special provision in the first part of the clause refers; for I apprehend it could not be held—under any admissible construction of the first part of the clause—that had Lady Jane Boyle been succeeded by an only daughter, who, having succeeded to the estate of Rowallan, had also succeeded to the estates of Loudoun, that only daughter would have been affected by the provisions of the first part of the clause, and that the succession on her death would have fallen to take place in terms of that provision.

By the clause in its first part, special provision is made for the case of Lady Jane Boyle leaving a son or two sons. No provision is made for the case of her leaving daughters, or a daughter only. There is no provision affecting or qualifying the primary destination as respects them. Their right to succeed to Rowallan in virtue of it is not touched. It is not provided that the second daughter shall exclude the eldest, or that if there should be only one daughter, who shall succeed to the estates of Loudoun, then her second son, or, failing a second son, her eldest daughter shall succeed to the estate of Rowallan. The clause is an entire blank as respects either of these cases, when making special provision for the succession to Rowallan in the first and second generations of the descendants of Lady Jane Boyle. And as far as I can see, there is no ground, but the contrary, for supposing that the omission was not intentional; and no principle on which it can be maintained, that by the provisions in the first part of the clause, all the qualifications meant to be made, upon the succession appointed by the primary destination in the first and second generations of the descendants of the marriage, were not made, and that they were left to be extended by the second part to different cases even in these generations, so as to embrace female heirs in them, and to subject the succession to Rowallan to the same provisions in the case of Lady Jane leaving daughters, or an only daughter, as in the case of her leaving sons, or only one son, to which last case, in the event of a son succeeding to Loudoun, the

No. 1. provisions are specially applied. I cannot think, that to so interpret the second part of the clause, would be a warrantable or sound construction of it; but if not, I find great difficulty in discovering any safe ground upon which it can be found that the second part of the clause extended the rule of the first, to the effect of introducing, in a more remote part of the descent of the estate of Rowallan, a rule of succession qualifying the primary destination, and affecting the heirs entitled by it to succeed, which would not have obtained in the earlier part of it, had the succession then opened to a female heir, as it afterwards did in the postponed portion, when the late Marchioness came to succeed to the estates of Loudoun and Rowallan. If the second part of the clause cannot be held to affect or extend the first, so as thereby to bring a daughter of Lady Jane Boyle, and the succession on her death, within the provisions of the first part of the clause, how can it be justly contended that, in remoter stages of the succession, the first part of the clause was so extended by the second, that the provisions of the first are made to apply to a daughter of James Mure Campbell, and the succession on her death? For what is that but to maintain, that by the second part of the clause the rule is made to apply, in a subsequent part of the course of succession, in circumstances which, had they occurred in those parts of the succession to which the provisions of the first part of the clause specially and directly relate, it would not by the second part have been made to apply. This, with deference, seems to be a construction of the clause which cannot be entertained, without totally disregarding the declaration in the second part of it, by which the extending words are accompanied, viz. that the succession to the estate of Rowallan "shall take place according as is above-mentioned in all time coming." By that construction the succession is made to take place, not "according as is above-mentioned," but in a manner entirely different from, and opposed to what is above mentioned, inasmuch as it is made to take place in a way in which it would not have taken place in similar circumstances, in those very parts of the succession for which the first part of the clause, which is referred to, makes express provision. If, indeed, to adopt that construction were essential, in order that the portion of the second part of the clause, immediately preceding that just quoted, may receive effect, it might be that it could not be objected to, for I at once admit that effect must be given to them. Whether, in order to do so, they require to be interpreted in a manner which would exclude the Marquis from the succession, shall afterwards be adverted to.

But in the mean time, and further, it is to be remarked, that in advocating a construction of the second part of the clause which makes it operate against the claim of the Marquis, the only son of the Marchioness, and bring in Lady Sophia, her eldest daughter, in respect of the failure of a second son, a preference is required to be given to a female heir in the succession to a female heir, to the exclusion of a male heir—that is, the clause is made to operate in remoter parts of the succession in a manner altogether dissimilar and opposed to the manner in which it is provided that it shall operate in the earlier parts. The union of the two estates in the person of a female heir is not provided against. A female heir may take both, unaffected by the clause in every respect. The last part of it, for the management of the rents of Rowallan, does not apply to the case. The only case of succession in a female line that is provided for, is that to Lady Jane Boyle. If the first part of the clause has any model for such succession, which by the second is extended to the whole course of succession, it is to be found in that part of its provision alone. But there is no provision for a female heir being succeeded

No. 1.

Nov. 12, 1844.
The Marquis of
Hastings, &c.

by a daughter, a female heir, to the exclusion of an only son. On the contrary, an only son is to exclude a daughter, and this although he shall succeed to both estates. By the qualifying clause, the succession by the primary destination of an only son to Rowallan is only affected, upon his also succeeding to Loudoun, in the event of his having a younger brother, or having children of his own, in which last case his second son, or, failing a second son, his eldest daughter, were to be entitled to succeed to Rowallan—that is, a son or male heir were to be succeeded by a male or a female in his room—and this is the only case in which the provision was to operate in favour of a female. In no case is it made to operate to the effect of bringing in a female after a female, to the exclusion of a male entitled to take by the primary destination. If then the Marquis is here to be excluded in favour of his sister, the succession of the Marchioness, a female heir, will in this view be regulated differently in a remoter generation from the manner in which the succession of a female heir is appointed to be regulated in a prior one. Can a principle of construction of the second part of the clause be countenanced which would work in this manner? Would that be to give effect to the whole words of that part of the clause, whereby, while the first part is extended “to any of the heirs of this marriage,” it is always subject to the proviso and qualification, “that the succession to the said estate of Rowallan shall take place according as is above mentioned?” I think not: And I am of opinion, that without running counter to any fixed course of interpretation, a different construction may be adopted, viz. one by which the second part of the clause is made merely to generalize the first, by advancing—for the regulation of the succession in future generations, when in them the same cases occur as those provided for in the first—the same rules as are in these cases applied in the earlier ones. By this construction, as it appears to me, no violation is done to any part of the second part of the clause. Effect is given to the whole words of it, and it is recommended just because it goes no further than to generalize the provisions of the first part of the clause. That the entailor should have had this in view, and provide accordingly, was natural. It is, therefore, a safe mode of construction; but a more enlarged construction is just the reverse. It goes beyond what might naturally be supposed to have been the intention of the entailor; for having, by specific provisions in the first part of the clause, explained how the succession to Rowallan was to be regulated, and the primary destination affected in the earlier part of it, in the event of the succession to the estates of Loudoun opening to the heir of the estate of Rowallan, it is not natural to suppose that rules of succession and qualifications upon the primary destination not applied to these earlier parts of the succession, and opposed to what, from the provisions in regard to them, might be inferred as to the views of the entailor, should have been introduced by the second or extending part of the clause, in reference to more remote parts of the succession. To put a construction on the second part of the clause which would make it so operate, would require words to have been used which, dealing only with them, did not admit of any other—otherwise it is not a safe construction, but the reverse. It is at best a most doubtful and questionable construction, and therefore not one upon which any heir, called by the primary destination, should be excluded from the rights thereby expressly conferred on him.

At the same time, whatever might be the difficulties in the way of supporting the construction contended for by Lady Sophia and others, I should not hesitate

No. 1. in saying that they must be got over, if it were only by that construction that the whole words of the second part of the clause would receive effect. If the opposite construction required that some of the words should be dealt with as having no meaning, if that must be the consequence of adopting it, then it may be that it would fall to be rejected, and the other preferred. But there is no room for imputing to it any such violation of the acknowledged rules of construction.

Nov. 12, 1844.
The Marquis of
Hastings, &c.

The words "any of the heirs of the marriage," are the only ones in the second part of the clause on which observation can be made, as rendering the enlarged construction necessary in order to give effect to them. But not to interpret words in their most comprehensive sense, and to reject them altogether, or to give them no meaning, are two very different things. Now it is evident that it is the first of these things that is done by the construction which I have stated ought in my opinion to be adopted, and not the last. Meaning and effect is thereby given to the words "any of the heirs of this marriage," although not their most comprehensive meaning and effect. If indeed it could be said that in law these are words of inflexible meaning, that might be sufficient to prevent any thing short of their most comprehensive sense being put upon them. But this cannot be said. The contrary is the case. It is not necessary that the words should be construed in so general a sense as to include all heirs. Therefore it is no objection to a construction of this part of the clause, that it does not give the words their most comprehensive meaning. That may be done without disregarding any recognised rule of construction. The only question that can be raised is, whether they ought, in the circumstances, to receive their most comprehensive meaning, or a more limited one? But this is a question which must be determined by the whole context, both of the part of the clause in which they occur, and of that part of it to which they refer. Indeed, the whole instrument may properly be looked at in order to decide it. Doing so, and more especially looking to the declaration in that part of the clause itself which forms a part of its provision in regard to "any of the heirs of this marriage," that the succession to the estate of Rowallan shall take place "according as is above mentioned in all time coming," and looking to the first part of the clause for what is above mentioned, I think, for the reasons already stated, that the words, "any of the heirs of this marriage," should not receive their most comprehensive meaning, but the more limited one which is given them by that construction of the second part of the clause, according to which the provision therein contained does not apply to the present case which relates to the succession to Rowallan on the death of the late Marchioness, and therefore does not exclude the Marquis from the succession to that estate even although he had taken the Loudoun estates under the investiture existing at the date of the entail of the estate of Rowallan.

Having made these remarks upon the import and effect generally of the clause in the entail of the estate of Rowallan, by which the primary destination is qualified, and upon the special pleas of Lord Henry Hastings and Lady Sophia Hastings, it does not appear to be necessary to advert particularly to those of the other parties competing with the present Marquis. I shall therefore only add, in conclusion, that I am of opinion that the present Marquis is the party entitled to succeed to the estate of Rowallan, as the heir of provision to that estate, in preference to all the other competitors, even assuming that the estates of Loudoun had been held by the late Marchioness till her death, on the ancient investiture subsisting at the date of the tailzie of the estate of Rowallan—and that, *esto* that

in that case his claim to be preferred must have been rejected, he is entitled to succeed in respect of the transaction which took place in regard to the estates of Loudoun during the life of the Marchioness, by which they were exchanged and alienated for estates in England, and came to be settled on the present Marquis in lieu of those estates, in the manner detailed in the papers.

No. 1.

Nov. 12, 1844.
The Marquis of
Hastings, &c.

LORD COCKBURN.—I concur in this opinion by Lord Wood.

LORD MONCRIEFF.—This case is certainly attended with considerable difficulty; and there may be difficulty in several points of it. But I am, on the whole, of opinion, that the argument for Lady Sophia Hastings is well founded.

I think, 1st, That, apart from the question raised concerning the particular position of the landed estate of Loudoun, the special provisions contained in the entail of Rowallan, for separating the possession and enjoyment of that estate, in the particular events laid down, from the succession to and enjoyment of the honours and estate of Loudoun, must be held to take effect at the death of the late Countess of Loudoun and Marchioness of Hastings: 2d, That if the provisions are to receive any effect at all, in the circumstances of the family at that date, they must operate to carry the right of succession to Lady Sophia Hastings: and, 3d, That that right, if otherwise arising upon the entail of Rowallan, is not, on a just construction of that entail, prevented or excluded by the particular arrangements concerning the estate of Loudoun referred to in the pleadings.

These questions arise under the following contingency of circumstances.

Jane Mure, Countess of Glasgow, was proprietor of the estate of Rowallan, which had come to her by regular descent. She was under no restraint concerning it; and, on the other hand, both the honours and estate of Loudoun were in a different family.

On the marriage of her eldest daughter, Lady Jane Boyle, to Colonel James Campbell, who was the brother-german of Hugh the third Earl of Loudoun, the Countess of Glasgow, in 1720, with consent of her husband, in the marriage contract of her daughter made an entail of her own estate of Rowallan. It contains an extensive destination both to her own descendants, and to collateral relations on the failure of all of them. It also contains special conditions and prohibitions, with irritant and resolute clauses, and among these a very anxious provision, that the heirs should assume and retain the name and arms of Mure of Rowallan.

The destination was to the Countess herself and her husband in liferent, and the heirs-male of their marriage in fee; which failing, the heirs-female of such heir-male; “ which also failzieing, to the said Lady Jean Boyle, and the heirs-male to lawfully procreate of her body of this present marriage, and the heirs-male of their bodies; which failzieing, to the heirs-female to be procreate of the body of the heir-male of their marriage, the eldest always secluding the rest, and succeeding without division, as said is; which failzieing, *to the heirs-female to be lawfully procreate of the said Lady Jean Boyle her body of this present marriage, and the heirs male or female of their bodies*, the eldest heir-female always secluding the rest, and succeeding without division, as said is; which failzieing, to the heir-male of the said Lady Jean Boyle her body of any lawful subsequent marriage, and the heirs-male of their bodies.” The words printed in Italics appear to con-

No. 1. substitute the substitution on which the present Marquis of Hastings founds his title to succeed.

Nov. 12, 1844.
The Marquis of Hastings, &c.

If the clauses of the destination had so stood, without being qualified by any thing else in the deed, the Marquis's title would, no doubt, have been clear, either as being heir-female generally of Lady Jane Boyle in her marriage with Colonel Campbell, or as being the heir-male of the body of the late Lady Loudoun, who succeeded as such heir-female.

But the destination was not left so unqualified. There are other clauses in the deed, expressly intended for regulating the succession in particular events. And there can be no more certain or fixed rule in the construction of such instruments than this, that all the clauses of the deed must be read together.

The provisions which here raise the question are no doubt very particular, and perhaps not well constructed for excluding all ambiguity. But this has happened in other causes, as in the material clause of the Roxburghe entail, and in many other instances; and in a question concerning the effect of the destination—in a question of succession among heirs—the Court must endeavour to ascertain what is the true meaning and import of the clauses, notwithstanding any difficulty which may attend the enquiry. These clauses occur in an after part of the deed, posterior to the entailing clauses—a circumstance which also occurred in the Roxburghe entail, and was much founded on in the discussion of that cause. But such a collocation cannot alter the nature and character of the clauses, as regulating the succession in the particular events to which they relate. They are expressed in the following terms:—"And in like manner, it's hereby expressly provided and declared, and appointed to be contained in the infestments to follow hereupon, that in case it should fall out that there be only one son of this present marriage procreate betwixt the said Master James Campbell and Lady Jean Boyle, who shall succeed to the honours and estate of Loudoun, though there be daughters, then and in that case it's hereby declared, that the second son of this only son of this marriage shall succeed to the said estate of Rowallan; and failzieing a second son, then the eldest daughter of this only son is to succeed to the said estate, and who shall be obliged to marrie and carrie the arms of Rowallan, in the terms and under the irritancies of the tailzie above mentioned; but if there be two sons of this present marriage, then the second son is to succeed to the estate of Rowallan, in case the eldest son shall succeed to the estate of Loudoun; and that the succession to the said estate of Rowallan, in case any of the heirs of this marriage shall succeed to the estate of Loudoun, shall take place according as is above mentioned, in all time coming; And so soon as the son of this marriage, or others aforesaid, shall accept of the honours and estate of Loudoun, then the rents of the said estate of Rowallan are to be managed and improven for the use and behoof of the next heir of tailzie, who shall succeed to the said estate of Rowallan in manner aforesaid."

This appears to me to be, in the material parts of it, nothing else but a provision regulating the succession in particular cases. It is a part of the destination. It is introduced, no doubt, in rather an awkward form. But if it be read as in immediate connexion with the destining clauses, or the order of succession before laid down, it can have no other character than that of a special provision, qualifying or regulating certain special branches of that destination. Except in the very last part of the clause, on which no question is at present raised, and which

may admit of different constructions, it has no resemblance to a clause of forfeiture. When a case occurs, in which it is clearly called into operation, the question can be nothing else but this—who is the heir called to the succession? If there had been two sons of the marriage, I think that it could have admitted of no dispute, that, if the eldest had succeeded to the honours and estate of Loudoun, the second son would have been entitled to succeed to the estate of Rowallan as heir of tailzie and provision; for the deed says expressly, that, in that case, “the second son is to succeed to the estate of Rowallan;” and then the general clause, which relates to other heirs of the marriage, is expressed in the same way—“that the succession to the said estate of Rowallan, in case any of the heirs of this marriage shall succeed to the estate of Loudoun, shall take place according as is above mentioned.”

No. 1.

Nov. 12, 1844.
The Marquis of
Hastings, &c.

Perhaps it may tend to explain the peculiarity of those provisions to observe, that the intention appears to have been of a very special nature. Lady Glasgow, being how very near her son-in-law, Colonel Campbell, was to the succession to the honours and estate of Loudoun, was evidently desirous, as far as she could do so consistently with other interests closely at her heart, to prevent the name and character of Mure of Rowallan from being sunk in the dignity of the Earl of Loudoun. But she makes no absolute provision of forfeiture whenever a succession to Loudoun should take place. It is a special rule for the succession, apparently confined within the destination to the heirs-male and female of that particular marriage. Whether the last branch of the whole clause would, in any case, be made to operate in favour of any of the other postponed heirs, may be matter of doubt. But, so far as the facts of the present case raise any question, the clause merely regulates the succession among the heirs of the contracted marriage, in the contingency anticipated of one of them succeeding to the honours and estate of Loudoun.

It is evident to me that, in construing this provision, the entailer attached great importance to the succession to the honours of Loudoun. I think that it was the matter of chief importance in her eyes in framing this part of the entail. It was against this mainly that she made the provision at all, as the event by which the name of Mure of Rowallan would be sunk; and I am convinced, that the extent or value of the landed estate of Loudoun, as it then was, or the titles by which it might be held, or the changes which it might undergo in the hands of fee-simple proprietors, entered very little, if at all, into her contemplation. Accordingly, in the very first part of the clause of the entail, the case put is, that of issue of the marriage “who shall succeed to the honours and estate of Loudoun;” and the same term is repeated in the last part of the clause. It is true that, in some of the intermediate abridged provisions, the word “estate of Loudoun” only is used—from which it is argued, on the part of the Marquis, that succession to the lands only is to be considered. But it seems to me to be impossible to say, that the meaning is different in these intermediate provisions from that which is plainly expressed in the first and last members of the whole clause. Besides, the word “estate” must be held to be sufficient in law to cover both the honours and the land rights. It was so held, in a much more important view, in the Roxburgh case, which here again furnishes a very apt authority. The entail was a nomination of heirs, under powers from the Crown, both as to the lands mentioned and “the title and dignity of an earl;” and, in all the clauses of the main destination, the earldom and the title and dignity were expressly mentioned, as

No. 1. well as the lands and other rights. But, in the clause of ultimate destination, which, on the failure of all the other heirs, was held to bring the estate to Sir James Innes, the words were simply, that "the rights of the said estates shall pertain and belong to the eldest daughter," &c. It may be remembered, that, even in the argument concerning the landed estate, there was much discussion on the question, whether the title and dignity were comprehended under these terms; and, it being held competent for the Court to consider that matter incidentally, the opinion which prevailed held that the honours did pass under the term "estate."

Nov. 12, 1844.
The Marquis of
Hastings, &c.

The case which has here occurred is this : There was no heir-male of the marriage of the Earl and Countess of Glasgow ; and Lady Jane Boyle or Campbell succeeded to the estate of Rowallan. There were not two sons of Lady Jane's marriage with Colonel Campbell, but only one son, James Mure Campbell. On Lady Jane's death in 1733, that only son took up the succession to Rowallan. In 1782, he became Earl of Loudoun, by succession to his cousin-german, John the fourth Earl of Loudoun. He had but one child, Flora Adelaide Countess of Loudoun. He died in 1783 ; and then there being evidently no one who, under the entail of Rowallan, could make any claim to that estate except that daughter herself, she of course succeeded, and got possession both of that estate and of the honours and estate of Loudoun. It was one of the cases in which the entail left the destination unqualified. She possessed the estate till her marriage, and afterwards till her death in 1840.

I think it abundantly clear that there was no provision in the entail which could affect her. She succeeded to Rowallan and to the honours and estate of Loudoun in the same instant, by her father's death. Twenty-one years after, no doubt, she married, and had successively an heir-male and several daughters. But I apprehend that this did not bring her within any part of the clause of the entail. It is a case which, in my apprehension, shows that it was not forfeiture but succession only that was thereby regulated. And even the last part of the clause could not be applied, because the only case to which it relates, that of an heir in possession of the estate of Rowallan subsequently succeeding to the honours and estate of Loudoun, did not occur.

But the question of succession now arises, upon the death of the Countess of Loudoun, between her son, the present Marquis of Hastings, as an only son of the deceased Marchioness, and Lady Sophia Hastings, as the eldest daughter existing at her death. I consider that question simply to resolve into a competition for the character of heir of provision under the special terms of the deed of entail. By the death of the Marchioness-Countess of Loudoun, the Marquis has succeeded to the honours or dignity of the Earl of Loudoun. By the same event he has the only title of succession to the landed estate of Loudoun ; and though a question is made concerning the nature and character of that title, there is no doubt that, in consequence of his mother's death, and only by that event, he has become proprietor of that estate.

I. In this state of the family, the first question which arises is, whether, supposing that the titles of the land estate of Loudoun had continued to stand precisely as they were when the late Countess succeeded to it, and that the Marquis took it simply as the heir of her investiture, the event which has occurred opens the succession to Rowallan to some heir different from her eldest son ? Claims are now made for various parties—for the Marquis himself—for his eldest son—

and now for his second son lately born—for his eldest daughter—and separately for Lady Sophia Hastings, as the eldest daughter of the deceased Countess. In considering the first point, as above stated, it may be treated as if it were divested of all other specialties, and as if it occurred simply in the case of Lady Loudoun, as the heir in possession of Rowallan, having died, leaving one son only, but an only or eldest daughter.

No. 1.

Nov. 12, 1844.
The Marquis of
Hastings, &c.

In this view of the case, the question appears to me to be of very easy solution. There cannot be any doubt concerning the effect of the first part of the clause, which relates to the succession to an only son of the marriage of Lady Jane and Colonel Campbell. The provision is, that if that son (having succeeded to the honours and estate of Loudoun) shall have a second son, that second son shall succeed to Rowallan. If, therefore, James Mure Campbell, the only son of the marriage, after succeeding to the honours and estate of Loudoun, had died, leaving two sons, there could not, I think, have been the least doubt, that the second son would have been entitled to succeed to Rowallan; for that is the very case provided for. But the deed also says, "and failing a second son, then the eldest daughter of this only son is to succeed to the said estate." If, therefore, James Mure Campbell, the only son of the marriage, had left one son and one daughter, it is equally clear that that daughter must have succeeded to Rowallan, while the only son succeeded to his father in the honours and estate of Loudoun. So far the effect of the clause is clear enough.

But the general clause which follows is to be construed and applied, with reference to these provisions, in the special events expressed. It is, "that the succession to the said estate of Rowallan, in case any of the heirs of this marriage shall succeed to the estate of Loudoun, shall take place according as is above mentioned in all time coming." This clearly supposes cases of succession of heirs of the marriage, different from those above provided for in the immediately preceding clause; and the form of expression, "any of the heirs of this marriage," having reference to the destination as admitting female heirs as well as male heirs, appears to me evidently to import, that the provision might take effect by the succession of female heirs. But this is not necessary to the present question. There having been no heir-male of James Mure Campbell, and only one daughter, the right of that daughter was necessarily clear, notwithstanding that her father was Earl of Loudoun, there being no other party to whom the succession could open under the terms of the deed. But now the case is, that she, being Countess of Loudoun, leaves an only son and an eldest daughter. That only son, *ex hypothesi*, succeeds to the honours and estate of Loudoun. And the question is, whether in that case, he being an heir of the marriage so succeeding, if the rule laid down, that the succession in that event is to take place according as is above mentioned, (that is, as it would have been if James Mure Campbell had had one son and one daughter,) the right to succeed must not now devolve upon, or be vested in, the eldest daughter of the Countess, the heir last in possession, to whom the succession must now take place. Holding that we are bound to give fair effect to the general clause, it appears to me that the case which has occurred is clearly one of the cases, and very probably a principal case, in contemplation of which the clause was framed. If, instead of there being one son of the original marriage, there had been only one daughter, and that daughter had had an only son and a daughter, it surely could not have been doubtful, that, if the son succeeded to his mother in the honours and estate of Loudoun, the daughter would have been her heir in Rowallan? But

No. 1. the case which occurs is substantially the same. It is only a degree lower in the destination to the heirs of the marriage. And, as the rule is given for the succession of all the heirs of the marriage in all time coming, it cannot make any difference, that the event in which it is called into operation does not occur in the succession to the first heir of the marriage, but only in the succession to the second.

Nov. 12, 1844.
The Marquis of
Hastings, &c.

It is possible, no doubt, that more difficult cases might be figured. But I see no occasion for perplexing the simple case which is before us, by suppositions which might raise more difficult questions. Unless it can be said that the clause has no effect at all, and ought to be regarded as wholly inoperative, I must think that we are bound to apply it to the plain state of facts which here exists.

I am therefore of opinion, that, looking to the entail of Rowallan alone, and assuming, for the present, that the Marquis has, at the death of his mother, succeeded to the honours and estate of Loudoun, the event has occurred in which the eldest daughter of the late Marchioness, being an heir of the marriage of Lady Jane Boyle and Colonel Campbell, is entitled by the entail to succeed to Rowallan, and to exclude the only son of the last heir,

II. In the view above taken, I have assumed it to be the simple case of an only son and an eldest daughter. But the title of Lady Sophia is denied, and other claims are made. It is evident that the claims made on the part of the Marquis's eldest son, of his second son, and of his eldest daughter, do not at all alter the point, that a contingency has occurred in which the rule of the entail must be applied: And the second question therefore is, whether the title of Lady Sophia is good, or whether it is excluded by some better title?

It appears to me, that the only title is in Lady Sophia. The question arises in the succession to the late Countess of Loudoun, the undoubted proprietor of Rowallan. The question is, who is the heir called to the succession after her by the entail of that estate? The event which occurs at her death is, that she leaves an only son and an eldest daughter; and at the time when the succession so opens, Lady Sophia is the eldest daughter. Assuming, therefore, according to the views already taken, that the only son having undoubtedly succeeded to his mother in the honours of Loudoun, and having also succeeded to the landed estate of Loudoun, according to the meaning of the entail, is not in a capacity to take up the estate of Rowallan as the heir of tailzie; I cannot see any room for doubting that Lady Sophia, as the eldest daughter, is the heir of provision now called to the succession. This is not a question as to the succession to the present Marquis, if he had ever been invested in the estate of Rowallan. It is a question in the succession to the late Marchioness, which must be solved before it can be assumed that there ever was any title in her only son to which any third party could succeed. To say, therefore, that his eldest or his second son can exclude her in the competition, is to change the state of the case altogether. It is first to decide it, by holding that a title vested in the Marquis himself; and then to raise altogether a different question, concerning the succession of his sons to him. The second son had no existence at the death of Lady Loudoun. But, although it had been otherwise, I apprehend that it would not have altered the case as to the right of the pursuer as eldest daughter. If we go back to the case which is specifically provided for, that of the only son of the marriage having an only son and an eldest daughter, it is very clear that, on the death of the son of the marriage, the eldest daughter would have been entitled to succeed. But could she have been excluded by the

contingency of that only son left by the first having a family of sons? There is no provision in the deed which could so qualify the right of the eldest daughter, in the event expressly provided for, of the son of the marriage having an only son. That contingency could scarcely have been overlooked; yet the provision is absolute, that, in the single event assumed, that of an only son of the marriage succeeding to the honours and estate of Loudoun, and leaving at his death one son and a daughter, the daughter shall have right to succeed. The case which occurs is substantially the same. The late Marchioness was not an heir-male, but she was the eldest daughter of the single heir-male of the marriage, and the heir-female of the marriage. She died, leaving an only son and an eldest daughter; and, by the entail, the right of succession is in the daughter. Under what provision of the deed, can any son of that only son exclude her? If the succession is to be "according as is above mentioned," there is no more room for such a construction in her case, than there would have been for it in that which is above mentioned, that of the eldest daughter of the only son of the marriage succeeding in preference to the only son of that son.

No. 1.

Nov. 12, 1844.

The Marquis of
Hastings, &c.

I do not think it necessary to consider more minutely the claims of the Marquis's two sons and of Lady Edith, his eldest daughter. Those claims suppose that a case has arisen, in which there is to be a separation of the estate of Rowallan from the honours and estate of Loudoun. But they are preferred, without any claim in the entail existing by which they can possibly be supported. The separation must take place as at the death of the last proprietor, the Countess of Loudoun, by the entire exclusion of the Marquis as having then succeeded to the honours and estate of Loudoun. But where is the provision of the entail, which gives his eldest or his second son, or his eldest daughter, any claim to exclude him in the succession to the Countess of Loudoun? If she had left no daughters, he would have taken the estate as her only son, whatever question might afterwards have arisen in regard to the ultimate succession to him, or under the last clause of the provision. But no such case can here arise, because there being an eldest daughter she excludes him, and, by excluding him, excludes also all questions among the members of his family, in regard to the succession to their grandmother.

The truth is, that in these pleas for the family of the Marquis, it is assumed that this is a case of forfeiture as in the person of the Marquis. They assume that the title of succession is vested in him, and that the question is, in whose favour he is to forfeit or denude; and then it is further assumed, that the Marquis is in exactly the same place with the first heir-male of the marriage, being an only son. I apprehend that neither of these assumptions is warranted. In my view of the entail, there is no case of forfeiture. If the destination takes effect in the same manner as it would have done in the case of an only son and eldest daughter of the son of the marriage, the title of the eldest daughter is clear, and prevents any right ever being vested in the only son of the deceased. But it is very material to observe, that the Marquis is not at all in the situation of the one son of the marriage. For as to that case, the entail expressly provides, that if there be only one son of the marriage, although there be daughters, the only son shall take the estate, notwithstanding his having succeeded to the honours and estate of Loudoun. But then it goes on to provide, that, in the event of that son having an only son and a daughter, the daughter shall have right to succeed; that is, in the succession to the only son of the marriage himself. The present Marquis is in

No. 1. this latter position, not in the first. But both his own plea, and that of his son and daughter, would place him precisely in the same position of the first son of the marriage, repudiating altogether the express provision of the entail for the other cases which are pointedly distinguished from it.

Nov. 12, 1844.
The Marquis of
Hastings, &c.

A separate plea against the claim of Lady Sophia is founded on the circumstance, that the Marchioness had an elder daughter, Lady Flora, who predeceased herself. I really cannot think that there is any ground for this plea. No one ever alleged that there was any ground on which the Marchioness could have been divested of the estate of Rowallan. No such claim was ever made; and I am of opinion that it could not have been made successfully. On the other hand, so long as the Marchioness lived, the event could not occur of her son succeeding to the honours of Loudoun; without which fact I conceive, that the clause of the entail could have no operation. But the mere existence of Lady Flora, who made no claim, and, as I think, could have made none, could not extinguish this part of the entail. No one makes any claim here through or in right of Lady Flora; and it is not easy to conceive what claim could be so made. The argument must therefore be, that, because she once existed as an eldest daughter, though she made no claim, the operation of the entail in regard to an only son and an eldest daughter must be entirely excluded at the only time when it could be applied. The simple case here is, that, at the death of the Marchioness, Lady Sophia was the eldest daughter, and that at that period there was only one son. I am of opinion, that as the eldest daughter then existing, Lady Sophia has the only title.

III. An important and somewhat difficult question then remains. It is maintained by the Marquis, that he has not succeeded to the landed estate of Loudoun as the heir of his mother, but has taken it by a different title, originating in a transaction between her and the late Marquis of Hastings, whereby the estate of Loudoun has been entailed in particular terms; and, therefore, that he has not succeeded to the estate of Loudoun in the sense contemplated in the entail of Rowallan.

The circumstances connected with this transaction, and the Acts of Parliament whereby it was effected, are fully narrated and explained in the papers. But I must confess, that, after giving all attention possible to those statements and explanations, I have not been able to see, how it can be held that any thing which was so done by the Countess of Loudoun could have the effect, either of rescinding the entail of Rowallan, or preventing the material event therein contemplated from taking place, or excluding the effect of it according to the provisions of that entail.

The question before the Court arises on the entail of Rowallan alone. That question is supposed to be affected by the particular situation of the estate of Loudoun. But the competition here is for the right of succession to the estate of Rowallan. That must be essentially regulated by the entail of that estate; and the only question is, whether the fact or event has occurred, which, under the provisions of the entail founded on, gives the right of succession to the eldest daughter of the late Marchioness of Hastings, as the heir of the marriage last in possession of the estate. I now assume that the effect of the clauses is, that, if any heir of the marriage shall succeed to the honours and estate of Loudoun, being an only son of the deceased proprietor of Rowallan, the eldest daughter of that proprietor shall have right to succeed to the latter estate. The only question is whether the fact has taken place?

It is certain that the Marquis of Hastings is the only son of Lady Loudoun. It is equally certain that he has succeeded, in the strictest sense, as heir of his mother to the honours of Earl of Loudoun, apart from his superior dignity as Marquis of Hastings. And it is further certain that he has taken up by a certain form of title, and now enjoys, the landed estate of Loudoun. So far the matter of fact is clear.

No. 1.

Nov. 12, 1844.
The Marquis of
Hastings, &c.

Now, the entail of Rowallan makes no mention, and takes no account, of the particular form or character of the titles by which the estate of Loudoun was held at the date of that entail, or of the extent or qualities of it; and as little of the party from whom it might come to the heir of the marriage. It says nothing at all of the mode or title whereby the heir of the marriage, succeeding by right of blood to the honours of Loudoun, might also succeed to the landed estate of Loudoun. Supposing that it assumed a case of succession both to the honours of Loudoun, and to the landed property known generally under the denomination of the estate of Loudoun, and that it required a succession to both in one form or another, to make the event contemplated, (though possibly doubt might exist even in this proposition,) there is not a word in the entail which can be so construed as to make the condition depend on any particular state of the titles to the land, at the time when the question on the contingency otherwise arises. The entail deals with facts alone, and that in very general terms. If there was any knowledge at all of the nature of the investiture in the estate of Loudoun, as it might then exist, it must have been known that it was held in fee-simple by parties who were then strangers to this contract; and, consequently, that the titles and the estate itself were liable to many changes, according to the will of the heir in possession for the time. But the reality is, that the entailer of Rowallan apparently took no account even of this, and looked only to the simple fact of the heir of the marriage becoming Earl of Loudoun, and getting also the estate of Loudoun, as it might stand at the time when the emergency should occur of the succession to the estate of Rowallan opening in other respects to the party so situated.

The proposition, which is insisted on with so much force and ability on the part of the Marquis, seems to amount to this, that, though he has succeeded to the honours of Loudoun, and though he has also obtained right to the landed estate of Loudoun, yet, as he has not succeeded to that estate simply or directly as the heir of the investiture of the Countess, he cannot be held to have succeeded to the honours and estate in the sense of the entail of Rowallan. I apprehend that this is a question on the fair meaning of the words employed, when applied to the facts which have occurred. It is very easy to put strong cases; and the supposition constantly pressed is, that the estate had been acquired by the Marquis simply by purchase for a price. But the supposition of strong cases, rendering the question much more difficult than that really in discussion, seldom affords much aid in coming to a sound judgment on the matter actually before the Court. I apprehend that there is no such case here as a purchase; but I shall advert presently to the state of the fact as I understand it. In the mean time, the principle of the Marquis's argument, if fairly carried out, can easily be shown to lead to results which it would be impossible to maintain.

The fourth Earl of Loudoun held the lands of Loudoun in fee-simple. Suppose, then, that he had made a strict entail. I presume that that fact simply would not have prevented the operation of the entail of Rowallan, when the heir of the marriage succeeded to the honours, and separately as heir of tailzie to the estate

No. 1. of Loudoun; and yet the succession would have been of an entirely altered character, and of diminished value. But suppose that he had so regulated the succession, as to exclude female-heirs altogether, and provided that, in the event of a single heir-female existing and becoming Countess of Loudoun, the estate should be held in trust till it should be seen whether that heir-female had an heir-male or not, and that when such heir-male existed the estate should devolve on him. On that supposition, Flora, the only daughter of James Mure Campbell, would have become Countess of Loudoun on his death: She would have had right to the estate of Rowallan; but she would have had no right to the estate of Loudoun, which would have devolved on her son the Marquis as soon as he existed. Upon the death of the late Countess, the competition for the estate of Rowallan would have arisen, as it does now, the Marquis having succeeded to the honours of Loudoun, and having previously succeeded to the estate of Loudoun. He might then have said, that he had not succeeded to the estate of Loudoun by the title which existed when the entail of Rowallan was made, and he had not succeeded to it at all as heir of his mother, but by the deed of the fourth Earl of Loudoun. Would it not have been enough, that he had succeeded both to the honours and to the estate, by whatever title, and that the fact of his succeeding to the estate as heir of tailzie to his grandfather, could not in any manner affect the right construction of the entail of Rowallan?

Nov. 12, 1844.
The Marquis of
Hastings, &c.

The case now supposed comes very near to the point of controversy. But to bring it still nearer. The Countess of Loudoun held the estate of Loudoun in fee-simple. On the other hand, she was bound by all the clauses of the entail of Rowallan, and had no power to defeat them by any direct act, as long at least as the general substance of the events contemplated might take place. If she had simply executed an entail of the estate of Loudoun, I suppose it will scarcely be maintained, that this would have excluded the destination of the entail of Rowallan, when her son succeeded as heir of tailzie. Neither, I presume, would it have altered the case, if he had been made *nominatim institute* in that entail, so as to enable him to take up the estate, on his mother's death, without service to her. He would still have succeeded to it. But suppose that the Countess had gone still further, and had not only made an entail calling her son as institute, but had actually put forward the succession, by conveying the estate to her son in her own lifetime, but still securing the destination beyond him. In that case, he would have had the estate, not by succession as heir to his mother, but by her voluntary deed; and he would have had it fully in possession before her death. Upon that event, he would have succeeded to the honours of Loudoun. But could either the time when he got the landed estate, or the form of title by which it came to him, of neither of which the entail of Rowallan takes any notice, have prevented the plain meaning of that entail from receiving effect, as in the case of an heir of the marriage having succeeded to the honours and also to the estate of Loudoun? I think that no such plea would have been admissible.

Neither, I should think, could it have made any difference, though the Countess, in exercising her powers as a fee-simple proprietor, had imposed burdens on the heir who was to succeed to her, or that those burdens were imposed for the payment of debts of her husband. I do not see how, in fair construction, such things could alter the entail of Rowallan. Extreme cases may be figured, calculated to raise doubts as to what might be the fair construction. I only think, in general, that the entail of Rowallan had not in contemplation any changes which

might be made on the titles of Loudoun, either by the family who then held that estate, or by any heir of the marriage who might come into possession of it, before the contingency arose which called the particular clause of that entail into operation; and that the substance of the case is to be found in the simple fact, that an heir of the marriage succeeds to the honours, and also takes up the landed estate such as it is, by whatever title.

The case which actually occurs, however it may be involved in apparent perplexity by details of the special circumstances, appears to be in itself simple enough. The Marquis of Hastings was in possession of an estate in England, settled in a particular manner under the law of England in favour of a certain series of heirs, or heirs or tenants in tail. We know very well that the effect of such deeds is not the same with the effect of deeds of entail in Scotland. But, in my view of the question, this difference is of no real importance. The late Marquis, being encumbered with very serious debts, made an arrangement with his wife, the late Countess of Loudoun, for the liquidation of those debts, which he could not accomplish without her aid. She could do what she pleased with the estate of Loudoun. But it is very clear that, in any thing that was done, so far from impairing any right of succession which her son, as the heir-male of her marriage, might have had, she effectually secured that right, even beyond her own power. And it appears to me that, in any question on the Rowallan entail, it can be nothing at all to the purpose what else she did with the estate of Loudoun, as long as, whether she left that estate to be taken up by her son under the old titles or not, she settled and effectually secured it to him.

The English estate being held by certain titles of entail, an Act of Parliament was obtained for enabling the Marquis to dispose of it for the payment of his debts, upon an arrangement that the estate of Loudoun should be conveyed to him; whom failing by death, to his eldest son the Marquis, and the heirs-male of his body; whom failing, to any other heirs-male of the marriage; thus being absolutely settled and secured to the heirs-male of the existing marriage in the first place, and then, indeed, to any heirs-male of any subsequent marriage of the Marquis, but after that to the heirs of the Countess herself succeeding to her in the titles and dignity of Loudoun; whom failing, to her own heirs and assignees. This arrangement was carried through by the force of the statute, and by deeds executed at the sight of this Court, for establishing the effect of it.

The effect of this arrangement, and of the deeds of conveyance or settlement of the estate of Loudoun by the Countess, in so far as any question on the entail of Rowallan is concerned, appears to me to be clearly a matter to be determined by the law of Scotland. What the effect of them might be in any other question, or particularly with reference to the titles of the English estates, seems to me to be altogether foreign to the present discussion. The question is on the entail of Rowallan. And as to that question, the simple fact is, that the estate of Loudoun is disposed by the Countess to the late Marquis, whom failing, to the present Marquis, her eldest son, and the heirs-male of his body, and with the further destination already mentioned. With that further destination the Marquis has no concern, except only that, there having been no heirs-male of any other marriage of the late Marquis, who predeceased the Countess, the estate stands finally destined to the heirs succeeding the Countess herself in the honours of Loudoun. And by no other title, the present Marquis, on the death

No. 1.

Nov. 12, 1844.

The Marquis of Hastings, &c.

No. 1. of his father, succeeded to the estate of Loudoun as the heir of entail called upon the failure of the Marquis as the institute in that entail. He succeeds, then, to the estate, and he succeeds decidedly as an heir of tailzie and provision; he succeeds in virtue of the disposition of the Countess of Loudoun. It may be that he succeeds immediately as heir to his father. It does not appear to me that this would affect the question, supposing that the late Marquis had in any other manner become proprietor of the estate of Loudoun. The entail of Rowallan says nothing of the person to whom the heir of the marriage may succeed. He must necessarily succeed to the honours as the heir of the person last in possession of these honours. But, assuming succession to the land to be also necessary, there is nothing in the entail which says that succession to that must necessarily be by service to the last Earl or Countess of Loudoun, whatever changes the titles might have undergone. But, as the case stands, the Marquis succeeds as heir of tailzie under the disposition of the Countess herself. And it is certainly a hard proposition to be made out, that this is not succession according to the true sense and meaning of the entail of Rowallan. Whatever may have led to the execution of that deed, the plain and simple truth is, that the Marquis has succeeded to the honours of Loudoun as the heir of his mother, and he has succeeded to the estate of Loudoun as heir of tailzie and provision under an entail executed by her.

Nov. 12, 1844.
The Marquis of Hastings, &c.

It cannot affect my opinion on this case to state that, according to the technical law of England, the heir of entail in the Huntingdon estate would be said to have a separate estate, as a remainder-man, from that vested in the immediate heir in the fee. That is but a technical peculiarity, whereby it may possibly be said that the heir or tenant in tail does not in strict language, in the law of England, succeed to the prior heir or tenant in tail; though I know not whether it would be so said or not. But the present question is on a Scotch deed, the entail of Rowallan. And, in that question, I can see no room for doubt, in so far as it could depend on that, that the heir taking up the estate, even under the law of England, must be held to succeed to it according to the plain meaning of the Scotch deed. Even on this point, however, the question relates to the settlement of a Scotch estate, which would have been totally invalid if executed by the forms of the law of England; and, standing as it does, it simply carries the estate to the present Marquis as an heir of tailzie and provision, under all the securities which the law of Scotland affords.

I am aware that it is thought that the circumstance of the estate of Loudoun having been so conveyed, under an arrangement which enabled the late Marquis to sell the English estates, converts the present Marquis's right from being a right by succession into a right by onerous transaction. But I am not at all convinced by this reasoning that he does not succeed to it in the sense of the Rowallan entail. The Countess had no power to alter or do away that entail in any point. She did not attempt to do so; and it would be strange, if the fact of her securing the estate of Loudoun to her son and his heirs-male should have that effect. The considerations on which she executed the deed appear to me to be foreign to the question on the Rowallan entail. If the arrangement was thought to be disadvantageous to the present Marquis in any other view, that might be an objection to the justice or propriety of it, as settled by the Act of Parliament and the deeds executed. But that it should have the effect of enabling him to extinguish an important clause in an entail of an entirely different estate, to which he had no

right if he succeeded to the honours and estate of Loudoun, is a proposition which I have thought from the first to be attended with extreme difficulty, and which, after mature consideration, I find it impossible to admit.

No. 1.
Nov. 12, 1844.
The Marquis of
Hastings, &c.

On the whole, I am of opinion that the claim of Lady Sophia Hastings ought to be sustained.

LORD MEDWYN.—I concur in the opinion of Lord Moncreiff.

LORD IVORY.—I am of opinion that the claim of Lady Sophia Hastings should be sustained. I arrive at this conclusion, substantially upon the same grounds that have already been so fully explained under the first two heads of Lord Moncreiff's opinion.

The case, as it appears to me, involves no question of forfeiture. It is one purely of destination. And as such, it turns altogether upon the reading of that *after* clause in the deed of entail, whereby the primary destination, as it occurs in the earlier portion of the deed, is subjected to certain most important conditions and modifications.

Without resuming the argument in detail, the true reading of the clause is, in my humble opinion, simply this:—

1. If the party succeeding to the honours and estate of Loudoun be an "only son," (of Lady Jane Boyle's marriage with Mr Campbell,) the succession to Rowallan is to be propelled to the "second son of this only son;" or, if such "only son" have no second son, then "the eldest daughter of this only son is to succeed to the said estate."

2. If the party succeeding to the honours and estate of Loudoun be one of "two sons," (of this present marriage,) it is the second of these sons who shall succeed to Rowallan.

3. If the party succeeding to the honours and estate of Loudoun be neither an "only son," nor one of "two sons" of the marriage, but yet fall, otherwise and generally, within the character and description of "any of the heirs of this marriage," (thereby including not merely the whole class of heirs-male, but daughters of the marriage, and other heirs-female, whether sons or daughters,) then the succession to the estate of Rowallan shall still take place "according as is above mentioned in all time coming." That is to say, the "second son" of the party so succeeding to the honours and "estate of Loudoun, where that party has two sons, or if such party have no second son, then the eldest daughter," shall (under the analogy of case 1, *supra*) succeed to Rowallan, unless such party happen himself to be one of "two sons," when (under the analogy of case 2) the second of these two sons, the preference to the family of his brother.

I do not see how this conclusion can well be avoided, unless it be denied that, under the words "any of the heirs of this marriage," heirs-female as well as heirs-male, are to be held included. But seeing that the primary destination of the entail, throughout all its subdivisions, calls "heirs-female" in so many words, and not less distinctly and anxiously than it calls "heirs-male," it seems to me that such a reading would be altogether inadmissible.

Holding the above construction of the deed to be the true one, there is no longer any difficulty in the case.

It is clear, that if the present question had occurred but one stage further back—that is to say, if James Mure (fifth Lord Loudoun) had been the father of the late Marquis of Hastings, and of his sister Lady Sophia—the right of Lady Sophia would have been incontestable. For, on this supposition, case 1 would

No. 1. have applied *in terminis*, James Mure being an "only son" of the marriage, and having no second son, (the Marquis of Hastings being an only son,) his eldest daughter (or, in other words, Lady Sophia) must have succeeded.

Nov. 12, 1844.
The Marquis of
Hastings, &c.

But the *species facti*, as it actually arises in this question, leads to the same result; for under case 3, Flora Marchioness of Hastings, mother of the late Marquis and of Lady Sophia, was (not less than her father, James Mure) "an heir of this marriage" who succeeded to the honours and estate of Loudoun. If she had had "two sons," the second would have succeeded to her in Rowallan, and not the Marquis, as eldest. But she had not "two sons," and the question arising between her "only son" and her "eldest daughter," it is the latter who is entitled to succeed.

I do not enter into the question raised under the third head of Lord Moncreiff's opinion. For as the present case is ruled by the succession to the honours and estate of Loudoun—not of the late Marquis, but of his mother—the change operated by that event upon the primary destination of the Rowallan entail cannot be affected, whatever may have been the course followed by that lady, in reference to the disposal of her rights, after she so succeeded.

The cause was finally advised this day.

LORD JUSTICE-GENERAL.—Although there are many circumstances arising from my relationship to the different competitors now before the Court, under the entail of the estate of Rowallan, to which my great-grandfather was a consenting party, as well as from my having acted as a commissioner for the Marquis and Marchioness of Hastings in regard to the second Act of Parliament that has been founded on by the parties, which would have made it desirable for me to avoid giving judgment in the case, yet, as no legal declinature does apply to me, I am bound to deliver the opinion I have formed, on a deliberate consideration of the arguments, which have been so ably and elaborately submitted by the parties.

The whole cause having been remitted by your Lordships for the consideration of the Judges of the Second Division and Lords Ordinary, we have now received their opinions, which very materially differ as to the competitor entitled to be preferred to the succession of the estate of Rowallan, which opened on the death of the Countess of Loudoun, widow of the late Marquis of Hastings, who, as the heiress of her father, James Earl of Loudoun, had possessed the estate of Rowallan from 1786 till her death in 1840. Attending to the opinions of the consulted Judges, in reference to the pleas maintained by the several parties now before us, (the present Marquis of Hastings having recently been sisted by his mother as his sole guardian, in consequence of the lamented death of his father, who was formerly also a party,) I find that the conclusions at which I have arrived, are so clearly, so ably, and so satisfactorily expounded in one of those opinions, that I might, and, if I had been a consulted instead of a consulting Judge, I should, feel myself fully justified in saying no more than that I concur in the judgment delivered by Lord Moncreiff. Were I now, indeed, to enter at large on all the various points embraced in his Lordship's opinion, I am sensible that I should weaken rather than strengthen what he has there so lucidly stated. I shall confine myself, therefore, to an exposition of the leading principles, which, arising from a consideration of the instrument on which we are called to determine, and

the rules of law applicable to its construction, appear to me ought to regulate the decision of the question truly at issue between the present competitors—namely, which of them, under the entail of the estate of Rowallan of 1720, in the circumstances that emerged on the death of the last heiress of entail vested in that estate, is entitled to the succession of it.

No. 1.

Nov. 12, 1844.
The Marquis of
Hastings, &c.

In the first place, then, I hold that we must keep carefully in view, that in a question among heirs as to which is entitled to succeed according to the destination and provisions of an entail, there is no room whatever for any application of the rules of strict construction that attach to questions as to its fetters. On the contrary, the maxim announced by Lord Kilkerran, in his report of the case of *Erskine*, of 1st July 1727, is that which is alone to be regarded, namely, that “the will and intendment of parties is the governing rule in all questions of this kind.” That dictum was relied on, with the fullest confidence, in the celebrated competition for the estate and dukedom of Roxburghe, and, as I shall afterwards have occasion to notice more particularly, received the fullest and most unqualified assent both from this Court and the House of Lords.

2dly, We must also particularly observe, that there is no question of forfeiture arising in the present competition, in reference to which an heir, attempted to be forfeited, is entitled to insist on a more rigid construction than usual of the terms of a deed. We have in fact only to consider, under the entail of Rowallan, the effect of what is truly a cause of devolution or limitation, embodied in the destination of the heirs called to the succession.

3dly, Keeping in view the destination of heirs contained in the entail of the estate of Rowallan, which I need not recapitulate at present, that that entail was ~~enacted~~ ^{granted} on the contract-matrimonial entered into between Lady Jane Boyle, the eldest daughter of Jane Mure, Countess of Glasgow, proprietrix of the estate of Rowallan, to which she had succeeded as heiress by the death of her father, with consent of her husband the Earl of Glasgow, and the Honourable Colonel James Campbell, brother of Hugh Earl of Loudoun; and that the attention of the maker of that entail seems to have been specially directed to the contingency of an heir of the intended marriage, sooner or later, succeeding to the honours and estate of Loudoun, it manifestly appears, from the whole structure of the deed, that the preservation of the ancient family name of Mure, and its estate of Rowallan, as a separate appanage, was the special wish and favourite object of the entailer; and that, as far as was possible, in consistency with the order of succession appointed by her deed in favour of the heirs of her daughter's marriage, her own name and estate should not be absorbed and sunk in the dignity and estate of Loudoun. As Lord Glasgow, the husband of the heiress of Rowallan, had in 1720, by a former marriage, three sons, and grandsons by the eldest then alive, succession to the earldom of Glasgow was a most remote prospect; and as it was by an heir of Rowallan succeeding to the honours of Loudoun, that the great risk was incurred of the name and family of Mure being obliterated, the entail then executed contains a most anxious provision for the continued use of the name and arms of Mure of Rowallan, under the penalty, on failure to implement, of the actual forfeiture of the contravening heir, whether male or female, the latter being taken bound to marry a gentleman of the name of Mure, or who shall assume it, while their descendants are also required to retain it in like manner in time coming.

I cannot, therefore, help thinking, that this main and leading purpose of the

No. 1. maker of the entail of Rowallan, and the true nature of the destination of heirs it contains, have not been sufficiently attended to in some of the views that have
Nov. 12, 1844. been taken as to the proper construction of the clause of that entail, under which
The Marquis of the present competition has arisen; for, if it was truly the *enixa voluntas* of the
Hastings, &c. entailer, that notwithstanding her predilection in favour of the heirs of the marriage which her daughter was about to enter into with the brother of the Earl of Loudoun, her own family name and estate should be preserved and kept separate from the honours and estate of Loudoun, it was obviously most natural for her entail not only to guard against such union taking place in the persons of the early descendant heirs of that marriage, but as to those of them also to whom the succession of Rowallan might come at a more remote period—and hence have plainly arisen the two branches of the devolving or excluding clause in question, but each of which is unquestionably entitled to equal efficacy. Accordingly, we find that that clause runs thus:—“ And, in like manner, it is hereby expressly provided and declared, and appointed to be contained in the infeftments to follow hereupon, that in case it should fall out that there be only one son of this present marriage procreate betwixt the said Master James Campbell and Lady Jean Boyle, who shall succeed to the honours and estate of Loudoun, though there be daughters, then and in that case it's hereby declared, that the second son of this only son of this marriage shall succeed to the said estate of Rowallan; and failzieing a second son, then the eldest daughter of this only son is to succeed to the said estate, and who shall be obliged to marrie and carrie the arms of Rowallan, in the terms and under the irritancies of the tailzie above mentioned; but if there be two sons of this present marriage, then the second son is to succeed to the estate of Rowallan, in case the eldest son shall succeed to the estate of Loudoun; and that the succession to the said estate of Rowallan, in case any of the heirs of this marriage shall succeed to the estate of Loudoun, shall take place according as is above mentioned, in all time coming; and so soon as the son of this marriage, or others aforesaid, shall accept of the honours and estate of Loudoun, then the rents of the said estate of Rowallan are to be managed and improven for the use and behoof of the next heir of tailzie, who shall succeed to the said estate of Rowallan in manner aforesaid.”

It may be assumed, then, as fixed by the established principles applicable to cases of this nature, that in order to arrive at the proper construction of the two branches of the above recited clause, every part of it must have its full effect; nay, every word of it, if capable of affording a clear and intelligible meaning, must have its due weight, in order to ascertain the true purpose of the entailer. That purpose, in the event of there being only one son procreated of her daughter's marriage, is unequivocally pointed out by the entailer; not content, however, with that, but looking forward to the succession of the two estates of Loudoun and Rowallan becoming united at any future period, the deed expressly provides, in brief but direct terms, that “ the succession of the said estate of Rowallan, in case any of the heirs of this marriage shall succeed to the estate of Loudoun, shall take place according as is above mentioned, in all time coming,”—referring manifestly to what had been more amply declared and provided with regard to an only son being born of the marriage, and succeeding to Loudoun.

In reference to the true import of this clause in the Rowallan entail, which thus makes positive provision for the event of any heir of Lady Jane Boyle's marriage succeeding to the estate of Loudoun, it is further essentially necessary to attend

to the fact, that no preference whatever is indicated by the entail, of males to females, throughout the order of succession; for although that deed, beginning with the heirs of the marriage about to be entered into between Lady Jane Boyle and Colonel Campbell, calls, according to the ordinary rules of succession, heirs-male in their order, yet throughout the instrument it will be found, where the opportunity occurs, that females are regularly called, their succession, for the preservation of the entail, being always guarded by the provision, that the eldest shall succeed without division. So far, indeed, from there being any indication of a wish to debar females from succeeding to the estate, the very contrary appears manifest from many clauses in the entail; and this can in no degree be deemed surprising, when it is recollected that this ancient inheritance had descended to Lady Glasgow herself, as the heiress of her father, the last proprietor, and that she herself calls to the succession, by this very deed, most extensive classes of heirs-female, in preference even to her own two sons by her former husband, Mr Fairlie, whose place in the destination occurs only towards the close of the instrument.

No. 1.
Nov. 12, 1844.
The Marquis of
Hastings, &c.

Nothing can, therefore, be clearer, than that no argument in favour of any of the competitors for this succession can justly be rested, on any supposed predilection, in the maker of the entail in favour of male succession. Every heir-female, whether an immediate or a more remote descendant of Lady Jane Boyle, is therefore manifestly as much entitled to the benefit of every clause and provision in the entail, as any heir-male that is called to the succession in any part of the destination. Every descendant of her ladyship's contemplated marriage, whether male or female, is undeniably one of the heirs of the marriage that afterwards took place; and, consequently, when in any part of the deed, mention is made of "any of the heirs of this marriage" being entitled to any right or privilege under it, these words must necessarily apply equally to female as to male heirs.

The consideration of what I have now noticed, bears most materially on the decision of any question that can arise as to the true construction of the Rowallan entail; for, though that deed may in some respects be expressed with brevity, and does not provide at length for all possible contingencies, yet there is no such obscurity in it as to prevent the true object of the entailer from being understood. By the second branch of the clause in the destination, which contemplates the event of any of the heirs of the marriage of the entailer's daughter succeeding to the estate of Loudoun, it is explicitly provided, that the succession to "Rowallan shall take place according as is above mentioned, in all time coming." We are necessarily, therefore, called upon to look back to what is above mentioned immediately before these words, with regard to the succession to that estate, which undeniably is, that the estate of Rowallan shall devolve and belong to the heir designated to take it, in conformity with the terms of the first branch of the clause of this part of the destination. The entailer has unequivocally made the same rule of succession, which she had declared should regulate the rights of the immediate descendants of an only son of her daughter's marriage, applicable also to the case of any other heir of that marriage in all time coming; and though she has expressed her will in a few words, their meaning appears to be sufficiently plain and intelligible, and consequently must, in my opinion, have full effect given to them. The intention of the maker of the deed is what is alone to be looked to, and to discover what that truly is, no rules of strict construction can be resorted to in considering the true import of the whole of the clause of destination.

No. 1.
 Nov. 12, 1844.
 The Marquis of
 Hastings, &c.

It can never, then, in my opinion, be a sound construction of this clause, that gives effect only to that part of it which has reference to the succession of an heir-male of the marriage of Lady Jane Boyle, while it is plainly made equally applicable to any heir of that marriage, whether male or female, succeeding, as is there contemplated. When the terms of the second branch of the clause in question are duly attended to, where is there any foundation for assuming that it does not provide for any devolution, in the event of the two estates of Rowallan and Loudoun uniting in an heir-female, as the destination of Loudoun clearly permitted as to the descent of that estate? This can only be successfully maintained by holding, contrary to the plainest rules of law, that any heir of the marriage of Lady Jane Boyle means only an heir-male. Had an only daughter been born to Lady Jane Boyle and her husband, Colonel Sir James Campbell, there can surely be no doubt that she would have been the heir of the marriage, and directly embraced by the words of the clause in question; and it is equally manifest that, in the event that took place by the death of her father, James Earl of Loudoun, the only issue of that marriage, the late Marchioness of Hastings, his only child, succeeded to him both as Countess of Loudoun and in that estate, and also as his heiress in the estate of Rowallan, in respect of her being the true heir of the marriage between her grandmother, Lady Jane Boyle, and her grandfather, Sir James Campbell, to whom that estate was provided by the entail. Her ladyship had come into the precise predicament embraced by the second branch of the clause now under consideration. Though not taking under the first branch of that clause of the destination, which applies specially to the case of an only son of Lady Jane Boyle's marriage succeeding to the honours and estate of Loudoun, the late Marchioness of Hastings, as heir of that marriage, and as such the heiress of entail of Rowallan, did succeed also, on the death of her father, both to the honours and estate of Loudoun; and her succession in the estate of Rowallan, came therefore directly to be regulated by the express provision contained in the second branch of the above clause, in the entail of that estate. It seems impossible, therefore, to deny effect to the plain meaning of the words of the entail, and there is nothing in the rest of the deed that can show that she ever attached a different meaning to them. The plain and simple view of the clause in question, therefore, is, that its primary purpose—the prevention of the name and estate of the entail from being extinguished by the union of her daughter with the brother of the Earl of Loudoun—was, by the two branches of that clause, made applicable to every heir of that marriage, whether male or female, that should come at any time to the succession of the honours and estate of Loudoun; and, when this consideration is attended to, as it unquestionably ought to be, all difficulty or obscurity is removed from the expressions used in the two members of the clause, which in fact directly cohere, and are in perfect consistency with each other for securing the object in view.

It must undoubtedly be admitted, that it is only by giving effect, in the way above stated, to the second branch of this clause in the Rowallan entail, that the claim of Lady Sophia Hastings in this competition can be sustained. It rests on the declaration attached by the maker of that deed to the destination of heirs called under it, that, if it should fall out that an only son of Lady Jane Boyle's marriage with Colonel Campbell should succeed to the honours and estate of Loudoun, the estate of Rowallan, though he should have daughters, shall, on his death, be taken up, not by his eldest son, but by his second son if he has one, and if he should have

son, by his eldest daughter; and that when any other heir of that marriage shall succeed to the estate of Loudoun, the succession to Rowallan shall take place, as is above mentioned, in all time coming. The two parts of the clause must be read as a whole, and as in fact constituting one declaration of will, for the preservation of the family name and estate of Rowallan, and placing a female heir of the contemplated marriage exactly in the same position in regard to that estate, as an only son of the marriage, when succeeding to the honours and estate of Loudoun. The late Marchioness of Hastings, the direct heir of that marriage, on the death of her father, did unquestionably become heiress of Rowallan, and succeeded also to the honours and estate of Loudoun. The declared will of the maker of the entail of Rowallan became then directly applicable to her ladyship; and it is to the state of her family at her death that we must pay attention, in order to ascertain to which of them the estate of Rowallan, under the destination of the entail, did legally descend, there being no provision in that deed for any forfeiture during her ladyship's life, or declarator in favour of any of her children. The direction in the entail for the management and improvement of the rents of the estate, for the benefit of the heir of the destination entitled to succeed to Rowallan, though not acted upon by the trustees nominated, or their representatives, must still be viewed as affording evidence of the purpose of the entailer to secure the succession in the way provided by her deed. As Lady Hastings, at her death, left an only son and three daughters, of whom Lady Sophia Hastings had become the eldest, she, (in conformity with the principle established in the case of Roxburghe,) as such, claims under the direct terms of the provision of the entail, not as eldest sister of her now deceased only brother, but as the eldest daughter of her mother, the heir of the marriage of Lady Jane Boyle, on whom the estate of Rowallan had descended as appointed, or, as the entail bears, "according as above mentioned, in all time coming." That part of the entail which negatives the right of the succession of the sisters of an only son of Lady Jane Boyle's marriage, is in no respect, therefore, applicable to Lady Sophia Hastings, as she claims solely as the eldest daughter of her mother, an heir-female of the marriage, who had succeeded to both the honours and estate of Loudoun, and whose only son is clearly excluded from the succession by the terms of the entail.

In the present competition, as to which of the heirs of the marriage between Lady Jane Boyle and Sir James Campbell shall now inherit the estate of Rowallan, a point which can only be regulated by the terms of the entail of that estate itself, it is manifest, that while the late Marchioness of Hastings, the only child of James Earl of Loudoun, the sole issue of that marriage, became vested, on his death, both in the estate of Rowallan and in the honours and estate of Loudoun; and though she was not compelled, by any provision of forfeiture in the entail, to divest of Rowallan in her lifetime—she could execute no deed, nor enter into any contract, that could in any way control or affect the subsequent destination of the heirs of Rowallan, as settled by the maker of that entail. The rights of her descendants were unalterably fixed by the terms of that deed, and nothing which the Countess of Loudoun might do afterwards, in disposing of the estate of Loudoun, either by a sale or an exchange of it, by executing an entail, or by propelling the succession of it in favour of her son, could affect the question as to which of her children was legally entitled to succeed to the estate of Rowallan at her death, in terms of its entail. She could have no more power in controlling the terms of the destination in the entail of Rowallan, than any other heir of tailzie; and there is

No. 1.

Nov. 12, 1844.
The Marquis of
Hastings, &c.

No. 1. an express prohibition in that deed against any alteration of the succession. What I have now stated, therefore, appears to me to be a sufficient answer to all that has been urged, as to the effect of the statutory proceedings which have taken place in regard to the exchange of the estate of Loudoun for that of the Earl of Huntingdon, which had descended to the late Marquis of Hastings, even if it had all the consequences that have been ascribed to it ; for if the fact truly is, that, in consequence of the state of the family of the Countess of Loudoun, late Marchioness of Hastings, the estate of Rowallan is by the entail declared to descend on her eldest daughter, to the exclusion of her only son, full effect must be given to that provision, even although that son had, by his mother's act, been afterwards deprived of the whole estate of Loudoun, and only succeeded at her death to the honours of that family.

Nov. 12, 1844.
The Marquis of
Hastings, &c.

Both the estate of Rowallan and the honours and estate of Loudoun, had undeniably become vested in the person of the late Marchioness of Hastings, whereby the event contemplated by the entailer of Rowallan was fully purified. The measures, therefore, that were adopted during her ladyship's lifetime for the exchange of the estate of Loudoun for that of Huntingdon, and its settlement by statute on her husband and only son, which, however, secured both the estate and honours of Loudoun to be enjoyed by both her son and his descendants, cannot in any degree operate to defeat the true destination of heirs in the Rowallan entail, the effect of which had finally been fixed by the late Marchioness of Hastings' succession as the only child of her father, and her leaving her family at her death in the situation she did.

But the arrangement adopted in the two Acts of Parliament detailed in the cases, while it enabled the English estate of Lord Moira, which had descended to him from his uncle the Earl of Huntingdon, to be sold, after being exchanged for the estate of Loudoun, was so carried into effect as to secure, by the act of the legislature after his death, the estate of Loudoun, held by the Countess in fee-simple, to her eldest son, and any other sons she might have by her marriage with Lord Moira, and (subject no doubt to the contingency of his marrying again after her ladyship's death, and having other sons who might succeed to it) the estate was to be secured to the other heirs of the honours of Loudoun. This was accomplished by the obligation granted by Lord Moira before the statute was passed, and was subsequently fully implemented. This arrangement came, therefore, in reality, to be little more than a contract between spouses for the descent of an estate to their descendants in a certain way, after the liferent being enjoyed by the husband, and on which descendants the entail would devolve as an inheritance, and by no means as a purchase.

It may further be observed, that the entail of Rowallan, in providing for the succession in the event of an heir succeeding to the possession of the honours and estate of Loudoun, and thereby extinguishing the family and estate of Mure, does not contemplate any particular form of titles, or mode by which the estate of Loudoun is to be taken up. It looks merely to the fact of a succession to the honours and estates of Loudoun, and not at all to the extent of that estate, or in what manner it might be diminished or affected by the debts or obligations of prior possessors. The debts of John Earl of Loudoun, for which the estate had been put under trust, did in reality lead to a sale of a considerable part of it ; but the extent of the reversion that remained to the successor in the earldom, can have no effect upon the true construction of the entail of Rowallan. The fact cannot be

overlooked, that notwithstanding the family arrangement that was entered into under the sanction of the legislature, the estate of Loudoun as well as the dignity came into the possession of the late Marquis of Hastings; and when the estate of Rowallan opened at his mother's death, the question is, which of her children was entitled, under the entail, to its succession? It has already, however, been shown, from the terms of that deed, that it is to the position in which the late Marchioness of Hastings, the undoubted heir of the marriage embraced in that entail, and also of the honours and whole estate of Loudoun, and the family that survived her, stood, that attention is alone due, in the present competition, for the succession to the estate of Rowallan; and when that is attentively considered, the claim of Lady Sophia Hastings seems, according to the will of the entailer, to be altogether irresistible.

No. 1.

Nov. 12, 1844.
The Marquis of
Hastings, &c.

There is no case to be found, in the decisions of this Court, in which the principles applicable to the legal construction of the Rowallan entail, and the necessity of giving effect to every part of the will of the maker of a settlement by an entail, as far as it can be discovered from the language he has used, have been more clearly evinced than in that of Roxburghe, on which the succession to both the honours and estate of that noble family came to depend entirely on the true import of a single clause, which was inserted in the entail executed by Robert Earl of Roxburghe in 1648, apart from the general destination of heirs, and posterior to many of the conditions and restrictions, as well as the irritant and resolutive clauses of the deed. That remarkable clause was conceived in the following terms:—"Quilks all failing, be decease, or the not observing the provisions, restrictions, and conditions above written, the right of the said estate sall pertain and belong to the eldest daughter of the said Harry Lord Kerr, without division, and y^r heirs male, she always marrying, or being married to, ane gentleman of honourable and lawful descent, who sall perform the conditions above and under written; quhilk all failing, and y^r said heirs male, to our nearest and lawful heirs whomever."

Although, confessedly, the ascertainment of the true meaning and import of this clause was attended with very considerable difficulty when it came to be applied in a question among competing heirs, yet no part, nor even one word of it, was held *pro non scripto*, or denied effect; but, on the contrary, every syllable of it was deliberately weighed and considered, in order to arrive at the true will and intendment of the maker of that entail. Accordingly, that clause, condensed as it undoubtedly is, and obscure as, at first sight, it may appear, so far from being laid aside as inoperative, was held, after the most thorough investigation, both here and by Lord Eldon in the House of Lords, to have called to the succession each of the four daughters of Lord Kerr, in their order, as they severally became eldest by their survivance—that the words "their heirs-male," following those of "eldest daughter, she always marrying," &c., meant heirs-male of their bodies, and not heirs-male general; and that, while all those called under this clause were to be held as heirs of entail, Sir James Innes, the son of Lady Margaret Kerr, the third daughter of Lord Kerr, was entitled to the succession of both the extensive landed estate and dignity of Roxburghe, under the above destination of the estate only, as contained in the deed, which the Earl of Roxburghe had been empowered to execute by the sovereign.

The principles that ruled the decision in the case of Roxburghe, and the circumstances under which it was pronounced, appear to me therefore, as they do

No. 1. to Lord Moncreiff, to bear most powerfully upon the present competition for the estate of Rowallan. For that decision undoubtedly established, that though the clause under which this competition has arisen, occurs in the deed of entail apart from the more general destination and order of succession, it is, nevertheless, entitled to full effect in all its branches, according to their fair meaning and import, as much as any other provision whatever contained in the deed. It is also an important consideration, in reference to the pleas maintained under the Exchange Act, that, as already glanced at, though the clause in the Roxburghe entail bore only that the right of the said estate shall pertain and belong to those called under it, yet that that word occurred in a Scottish grant, was held sufficient, both here and in the Committee of Privileges and House of Lords, to carry the dignity as well as the territorial estate, to the heirs called under it. Though in one part of the above devolving clause in the Rowallan entail, therefore, the words used are —“who shall happen to succeed to the honours and estate of Loudoun,” while, in the two other immediately following members of the clause, the words “estate of Loudoun” are alone used in regard to the succession, it may justly be considered, as is also noticed by Lord Moncreiff, that the latter is used only as an abridged expression, and not as implying that the landed estate was specially contemplated as separate from the honours, as the succession to the dignity of Loudoun was certainly the most effectual means of absorbing and extinguishing the name and estate of the entailer, which she was so evidently anxious to perpetuate.

But, besides the case of Roxburghe, the importance of the recognised principles of which, as an authority, is so obvious, there are others to be found, in the reports of our decisions, establishing what may truly be considered as the strongest precedents for the determination of the present competition.

In the destination of heirs in the entail of the estate of Balnagowan,¹ Charles Gilmour, and the heirs-male of his body, were called to the succession, but under the following *proviso* or devolving clause:—“It is hereby expressly provided and declared, that whensoever the said Charles Gilmour, or his heirs above mentioned, succeeding to and possessing my estate, shall succeed to the estate now belonging to Sir Alexander Gilmour, then, and from thenceforth, the right of my estate in their favour shall cease and be extinct, void, and null, and the same shall fall and pertain to the next heir of tailzie appointed to succeed, to whom it shall be lawful to procure themselves served, retoured, infest, and seised in my estates, as heirs of tailzie, to the person who was lawfully infest before the person thus succeeding to Sir Alexander Gilmour.” Charles Gilmour, the person so called, having succeeded to Sir Alexander Gilmour’s estate of Craigmillar, while the second son of Lord Ross held that of Balnagowan as heir of tailzie, was succeeded on his death, in the estate of Craigmillar, by his son, Sir Alexander Gilmour the second. The family of Ross having afterwards failed, a competition arose between Sir Alexander Gilmour and Colonel James Lockhart, the next substitute after him; and although Sir Alexander Gilmour strenuously contended that he was not precluded from taking the estate of Balnagowan, as he had succeeded to Craigmillar before the succession had opened to him, and was only debarred, if he should succeed to that estate, after succeeding to and possessing the estate of Balnagowan;

¹ Nov. 25, 1755.

yet the Court preferred Colonel Lockhart. Lord Kaim states the ground of this decision, in his report of the case, in the following words :—“ Sir Alexander, it is true, goes before Lockhart ; nor are there any words carrying that order that can be applied to the case which has happened ; but then, as it was evident by the entailor's will, that Sir Alexander should not enjoy both estates, Sir Alexander's claim of preference, which is supported by words merely, contrary to intention, ought not to be sustained in a court of equity.” If the principle that ruled this decision is applied to the present case, there can, it is apprehended, be very little doubt of the result.

No. 1.

Nov. 12, 1844.
The Marquis of
Hastings, &c.

Again, in the competition for the estate of Earlsall, decided in 1790, the entail provided that the devolution of that estate should take place, if the heir of entail “ shall happen to succeed to, or be in possession of, the estate of Fordell.” The fact, however, was, that a proprietor of the estate of Fordell had succeeded as heir of tailzie to Earlsall. Looking, however, to the true object of the maker of the entail of Earlsall, the Court gave effect to it, by excluding Sir John Henderson, who, when in possession of the estate of Fordell, had become next heir in the order of succession to Earlsall, and who was ordained to denude in favour of his brother, the next in the order of succession. As to the principle on which that judgment proceeded, which was affirmed on appeal, the report states the following as the argument of the successful party :—“ But if, on the other hand, the question is merely which of two heirs shall succeed, a matter which concerns not the general interest, the testator's will is to be judged of according to the same rules that are employed in the interpretation of any other deed or contract, upon a complex view of the whole, and consideration of the object in view. Thus it was James Henderson's object to prevent the estate of Earlsall from being absorbed in that of Fordell, an event not more connected with the case, in express terms described, than that which has in fact occurred.”

In the subsequent competition regarding the estates of Milton and Castlemilk, the entail of Milton bore, “ that if the heirs called shall come at any time hereafter to succeed to the estate of Castlemilk, then, and in that case, the person, male or female, so succeeding thereunto, shall thenceforth, *ipso facto*, amit, lose, and tyne their right, title, and succession, above specified, to my lands and estate, without any declarator, &c., and the same shall accrue to the next heir of tailzie.” The case of Earlsall was admitted to be identical, but its decision was contended to be erroneous. The Court, however, guided by that precedent, which had been affirmed in the Court of last resort, held, that full effect must be given to the devolving clause, and that the eldest of the competing brothers could not hold both estates. The rubric of the decision is thus expressed :—“ A party entailed his estate A on a certain series of heirs, declaring that if any of them should come at any time to succeed to another estate, B, they should lose all right of succession to the lands A, which should fall to the next heir, as if the person so succeeding were naturally dead ; and an heir having first succeeded to B, and the succession to A having thereafter opened to him, held that the prohibition was effectual to prevent holding both estates, but that he was entitled to his election which he should take.”

The foregoing cases must unquestionably be held to have been decided upon no other principle than that of giving effect to the true intention of the makers of these various entails, whenever it could be ascertained by fair and legitimate construction ; and, though the words used might have apparently led to a different

No. 1.
 Nov. 12, 1844.
 The Marquis of
 Hastings, &c.

conclusion, the object that had truly been in view, was carried into full effect. If the same principle, then, is applied to the decision of the present case, the will and object of the maker of the entail of Rowallan necessarily lead, in my opinion, to Lady Sophia Hastings being preferred to any of the other competitors now before us, under the circumstances that emerged on the death of her mother, the late Marchioness of Hastings and Countess of Loudoun.

LORD MACKENZIE.—I shall deliver my opinion with reference to the opinions of the consulted Judges lying before us, which enables me, and in reason requires me, to be much more brief than I otherwise could be.

Abstracting from the operation of the statutes, I am inclined to adopt the opinion of Lords Moncreiff and Medwyn. I admit that there is no general clause, providing simply that the estate of Rowallan shall never be held by an heir who has succeeded to the title and estate of Loudoun. But there is an express clause applicable to the succession of any heir in the destination of Rowallan to Loudoun; and I am not able to hold that clause *pro non scripto*. I am aware of no principle on which that can be done. The general rule in the interpretation of written instruments is, “*verba aliquid operare debent*.” I may refer to the opinion of Lord Chancellor Eldon in the Roxburghe cause for a very strong expression of that rule. But it requires no citation of authorities.

Then, if the clause is to operate, I see no principle on which its fair interpretation can be excluded in this case. This is not a question of fetters, or of penal forfeiture, warranting defeasive or even strict interpretation. It is a question of destination—who are the heirs truly called by the will of the entailer? by virtue of which only, any of the competitors can pretend to claim; and I cannot see why the words expressive of that will should not have fair effect. I see nothing unfavourable in the exclusion of any person from the destination of one estate, because he is to succeed, or has succeeded, to another greater estate. On the contrary, of all provisions of entail, or special destination, I think this is the most reasonable. Why should a man be provided with one estate who has already succeeded to another and better? and still more, why should a man be the destinee of a Scotch entailed estate, settled by entail, in order to preserve, in the eyes of the world, a family as proprietor of that estate, who cannot truly keep up that character, being proprietor of a greater and more honourable estate, by which his possession of the smaller must necessarily be eclipsed? As to the hardship of being prevented by such a provision from taking two estates at the same time, I remember its being somewhat ludicrously compared to the grievance of being asked to two good dinners on the same day; and I must say that I think the analogy is pretty close. Such a hardship cannot be deeply sympathized with. These considerations are supported by the authorities cited by your Lordship; and on these I shall not say more. I do not think, therefore, we can discard this clause altogether, or deny it a fair interpretation. I apprehend, however, that even the first of these—*i. e.* a denial of all effect—must be the result of holding that what is to take place, in case of Loudoun descending to any heir of Rowallan—*i. e.* to heirs of Rowallan not being sons of the marriage—is to be nothing but a regulation applicable only to the case of such sons succeeding—such a provision being plainly nugatory. Strict interpretation of this clause is, in truth, no interpretation at all; but just holding it *pro non scripto*. I cannot, therefore, adopt that view; and then we must give to this clause fair interpretation, that it may have effect. And if that is to be adopted, I have come, though certainly with

more hesitation, to think that it cannot stop short of the opinion given by Lord Moncreiff. This is the view I should take, if I could abstract from the operation of the statutes; but I must add, that I am not able to do that. On the contrary, I have come to concur in the opinion of Lord Cuninghame, the Lord Justice-Clerk, and other Judges, who think that the effect of the Acts of Parliament, and transactions under them, has been to prevent the succession to the estate of Loudoun from taking place in any after heir, in the sense of the entail of Rowallan.

No. 1.

Nov. 12. 1844.
The Marquis of Hastings, &c.

This question, I think, depends upon another—viz. whether the new conveyance of Loudoun was merely a new form and style of transmitting that estate to the heirs of that estate, in effective maintenance of their original right, or hope of succession to it as heirs; or whether it was a substantial alienation of that estate, as a *surrogatum* for the entailed English property of the Marquis of Hastings to the heirs of that property. If it was the former, the exclusive provision of the Rowallan entail could not, I think, be defeated by it. If it was the latter, the circumstance that the heirs of Loudoun were also *de facto*, in part, heirs of these English estates, and consequently of the *surrogatum*, would not make that succession be regarded, in respect to them, as that succession to the estate of Loudoun which was looked to in the entail of Rowallan. In this latter case, the estate of Loudoun was not taken by mere succession, but by a substantial title of new acquisition by purchase or exchange. But the succession spoken of in the entail of Rowallan is mere succession. That only the entailor contemplated, or has expressed. Acquisition by sale or exchange, though followed by succession to the buyer or exchanger, in the bought or bartered right, is not what this entailor of Rowallan, or any entailor speaking of an heir succeeding to an estate, contemplates or means, or is understood to express. A buyer or acquirer by exchange of an estate, is not said, either technically or in common language, to succeed to it. And if the buyer himself take not by succession at all, his heirs who take his right by succession in it to him as buyer or exchanger, do not take by succession of a kind that was, or could have been, contemplated by an entailor making a provision like that in the entail of Rowallan. They take not by succession simply, but by purchase, and succession to the purchase, which is not what was contemplated. The question then rests where I have put it. Now, I answer this question by saying, that, in my opinion, the new conveyance of Loudoun was a substantial alienation of that estate, as a *surrogatum* for the English estate. That English estate was subject to an English entail on certain heirs, protected from the debts of the Marquis. It was given up to be sold away from these heirs, and in lieu of it the estate of Loudoun was given up, to be vested under that entail, or a Scotch entail to the same effect. The right to it then, I think, came to rest, not nominally or formally only, but really, on this exchange of land for land. The exchange was the solid and real basis of the title to that estate ever after; and that just as much in the heirs of the exchanger, as in the exchanger, Lord Hastings himself, who gave away his right to the English land, and got right to Loudoun in place of it. So complete was the change, that the Countess herself thereby lost her right to the lands of Loudoun, which vested in her husband and son during her life, and never reverted to her; or passed through her, even to her son, excepting through her as disponent or alienator. This seems enough for the decision of the present question. If we should be inclined to look further, and consider the equity arising under the statute, then we must observe that not only Lord Hastings, but also his

No. 1. heirs, held the English estates without the burden or risk of any exclusive clause and it would not be equitable to hold that Loudoun, when accepted as *surrogatus* for the English estate, should be subjected to this burden or disadvantageous condition, of being incapable of union with Rowallan, to which the English estates were not liable, in effect making the exchange quite unequal. This is valid, at least in regard to all the heirs of Loudoun who were heirs of the English estates. On the whole, then, I think the clauses in the entail of Rowallan cannot operate in this case, and therefore that we must decide in favour of the Marquis of Hastings.

Nov. 12, 1844.
The Marquis of
Hastings, &c.

In what I have said, it will be observed that I have not adopted the opinion of Lord Ivory, that the statutes could have no operation in this question, because the succession to Rowallan had been fixed in favour of Lady Sophia Hastings before the dates of the Acts of Parliament disposing of Loudoun. I think that, in fair and reasonable interpretation, the succession to Rowallan of a daughter, in preference to an only son, her brother, depends on the estate of Loudoun remaining for him to succeed to. This, I think, is with sufficient certainty implied, though it be not expressed. The intention of the entailer of Rowallan in this clause, being entirely founded on his desire of excluding the union of the two estates in the eldest son, I do not think it reasonable to construe the words to work that exclusion, where that only son does not succeed to Loudoun, but is, by the act of his father or mother, deprived of that succession. I cannot think the entailer ever intended that the only son might have no estate at all, while his sister was to be the heir of Rowallan, and might afterwards succeed to Loudoun, and hold both.

LORD FULLERTON.—This is a competition which has arisen on the disputed construction of the destination in the marriage contract of the Honourable James Campbell and Lady Jane Boyle; the eldest daughter then in life of David Earl of Glasgow, and his Countess, the daughter of William Mure of Rowallan.

The main object of this contract, or at least of that part of it now in dispute, was to settle the succession of the estate of Rowallan, failing other sons of the Earl and Countess of Glasgow, on Lady Jane Boyle, and the descendants of her marriage with Colonel Campbell. The destination, independently of the qualification afterwards attached to it, is usual enough, and might not have given rise to any dispute. It is "to the said Lady Jean Boyle, and the heirs-male to be lawfully procreate of her body of the said marriage, and the heirs-male of their bodies; which failzieing, to the heirs-female to be procreate of the body of the heir-male of the said marriage, the eldest always secluding the rest, and succeeding without division, as said is; which failzieing, to the heirs-female to be lawfully procreate of the said Lady Jean Boyle her body of the said marriage, and the heirs-male or female of their bodies, the eldest heir-female always secluding the rest, and succeeding without division, as said is."

But the parties to this contract contemplated a particular contingency, for which they thought proper to make provision. That contingency was, the succession of any of the heirs of the marriage to the honours and estate of Loudoun—an event likely enough to happen, from the near relationship of the Honourable James Campbell. This led to a qualification of the original destination, which has produced a competition of no less than four parties claiming the succession, on the death of the late Marchioness of Hastings; and each founding upon a particular construction of the special clause qualifying the general destination. One of these competitors, indeed, the present Marquis, maintains, as was done by his late

father, that, whatever may have been originally the true effect of the qualifying clause on the destination, that qualifying clause is no longer operative, inasmuch as his succession to, or rather acquisition of, the estate of Loudoun, was not a succession, in the sense of the marriage contract, which could call the qualifying clause into operation; from which he concludes, that he is now entitled to take the estate as the party unquestionably called by the general terms of the destination.

No. 1.

Nov. 12, 1844.
The Marquis of
Hastings, &c.

As this is a specialty, which, if well founded, might exclude all consideration of the construction of the qualifying clause, it ought, perhaps, in proper order, to be considered and disposed of before entering upon any discussion of the clause upon which the competitors rely. But as it is understood that we are bound to give our opinions upon the whole points raised by the parties, it seems to me the most convenient course, to ascertain, if possible, the meaning of the disputed clause itself, before entering into the enquiry how far its operation is affected by the special circumstances of the case.

The clause relating to the possible succession of the heirs of the marriage to the honours and estate of Loudoun, begins with certain provisions, exclusively applicable, to the opening of that succession, combined with particular contingencies as to the state of the family born of the contemplated marriage. "In case it should fall out that there be only one son of this present marriage procreate betwixt the said Master James Campbell and Lady Jean Boyle, who shall succeed to the honours and estate of Loudoun, though there be daughters, then and in that case it's hereby declared, that the second son of this only son of this marriage shall succeed to the said estate of Rowallan; and failzieing a second son, then the eldest daughter of this only son is to succeed to the said estate, and who shall be obliged to marrie and carrie the arms of Rowallan, in the terms and under the irritancies of the tailzie above mentioned; but if there be two sons of this present marriage, then the second son is to succeed to the estate of Rowallan, in case the eldest son shall succeed to the estate of Loudoun." There is here a specific direction as to the succession, modifying the original destination, and dependent on there being only one, or more than one son, of the marriage, and also on the succession to Loudoun having opened to the eldest or only son. Then follows the more general provision, "that the succession to the said estate of Rowallan, in case any of the heirs of this marriage shall succeed to the estate of Loudoun, shall take place according as is above mentioned in all time coming." And the clause concludes with the provision as to the accumulation of rents in certain events—a clause which does not affect the destination, although it may, to a certain extent, assist in its construction.

Now, it does not appear to me that the leading part of the clause presents any very great difficulty. It might puzzle one, perhaps, to discover what motive the parties had for an arrangement so arbitrary and capricious. The most natural and simplest explanation is, that their intentions were loosely and imperfectly expressed; and the consequent probability is, that if they had been called to consider the chances of its operation, those expressions would have been altered. But with that we have nothing to do. If the words of the deed admit of a definite meaning, we are bound to give effect to them, however incomprehensible to us the motives of the party may have been for adopting that course which those words express. While, then, it was provided by that member of the clause, that if there be only one son of the marriage, who shall succeed to the honours and

No. 1. estate of Loudoun, then, though there be daughters, the second son of this only son, and failing a second son, the eldest daughter of such only son, should take Rowallan, there is no provision whatever, either in the case of there being only daughters, one or more, of the marriage, who should succeed to the estate of Loudoun, or of the eldest daughter of the only son taking the estate of Loudoun, as well as Rowallan, that the qualifying clause should apply, or that there should be any separation of the two estates. As to the case of there being only daughters of the marriage, it seems clear. The only contingency provided for is, that there be one or more sons of the marriage. In the first case, the estate of Rowallan is to go to the second son, whom failing, to the eldest daughter of that only son, and in the other, to the second son of the marriage. The event of there being daughters of the marriage is clearly contemplated, and even expressed; yet there is no provision that, on the eldest daughter taking the estate of Loudoun, there shall be any exclusion of her right to Rowallan, in virtue of the general destination in favour of the eldest heir-female without division.

In regard to the eldest daughter of the only son, it might be supposed, perhaps, that the words "failing a second son" imply the existence of at least one son to take the estate of Loudoun, if Rowallan was to go to the eldest daughter. But that is an implication to which, in construing such a deed, we cannot give effect. The failure of a second son evidently includes the case of the failure of sons altogether, and we cannot, in sound construction, read it as by implication limiting the succession of the eldest daughter, to the special case of there being one son, and no more.

It seems to me then, that, by the first part of this qualifying clause, there is no provision or condition whatever affecting the right, either of the daughters of the marriage, or of the eldest daughter of the only son of the marriage. There is nothing to prevent any of those parties, though succeeding to Loudoun, from also succeeding to Rowallan.

To be sure there is the second provision, of a more general nature, "that the succession to the said estate of Rowallan, in case any of the heirs of this marriage shall succeed to the estate of Loudoun, shall take place according as is above mentioned, in all time coming;" and the words, "in case any of the heirs of this marriage," shall succeed, are broad enough to include the succession of the daughters of the marriage as well as the daughters of the only son. But then, what is to happen upon that event? That the succession is to take place "as is above mentioned." In order to modify the general terms of the original destination, there must be some express mention of a change to be effected in the succession of Rowallan by the succession to Loudoun. But there is nothing mentioned in the preceding part of the clause of any change, in the case of females taking both estates; and it would seem to be an unwarrantable extension of the term, "as above mentioned," to apply it to the succession not only of sons which had been mentioned, but to the succession of daughters which had not been mentioned in the only qualifying clause to which reference could be made.

It seems to me, then, that if there had been only daughters of the marriage of Colonel Campbell and Lady Jane Boyle, the eldest daughter without division, though she had succeeded to the estate of Loudoun, would have been enabled to take the estate of Rowallan; and on still stronger grounds, I conceive that, in the event of the succession to Loudoun opening to an only son of the marriage, the daughter and only child of that only son must have been entitled to take both

No. 1.

estates. The clause itself specially providing for the case of the estate of Loudoun falling to an only son, declares, that failing a second son of that only son, the daughter shall take; and though it is quite possible that the framers of this deed, may have had in view the event of that only son having one son and a daughter, they have certainly not expressed that event, or qualified the daughter's right by any such condition. She is to take, failing a second son, a condition which, in the only rule of construction, must be held to be purified by the failure of sons altogether. The effect of the provision then, in the event of the succession of Loudoun opening to an only son of the marriage, is, to give the estate of Rowallan to that only son's only child, if a daughter, without any condition whatever; and when the next sentence of the clause provides, that if any of the heirs of the marriage shall succeed to the estate of Loudoun, the succession to Rowallan shall take place as is above mentioned, it seems to me impossible to construe these words, "as is above mentioned," into an exclusion of the only son's eldest daughter, from a right which the clause referred to gave her without qualification. It is possible the parties may have had in view a provision for the continued separation of the estates—may have intended to declare, that if any one heir of the marriage should turn out to be the party entitled to succeed to the estate of Loudoun, he or she should not take by succession the estate of Rowallan, as in the case specially provided for, of the eldest son of the marriage taking the estate of Loudoun. But that has not been clearly said. Indeed it has not been said at all; and to infer all that from the employment of the words, "according as is above mentioned," would be, in truth, not to give effect to what had been "above mentioned" in the preceding clause, but to rear up, upon some other presumption of intention, a qualification of the succession, which had not been mentioned in the leading part of the clause.

By applying the terms of the destination thus explained, to the events which actually took place in the family, we are enabled to fix, upon sure ground, at least one point of some importance; I mean the particular event on which the disputed succession must be held to have arisen. There was only one son of the marriage, James Mure Campbell, who after succeeding to the estate of Rowallan, also became entitled, in the year 1782, to the honours and estate of Loudoun.

Whether, by the concluding provisions of the clause so often alluded to, the rents of the estate of Rowallan ought "to have been managed and improved for the use of the next heir of tailzie, who shall succeed in manner foresaid," at sight of the persons named in the contract and their heirs, is a question which it is unnecessary to consider. No such claim was advanced. James Mure Campbell, then Earl of Loudoun, was allowed to continue in peaceable possession of the estate until his death in 1786, when he was succeeded by his only daughter, the late Marchioness of Hastings. She, too, possessed both estates until her death in 1840, upon which the present competition arose.

Now, for the reasons already assigned, I conceive that the Marchioness, the only daughter of the only son of Colonel Campbell and Lady Jane Boyle, was entitled to succeed to, and to hold the estate of Rowallan, though she also succeeded at the same time to the honours and estate of Loudoun. As whatever might be in other respects, the effect of the clause qualifying the original destination, the provision for the separation of the two estates did not apply to her. Accordingly this seems to be the opinion of the whole of the consulted Judges, however they differ in other respects. However opposed their views may be on the subject of the

Nov. 12, 1844.
The Marquis of
Hastings, &c.

No. 1. succession to the late Marchioness, they seem all to agree in this, that it was on her death that the question of disputed succession arose; she being understood to be the person holding by a title sanctioned by the entail. Indeed that seems an admitted point in the present competition. Even in the summons on the part of Lady Sophia Hastings, and her defences against the actions of the other competitors, and in her argument, it is assumed that the only question is, how the succession to Rowallan fell to be "regulated upon the death of the Marchioness."

Nov. 12, 1844.
The Marquis of
Hastings, &c.

The point to be determined then is, who, by the force of the original destination, as qualified by the clause so often quoted, was the individual entitled to take, as heir of entail of the estate of Rowallan, on the death of the Marchioness of Hastings.

Now, there is one view suggested of the joint effect of these clauses of destination, which would remove all difficulty. It seems to be thought that the condition of the special rule of succession, "in case any of the heirs of the marriage shall succeed to the estate of Loudoun," may be read as exclusively applicable to the junction of these two estates, by succession from different quarters; and that consequently its operation was exhausted, or extinguished, by the junction of both estates in the person of the late Marchioness. I have great doubts, indeed, whether this reading can be adopted as the true one. It can be made out, only by using great freedom with the express words of the deed. These words are quite general: "In case any of the heirs of the marriage shall succeed to the estate of Loudoun," expressions which include the case of succession to Loudoun from an ancestor at the same time holding Rowallan, as well as the succession to that estate, previously held separate. And this is strengthened by the consideration, that according to the view which all the Judges seem to take of the sentence immediately preceding, the framers of the deed must be presumed to have had in their view, the contingency of the daughter of the eldest son of the marriage holding both estates, and consequently of the succession to the estate of Loudoun, on the death of a party also holding Rowallan. The general words then immediately following—"In case any of the heirs of the marriage shall succeed to the estate of Loudoun," do seem to me to apply to that point of the succession in the destination of Rowallan, which occurred on the death of the late Marchioness; always assuming, of course, in this branch of the discussion, that the mode of acquisition of the estate of Loudoun by the late Marquis, was to be held as a succession to that estate in the sense of the Rowallan entail. On that assumption, the late Marquis was an heir of the marriage who had succeeded to the estate of Loudoun, so that there was room for the enquiry how the succession to the estate of Rowallan was to take place.

Neither can I see how this provision in the Rowallan entail can be considered as exhausted by one single operation, and as confined to the first case of the junction in one individual, of the character of heir of Loudoun and heir of the marriage. The clause declares, that the succession "shall take place, as is above mentioned, in all time coming." The rule of succession, whatever it may be, is not to be exhausted by a single operation. It is clearly introduced as a permanent rule of succession, to be observed on every occasion of succession in which the party who is the heir of the marriage has succeeded to the estate of Loudoun.

To be sure, there remains behind the more difficult point what that rule of succession truly is; for it is not specifically laid down. It is described merely by reference to what "is above mentioned," as I understand it, in the sentence im-

Nov. 12, 1844.
The Marquis of
Hastings, &c.

mediately preceding, in which a rule is laid down for regulating the succession in one particular case, the succession of Loudoun having opened to the eldest son of the marriage. In order to discover, then, what the permanent rule of succession is to be in the general case of any of the heirs of the marriage succeeding to the estate of Loudoun, we must try to discover what is the specific rule of succession laid down in the case specially provided for, and apply that, if it can admit of application, to every case of succession under the more general direction. Now, the special rule seems to be this—that if there be two sons on the succession opening, the second son is to take Rowallan if the eldest shall succeed to Loudoun; but if there be one only son, then, though there be daughters of the marriage, the second son of that only son is to take Rowallan, and failing a second son, the eldest daughter of that only son. And while it is here provided, I think, with sufficient clearness, that a son of the marriage who has succeeded to Loudoun shall not take Rowallan, there seems, as I have already mentioned, no prohibition either of a daughter of the marriage, or of a daughter of an eldest son, succeeding to both estates. I rather think, however, that there is a prohibition of a son of the marriage taking both estates. For it does not appear to me, as it does to some of the consulted Judges, that an only son of the marriage could have taken or kept both estates, merely because he had at the time no second son or daughter to exclude him. That affords a very good explanation of the fact of his being allowed to keep both estates, but it does not touch the question of right as arising under the words of the deed; for the deed clearly contemplated and provided for the case of the management of the estate while the right was in suspense, from the non-existence at the time of the heir contingently called to the succession. This seems to be the sole object of the concluding part of the clause, that “so soon as the son of this marriage, or others foressaid, shall accept of the honours and estate of Loudoun, then the rents of the said estate of Rowallan are to be managed and improved for the use of the next heir of tailzie who shall succeed to the estate of Rowallan.” If, then, the only son of the marriage had succeeded to Loudoun when the succession to Rowallan opened, I rather think that, by the true construction of the clause, that only son could not have taken, but that the estate must have been managed by the trustees till the abeyance fell by the existence of the second son of that eldest son, or “next heir of tailzie who shall succeed.”

In order to ascertain what the rule of succession “above mentioned,” to be followed in the case now occurring, on the death of the late Marchioness, truly is, it may be well to enquire how the specific rule would have operated, if the circumstances at the dissolution of the marriage had been nearly the same; if, in short, the succession to the two estates had opened at the same time to the child or children of the marriage. This might easily have happened. It may easily be supposed that Colonel Campbell had succeeded to the estates of Loudoun before his death, and that his death, and that of Lady Jane Boyle his wife, had, by some casualty, happened at the same moment. In such circumstances, the succession to both estates would have opened at once to the eldest son, but for the provision qualifying the destination of Rowallan. But, by the force of that qualification, I think it pretty clear, first, that if there had been two sons of the marriage, the estate of Rowallan would have gone to the second son, and secondly, that if there had been only one son of the marriage, the estate of Rowallan ought, under the directions of the deed, to have been managed by the trustees until he had a second son, or until the failure of sons carried it, at his death, to his eldest daughter, if he

No. 1. had one. That appears to me to be the rule of succession mentioned in the deed, in the special case; and therefore, being the rule referred to, I rather think it is the one which we are bound to enforce in the case which has occurred, of the succession opening to both estates by the death of a female, allowed, by the terms of the destination, to hold both. No doubt the rule is capricious and arbitrary enough; for, while it admits the union of the estates in a female, it requires the separation of them in the case of a succession of males. As I have said before, I think it extremely likely that this has arisen from oversight, or inadvertency, or inaccuracy of expression, but still, there the words are. Such is clearly the effect of the special clause qualifying the destination, in the persons of the immediate children of the marriage. There is a male barred from holding both estates, while a female is not. Now, the words of reference seem to carry out the same principle through the whole succession: And although the result is unusual, and perhaps unprecedented in cases of this kind, still it involves no such intrinsic inconsistency or absurdity as to warrant a court of law in discarding the construction on which it rests.

Nov. 12, 1844.
The Marquis of
Hastings, &c.

Now, if this be the true construction of the qualifying clause, a proposition which, however, I submit with the greatest diffidence, it would at once solve the questions between these different competitors, if the competition were to be determined by the words of the clause, and independently of the specialty founded on by the late Marquis of Hastings and his eldest son.

In the first place, that construction would at once exclude the claim of Lady Sophia Hastings. Holding the question to arise as at the death of the late Marchioness, and applying to that case of succession the rule above mentioned, that is, the special rule fixing the succession in regard to the sons of the marriage, it seems to me that Lady Sophia does not stand in the situation of the eldest son's eldest daughter, who is entitled to take the estate, but in that of the daughter of the marriage, the only son's sister, who is not to take the estate in preference to his issue. Nor is it requisite, in order to support this view of the case, that the late Marchioness should be considered as, in all respects, in the same situation as Lady Jane Boyle. The question is the question of succession; and it is enough, in regard to that, that the late Marchioness stood so far in the same situation as Lady Jane Boyle; that she was the person on whose death the succession to Rowallan opened. Being identified in that particular, it seems to me that, in applying the rule of succession laid down for the children of the marriage to the case of the death of the late Marchioness, the right of Lady Sophia must be considered as analogous to that of a daughter of the marriage, the sister of the only son, and must, therefore, be postponed to his issue. Indeed, I do not see how Lady Sophia's claim could be sustained in competition with the issue of her mother, except on the supposition that the late Marchioness was to be viewed in the question of succession as in a situation analogous to the only son; and consequently, that she, Lady Sophia, was entitled to take, not by succession from her mother, but in preference to her mother. When once it is assumed that the late Marchioness was entitled to hold the estate till her death, and that from that point only the question of succession emerged, the necessary consequence seems to me to be, that, in combining the general rule of succession with the special rule "above mentioned," the late Marquis must be viewed as the only son who has succeeded to the estate of Loudoun, and that his sisters can have no claim while he had hope of issue.

But I confess I do not see what answer can be made, on this construction of the

deed, to the claim of Lord Henry Hastings, the second son of the late Marquis. He is the very party who appears to me to be called by the combined operation of the different parts of the clause qualifying the destination. That he was not Nov. 12, 1844.
The Marquis of
Hastings, &c.

A provision that an estate shall go to the second son of a party named, necessarily implies the contingency of that destination being suspended while there is a possibility of the existence of a second son. And there seems to me to be no ground for holding that, in the case of a destination to the second son of a particular party, whom failing, his eldest daughter, the eldest daughter would be at once entitled to take the estate on the succession opening, merely because there was no second son then in existence. The eldest daughter being only entitled to take failing a second son, there cannot be said to be any such failure so long as there is a possibility of his existence. And, indeed, the only difficulty which, in the ordinary case, would occur—that of the right being suspended—is evidently contemplated and provided for by the clause regarding the management of the rents for behoof of the next heir of the entail who shall succeed to the estate.

On these grounds, I think that Lady Edith Hastings has no claim in competition with Lord Henry; but, upon the whole, I am rather inclined to think that, holding the question to be open, and to be determined by the construction of the clause qualifying the destination, the claim of Lord Henry Hastings would preponderate. It is true that opinion is any thing but confident. Indeed, the provisions are so perplexed, the lights in which they admit of being viewed are so varied and shifting, that I have found the greatest difficulty in forming any well defined opinion upon the subject. But, after all the considerations which I have bestowed upon the case, that above expressed has appeared to me to offer the least violence to the terms of the deed, and to give the fullest effect to its different provisions.

As the view which I entertain of the meaning and effect of the clause in dispute, affecting the destination of Rowallan, is different from that which has been adopted by any of the consulted Judges, I have thought it right to state my view at some length. Indeed, it may very probably be thought at greater length than was necessary, considering that I concur in the opinion of the majority of the consulted Judges, that the circumstances under which the late Marquis of Hastings took the estate of Loudoun were not such as to admit of the operation of the clause.

It is true that, before the succession to Rowallan opened to him, he had taken and held the estate of Loudoun. In one sense he had succeeded to the estate of Loudoun; but he had succeeded to it, not as the heir of his mother—not as the heir of the marriage of Colonel Campbell and Lady Jane Boyle, but as heir of his father, Francis Earl of Moira and first Marquis of Hastings, the institute of the entails executed by his wife, the late Marchioness of Hastings. It is needless to go into the details of these somewhat complicated transactions. It is sufficient to state, that, by the arrangements made between the late Marchioness and her husband, at that time Earl of Moira, and sanctioned by certain statutes obtained for that purpose, she, then holding the estates of Loudoun in fee-simple, transferred them to the parties in right of certain English estates which had belonged to the Earl of Huntingdon, and in which the various interests were fixed by his settlements. Of these, the life interest was held by Francis Earl of Moira,

No. 1. afterwards first Marquis of Hastings ; the substantial, permanent interest, or what we should call the right of fee, being in his children ; and particularly, at the date of the transactions, being in the person of his eldest son, the last Marquis of Hastings, then designed Lord Mauchline. The object of these transactions certainly was to enable the late Marchioness to apply the proceeds of the English estates in payment of her husband's debts ; but the direct effect of the transaction was to divest her entirely of all her rights to the estates of Loudoun, and to convey them to the parties having right to the English estates, as an equivalent for those English estates.

Nov. 12, 1814.
The Marquis of
Hastings, &c.

It is said, indeed, in the preamble of one of the statutes, I think, that the Scotch estates were of greater value—a statement made merely to facilitate the transaction. They are given, evidently, as an equivalent, and nothing else. Accordingly the Scotch estates of Loudoun were settled by deeds, framed expressly on the principle of identifying, as nearly as possible, the interests of the different parties in the English estates, with those in the Scotch estates which they were to receive in return. Those deeds were, of course, in the form of entails, executed by the late Marchioness, the proprietrix of the estates. The institute in these entails was her husband, the Earl of Moira, he being indispensably brought under strict fetters ; as, by the English deeds, he holding merely a life interest, had not the power to defeat the rights of the English heirs. But these very entails contained a provision that Francis Earl of Moira, with the consent and approbation of his eldest son Lord Mauchline, the late Marquis of Hastings, after arriving at the age of twenty-one, should have the full power to dispose the estate in any way they chose ; and that after the death of the said Francis Earl of Moira, the said Lord Mauchline should, on arriving at twenty-one, have the full power of disposing of these estates. In short, these Scotch entails were merely the instruments for creating and protecting interests in the Scotch estates, as nearly identical with those in the English estates, for which they were substituted, as the principles of conveyancing of the two countries would admit of.

Now, the question comes to be, whether the last Marquis of Hastings, acquiring by these transactions the estates of Loudoun, can be held to have fallen under any disqualification as to taking the estates of Rowallan. I agree with the majority of the consulted Judges in thinking that it is not enough that he has taken the honours of Loudoun, that is, the title. The clause in the Rowallan entail, in its first clause, mentions both honours and estates, while in the second, the most important sentence of the whole, the estate of Loudoun is the expression used. I cannot read, then, the word estate as meaning either the honours or the estate. I think, particularly in construing a clause of this kind, the taking of the estate, as well as the honours, is indispensable to bring the condition into operation.

Now, the first thing that must strike one, on the supposition that the taking of the estate of Loudoun, in the circumstances above mentioned, disqualified the late Marquis in any way whatever in regard to the estate of Rowallan, is, that a consequence would thus arise from the transactions above mentioned, most materially affecting the interests of the late Marquis, and which never could have been contemplated. His rights to the English estates were secure. Indeed it seems pretty clear, from the English opinion, that they were rights in absolute property, in the event of his arriving at the age of twenty-one. The taking and holding those English estates attached to him no disqualification whatever as to taking Rowallan ; and yet it is supposed that the statutes, passed expressly on the footing of

one set of estates being the substitute and equivalent for the other, gave him the equivalent indeed, but under the condition that, in taking that equivalent, he should be in some way disqualified from taking another valuable estate, which it was previously quite competent for him to hold.

No. 1.
Nov. 12, 1844.
The Marquis of
Hastings, &c.

I do not make this remark as conclusive. I am quite aware this is a question as to the entail of Rowallan, and that the rights of the heirs of that entail cannot be affected by any oversight which may have been committed in these transactions, to which they, the heirs of Rowallan, were not properly parties. But it shows where the equity of the case lies. It entitles us fairly to scrutinize, with some rigour, the terms of the entail of Rowallan, in order to see whether these terms do necessarily require a construction leading to a consequence so unforeseen and so unjust. And I agree with the majority of the consulted Judges in thinking that they do not.

There is nothing in the clause in question about taking or holding the estates of Loudoun, or any other estate. The events contemplated were, "if there be an only son of the present marriage who shall succeed to the honours and estate of Loudoun;" and the other clause, "if any of the heirs of the marriage shall succeed to the estate of Loudoun." It is a taking by succession which alone is contemplated; and why that was contemplated is sufficiently obvious from considering the nature of the deed. It was a marriage-contract, in which the wife, Lady Jane Boyle, was contingently the heiress of Rowallan, and the husband, the Honourable James Campbell, there described as the brother of the Earl of Loudoun, was by possibility, not very remote, the heir of the honours and estate of Loudoun. It was natural enough then, in these circumstances, that the parties should contemplate the possibility of the heir of the marriage succeeding to the estate of Loudoun, and should introduce, on that event happening, alterations on the destination of Rowallan. But what is the event on which, both by the letter and the spirit of the clause, these modifications are made to depend? It is that of the heir of the marriage succeeding to the estate of Loudoun. The fair, as well as the usual construction, is not a succession as a singular successor, or even to a singular successor, but a succession, in the proper sense of the term, as heir of the marriage, through Colonel James Campbell, whose propinquity to the honours and estate of Loudoun formed the single ground for inserting the condition in regard to these two estates. The effect which the succession of the one was to have upon the succession of the other, was provided for solely on the contemplation of certain parties becoming, as heirs of the marriage, the heirs of both estates. The event of the estate of Loudoun being acquired by a singular title, was a case not provided for by the letter of the contract, and clearly not falling within its spirit, because it evidently was not an event which they could have foreseen or thought of. The expression actually used, "if the heirs of the marriage shall succeed," does not cover the case of an heir of the marriage acquiring by purchase, and transmitting it to his representatives. Such a party does not take by succession, but by a singular title; and it seems to me clear, both from the expressions used, and the circumstances of the parties to the contract under which they were used, that they could not be intended to cover any such case.

In adopting this view, I do not mean to say that a mere change of title, in some particulars, might have been sufficient to exclude the operation of the clause. It would not have followed, perhaps, from a deed of the late Marchioness merely propelling the succession, or conveying under fetters the estate formerly held in

No. 1. fee-simple, because *there* there would have been really a succession to the estate of Loudoun, a taking *titulo lucrativo*, flowing through Colonel James Campbell, the original party to the marriage-contract. But when there has been an acquisition by a purely onerous and singular title—when there has been no succession, in any sense of the terms, to the late Marquis as heir of the marriage—and when consequently the event has not occurred on which alone the excluding clause is dependent, there is no room for giving any effect to it; and the party entitled, by the terms of the general destination, to take the estate of Rowallan, is as little affected by the mere fact of his happening to hold the estate of Loudoun by a singular title, as if it had been alienated to a third party. In fact, the alienation was complete by the transactions in question. The late Marchioness of Hastings, and the heirs of the marriage of Colonel Campbell and Lady Jane Boyle, were, in that character, as completely divested of the estate of Loudoun as if it had been sold to third parties. No doubt some of the individual heirs of the marriage did acquire right to the estate of Loudoun by that transaction. But then it was in a totally different character, viz. that of heirs of the estates of the Earl of Huntingdon, in England; for, although the parties first called by the entail of these estates were the late Lord Hastings, the eldest son of the marriage of the first Marquis and the late Marchioness, and any other son they might have, parties who were also heirs of the marriage of Colonel Campbell and Lady Jane Boyle, and heirs of the honours of Loudoun, the very next substitution is “to the first and other sons of the body of the said Francis Earl of Moira, to be born of any other marriage he may subsequently lawfully contract and enter into”—persons who had no connexion whatever, either with Colonel James Campbell or the estate of Loudoun, but who were the parties called by the English entails. I must hold then, that in regard to succession, in the sense in which the word is used in the entail of Rowallan, the case is the same as if the late Marchioness of Hastings had sold the estate of Loudoun out and out, and as if the trustees, or those entrusted with the management of the English estates, had bought it and settled it on the English heirs. It seems to me, that although some of the individuals who might take the estates in consequence of this transaction, happen to be parties who might, if the estates had not been alienated, have succeeded to them as heirs of the marriage, this was not a succeeding to the estates of Loudoun in the sense of the entail of Rowallan, which could exclude from succeeding to the last-mentioned estate.

I may also mention, that I am not moved by the consideration so strongly urged in these papers, and so powerfully enforced by your Lordship, that giving this effect to this arrangement would be in truth enabling the late Marchioness to alter the succession of Rowallan. It is said that the succession was fixed by her succession to Loudoun, and that it could not be altered by any act of hers. It rather appears to me to be an abuse of terms, to describe the effect of that transaction as an alteration of the succession of Rowallan. The succession of Rowallan is fixed by the destination, and the late Marquis was undoubtedly the heir of that destination. The qualifying clause merely provided that, on a particular event, that destination should be modified, while it is clear that the means of excluding that event were, from its nature, within the powers of third parties, and might be within the powers of persons who also happened to be heirs of Rowallan. Thus the former proprietor of Loudoun, brother of Colonel James Campbell, might have sold the estate, in which case the general destination of Rowallan must have taken unqualified effect. Yet it surely could not be said that the Earl of Loudoun, by so doing,

had altered the destination of Rowallan; on the contrary, his act rather secured the original line of descent by extinguishing the possibility of the event on which its modification depended.

No. 1.

Nov. 12, 1844.
The Marquis of
Hastings, &c.

In the same way, when the late Marchioness, who held both estates, alienated Loudoun, she did nothing, as heiress of Rowallan, to alter the line of succession of that estate, which of course she had not the power to do. But as proprietrix of Loudoun, she did what any proprietor of Loudoun was entitled to do, alienate that estate, and thus indirectly affect, as any proprietor of Loudoun might have done, the succession of Rowallan, by excluding the possibility of that event on which a certain qualification of the line of descent was conditioned.

As to Lady Sophia Hastings having a vested interest in the succession from the moment her mother took both estates, I do not well understand how the proposition, if it has a meaning, is reconcilable with the other parts of her argument. It is admitted that the point at which the question of succession must be held to have opened, was on the death of the late Marchioness. The question is, Who is next heir to her in the order of succession of Rowallan? Now, that question must be solved by the original destination, unless it is affected by the qualifying clause. But the late Marquis was undoubtedly the heir of the destination; he was entitled to take, unless he was affected by that clause; while it is equally clear, that as there was then no succession to Loudoun, in the above sense of the clause, he was not subject to its operation.

If Lady Sophia was claiming a vested right of any kind in the estate of Rowallan prior to the death of her mother, I can understand how that would have been beyond the reach of any acts of the Marchioness; but the question of succession, depending on the circumstances as they should stand on her mother's death, must have been affected by any circumstances legitimately within her mother's power during her life, which the alienation of Loudoun undoubtedly was.

Upon the whole, then, while I am rather of opinion that the most probable construction of the clause, if held to be in operation, would have carried the estate of Rowallan to Lord Henry Hastings, the second son of the late Marquis, I concur in the opinion of the majority of the consulted Judges in thinking that there is now no room for the enforcement of the clause, and that the late Marquis was, and the present Marquis, his eldest son, is, entitled to take the estate of Rowallan, in virtue of the general terms of the destination, now disencumbered of any quality or condition whatever.

LORD JEFFREY.—I at one time thought there were great difficulties in this case; and, with the difference of opinion which still exists among us, it would be presumptuous in me to say that there are not difficulties. For my own part, however, I am glad to say that I have now got very much over them, and not only concur fully in the conclusions of the majority of the Judges, and in most of the grounds on which they proceed, but have even had ultimately less hesitation than many of them in coming to these conclusions. My own view of the case, at all events, now strikes me as in some respects more simple, and, generally, more perspicuous, than many of those which have been taken. I shall not of course now go into any of the details, with which we are all familiar, but content myself with stating, as nakedly and precisely as I can, the grounds on which I rest the opinion I have just indicated.

There are four questions, as it appears to me, upon which we must come to a conclusion, before we can exhaust the merits of this competition; and though it

No. 1. happens that the ultimate decision of any one of them in favour of the late Marquis of Hastings would make it unnecessary to dispose of the others, yet, as the case now stands, and with the prospect of our judgment being taken to review, I am afraid we must each of us express a deliberate opinion, and in fact virtually give judgment on them all.

Nov. 12, 1844.
The Marquis of
Hastings, &c.

The first question is, Whether the late Marquis did succeed to, or become possessed of, the honours and estate of Loudoun, in such circumstances as to be in any way affected by the clauses of exclusion in the Rowallan entail? or was not, on the contrary, entirely exempted and relieved from their operation, by the true nature of his right to the Loudoun property? The second question is, Whether the terms of these clauses can be held, on a just construction of them, to have any application to the case of females succeeding to both estates, or to any of their descendants, who (of whatever sex they may be individually) are so called in the destination as to be all heirs-female in the eye of law, and entitled to all the immunities which may attach to that character by the settlements of either estate? The third question is, Whether the whole of the said clauses were not limited to the two first generations of heirs (or, as I would put it, heirs-male) of the marriage, who might be called to the succession of Rowallan after Loudoun had previously devolved on them? and whether they had not been consequently worked off, sopite and exhausted, by the legal union of the two estates in the persons of heirs falling under this description, for two such generations previous to the succession opening to the late Marquis? And the fourth and last question is, Whether, supposing the decision to be adverse to him on all the preceding points, the terms of the said clauses are not still such as to prevent them from applying to the particular case of the late Marquis, and his place in the destination, or from importing his exclusion?

My opinion is in favour of the late Marquis, upon one and all of these questions; and I shall now state, as succinctly as possible, the principal reasons which have led me to this conclusion.

In reference to the first question, it is necessary to bear always in mind, that the entail containing the provisions in question was embodied in a contract matrimonial between the presumptive heiress of Rowallan and a near expectant heir of the honours and estate of Loudoun; so that, I think, it may be assumed as indisputable, that the only succession to Loudoun which was then contemplated, and to which, in certain cases, the exclusion from Rowallan was attached, was a lucrative succession (through that expectant heir) of one member of the Loudoun family to another—either *jure sanguinis*, and at common law, or under such destination as might have been made for regulating the order and course of such family succession. It was plainly expected, too, that the estate and the honours (which last should not go out of the family) should be succeeded to together: And the succession to which these incapacities are attached, is expressly declared, accordingly, to be a succession to both—as not unlikely to come, in the natural course of descent, to some of the heirs of the marriage then about to be celebrated.

If the Loudoun estate, therefore, had been sold, or alienated out and out from the family, (as it might well enough have been,) either by Earl John—upon whose death it did actually come to James Mure Campbell, the first heir of the marriage—or even by James Mure Campbell himself, previous to the succession of Rowallan opening to him by the death of his mother, and had so remained in

the hands of strangers, I do not understand it to be questioned, that Rowallan would then have gone to that first heir, and to all the substitutes in the original destination, free of any conditions or limitations whatever; and exactly as if there had been no provision about Loudoun, or any mention of that estate in the entail. By the sale and alienation of that estate to strangers, there would, of course, have been an end of all risk of its after consolidation with Rowallan, by and through the intermarriage of the Rowallan heiress with an expectant heir of the greater property—which was, beyond all dispute, the only event contemplated or provided for by the contract.

Nov. 12, 1444.
The Marquis of
Hastings, &c.

But if this be, as I take it to be, indisputably clear, I am really unable to imagine that it could have any difference, or that these provisions could ever possibly have received, although some future or expectant Earl of Loudoun should, at the distance it might be of centuries, have bought back this old family estate, and settled it upon some of the heirs of Rowallan. My notion, in short, is, that as soon as the Loudoun estates were once fairly alienated and taken absolutely away from the Loudoun family, there was an end, at once and for ever, of all pretence for disturbing the succession to Rowallan, according to the original destination in the entail of that property; and that the accident of the Loudoun estates coming back again to the family, not by succession, but purchase, was not an event contemplated by that deed, nor capable, therefore, of calling into operation any of its provisions.

But this, or something still more favourable than this to his present claim of immunity, I take to have been truly the nature of the late Marquis's actual right, in 1826, to what constituted the family estate of Loudoun in 1720. I shall not enter into the detail of the different acts of the legislature, which ultimately constituted, beyond all doubt, his sole title to these properties; and which, at one and the same time, took away his otherwise indefeasible right to the English properties of his father's family, and secured to him—by and through that connexion, and not through his mother or her family at all—an equivalent right to these surrogated subjects in Scotland. The sum of the matter is, that the whole right and interests of the family of Loudoun to this their ancient patrimony, was, by those statutes, finally cut off and extinguished; the whole having been onerously sold and transferred for his life to the Earl of Moira, (afterwards the first Marquis of Hastings,) an entire stranger to their blood; and made liable, in his person, to all the conditions, and descendible to all the heirs named in the settlements of the Earl of Huntingdon, with regard to his English possessions; by virtue of which English settlements alone, and not in any degree through any right of succession to his mother or her family, the late Marquis was ultimately vested with the property.

I purposely abstain from going into particulars with which we are all now familiar. But it is indispensable, and seems to me indeed, *per se*, conclusive on this branch of the case, to bear in mind that, in conformity with these onerous arrangements, complete titles were made up to the old Loudoun estates, in the person, not of the Countess, from whom they had been purchased, but of Earl Moira, who had purchased them with his English property in the years 1809 and 1815 respectively: And that, upon the death of the said Earl in 1826, the late Marquis again made up titles to these estates, expressly as heir of provision to his still father, and entered into possession accordingly—fully sixteen years before the demise of his mother could have entitled any one to take, or to claim, as heir

No. 1. or successor to her. He did not succeed to the estates or the family of Loudoun, therefore, in the sense of the Rowallan entail; and truly did not succeed to them at all, but took them substantially as purchaser, and in lieu of other properties belonging to himself individually, for which they had been exchanged.

Nov. 12, 1844.
The Marquis of
Hastings, &c.

It is true, no doubt, that in a certain sense he may be said to have succeeded to these estates, inasmuch as, by the form at least of his title, he took them as heir of provision to his father, and not as purchaser directly; and it is also true that his mother was a party to the dispositions, executed in implement, and under the compulsion of the statutes (for there was no option in the matter) upon which both he and his father were successively infeft. But though I think it would be a sufficient answer to both these observations, that succession to a stranger purchaser manifestly was not the succession provided for in the entail, and that the Countess's concurrence in the dispositions was, and is expressly stated *in gremio*, to have been merely to give more ready effect to the will of that purchaser, and to abridge the forms of conveyancing—the true and substantial answer really goes much further, and brings out the case more strongly in the Marquis's favour. For it is the scope and sum of that answer, that the late Marquis himself, whatever might be the form of his title, was, by the plain terms of the statutes, which were the true and only measure and source of his rights—a direct onerous purchaser for his own behoof; and that he took the estates accordingly, not at all in right even of his father, or as his representative, but by an independent and indefeasible right of his own. That his right to the Huntingdon estates was of this description (his father having a mere liferent) cannot be, and has not been, denied. But the statutes in question enact and declare, and this is their sum and substance, that upon these English estates being made over in fee-simple to the Countess of Loudoun, the rights of all parties formerly interested in them should attach to, and be available against the Loudoun estates, exactly and at all points in the same way, and to the same extent, as they had previously subsisted over those for which they were now to be exchanged. By the tenor of these statutes, therefore, the late Marquis's right to these estates is proved to have been a right absolutely independent of any lucrative succession to either of his parents; and of which neither his father nor his mother, nor both together, had any power to deprive him. He, therefore, really took nothing, either by his service to his father, or by the concurring disposition of his mother. His sole title and right to the estates were by and through the statutes, and antecedent settlements of Lord Huntingdon; and these services and dispositions were mere forms of conveyancing, the want of which might have been supplied by a declarator, or implement, or other known process of law, proceeding on the statutes alone.

I conceive, therefore, that I am fully warranted in saying, that the late Marquis did not truly succeed to the estate of Loudoun, in the sense either of the Rowallan entail, or in any other sense. He took that estate, not as inheriting it from the Loudoun family, or from any one else; but in consequence of a fair and onerous exchange for certain English properties belonging to himself, and to which his right was derived from entire strangers to that family; and, upon the whole matter, it is manifest to me, that his right to Loudoun came ultimately to be a right under the settlements of the Earl of Huntingdon, and nothing else; and that there would, therefore, be no more justice in now excluding him from the succession of

Rowallan, because his rights under those English settlements had been transferred, in his nonage and by Parliamentary authority, to properties once belonging to the family of his mother, than if, without the interposition of any such *surrogatum*, he had merely succeeded to the original estates in Leicestershire.

No. 1.

Nov. 12, 1844.
The Marquis of
Hastings, &c.

But, even assuming all this to be so, it has been strenuously maintained by Lady Sophia, that this alienation of the Loudoun property came too late to save the late Marquis from the exclusion from Rowallan, which, she says, was a necessary and indefeasible consequence of the previous conjunction of both estates in the person of his mother; and, accordingly, the argument is carried the full length of maintaining, that if the mother had sold every acre of the Loudoun estates, and squandered the whole price, and they had never been bought back by any body, her eldest son, confessedly the *persona predilecta* of the Rowallan entail, would, notwithstanding, have been for ever excluded from that succession, and left, without any patrimony whatever, to the barren dignity of his earldom; while his sister (herself not very clearly bound to bear the name and arms of the family) succeeded to that only remaining property of both the parties to the contract.

I believe I need scarcely say, that I cannot accede to this very bold and startling proposition, which has not been countenanced, I think, by any one of the consulted Judges, (except, perhaps, by Lord Ivory,) and seems to me to receive no support from any part of the deed under consideration. Without going again into the reasons for that opinion, which are so forcibly stated by the Lord Justice-Clerk, Lord Wood, and Lord Cuninghame, I shall content myself with saying, that I think it too clear to admit of serious question, that the succession from which, in certain cases, the heirs of the marriage are to be excluded, is, in all cases, a succession to the individual last legally vested with the property; and that the only ground of that exclusion must be the fact that such heir, *alioquin successurus*, had himself at that time, or previously, succeeded also to the honours and estates of Loudoun. The *punctum temporis inspicendum* is, therefore, in all cases, that of the death of the last legal possessor of Rowallan, and no earlier period; and no exclusion can be fixed on any heir-presumptive, or any right of succession vested in any surrogated person, prior to that event; or established even then, except by showing that the heir, otherwise preferable, is at that moment vested, or entitled instantly to vest, himself with the honours and estate of Loudoun, under the circumstances specified in the Rowallan entail.

Any other construction of the deed would, as I think, be not only against any reasonable or conceivable intention of the parties to it, but, as I read it, inconsistent with its actual tenor. The Lord Justice-Clerk has well observed, that this instrument does nowhere set out, in distinct terms, the precise object for which these excluding clauses were inserted; and that we are thus left without a key, that is often of the greatest value in disclosing the true meaning of doubtful or disputable provisions. But though it is true that we have not here any formal statement of the precise object of the contracting parties, there can be no possible doubt as to what it substantially was: Nor, indeed, has any party disputed that it was, in certain specified cases, though not in all, to prevent or postpone the conjunction of the Rowallan and Loudoun successions. Though there may be difficulty, therefore, in determining what the specific cases are in which this exclusion is required, there can be none, I apprehend, in deciding that it can never be required, where there neither is, nor can possibly be, any such conjunction of succession; and this alone is, to my mind, conclusive of all this part of the question;

No. 1. if I am right in holding, that long before the succession to Rowallan opened to the late Marquis by the death of his mother, the estates of Loudoun had gone finally out of her family, and been onerously vested in a stranger to their blood—viz. the Earl of Moira—or rather the trustees and beneficiaries under the settlements of the deceased Earl of Huntingdon; and had, in fact, come to the late Marquis himself, not as a successor to the Loudoun family, but as one of these beneficiaries, and in no other character.

Nov. 12, 1844.
The Marquis of
Hastings, &c.

But, in reality, the words of these provisions of the entail are as much opposed to this strange construction of Lady Sophia's, as the plain object and reason of their insertion; since in the clause regulating the succession of the immediate issue of the marriage, while it is declared, that "if there be two sons of the present marriage; then the second son is to succeed to the estate of Rowallan;" it is expressly added, that this is only to take place "in case the eldest son shall succeed to the estate of Loudoun;" and it is immediately after this last provision, and with undoubted, if not exclusive, reference to it, that the generalizing clause, which has given rise to the whole controversy, is added, "declaring that the succession to Rowallan, in case any of the heirs of this marriage shall succeed to Loudoun, shall take place, as is above mentioned, in all time coming." If, then, an eldest son of the first generation was only to be excluded from Rowallan, even by a brother, in case he himself had actually succeeded to Loudoun, with what consistency can it be pretended that, in virtue merely of the general extension of the specific clauses to future generations, an eldest son who did not, and could not, succeed to Loudoun, should yet be excluded, and even by a sister?

It is said, indeed, that the original clause was applicable only to the event of the Loudoun succession opening, for the first time, to this eldest son of the first generation; and that it is not extended, in this respect, to the case of later descents. Now, I think it was with this respect mainly that it was so extended; and am unable to discover, in any part of the deed, the least warrant for this extraordinary limitation of its meaning. But the supposition is not only groundless and absurd in itself, but leads to what I think a still clearer view of the fallacy of the whole argument it is intended to support; it being manifest to my mind that the eldest son of the first generation could scarcely ever have been excluded from the Rowallan succession, if that of Loudoun had first come to the heirs of entail in his person; and that by far the most probable case for the second son ever getting Rowallan under this clause, was that of the father having previously taken Loudoun in his lifetime, and leaving that succession to his eldest son on his death. If the original parties to the marriage, Colonel James Campbell and Lady Jane Boyle, had both died, leaving two sons, before the Loudoun succession had at all opened to this branch of the family, I take it to be clear that the eldest son would indubitably have taken Rowallan, and held it unchallengeably for the whole period of his life, although he had afterwards succeeded to Loudoun also, on its first coming to any heir of Rowallan—the very case in which it seems to be maintained by Lady Sophia that he was most clearly to be excluded! This necessarily follows, indeed, from what is now admitted upon all hands, that there is no provision in the entail for forfeiting or denuding any heirs who may have once lawfully taken Rowallan—the qualifying clauses not importing any devolution of a right once vested to that estate, but only a proper exclusion from, or prevention of access to, one which would otherwise have so vested.

In the same way, it is clear that, if the eldest of these two sons had succeeded

No. 1.

Nov. 12, 1844.
The Marquis of
Hastings, &c.

to Rowallan in his father's lifetime, through his mother's predecease, his right to that estate would not have been in the least touched or impaired by his father having afterwards succeeded to Loudoun, and he himself taking that estate also, by succession, at his death. But if in all these cases the succession of the second son, even of the first generation, which seems so anxiously provided for, would plainly have been disappointed, notwithstanding that the eldest had regularly succeeded to Loudoun, is it possible to imagine that a second son (and much less a daughter) of a subsequent generation, should exclude an eldest son, for whom no Loudoun was left to be succeeded to?—merely because, at some time before or after his birth, his parent had so succeeded, but had afterwards sold and squandered the inheritance?

I have already put the case of the late Countess having sold Loudoun after the birth of her children, and given away the produce to strangers—which in truth was what she actually did—having sold or exchanged it for Lord Huntingdon's English estates, and then sold them, and given the whole price to the creditors of her husband. But it may bring out the view I am seeking to illustrate a little more clearly, if I now take the case of her having merely made a new settlement of Loudoun (as she had full power to do) on a different series of heirs. To bring the matter at once to a point, I shall suppose that she had had two sons, and no other children; and that, in this situation of her family, she had made an entail settling Loudoun on her second son and his issue; whom failing, on more distant relations—but to the utter exclusion of her eldest son and all his descendants. Would this second son, then, have taken Rowallan also at her death, and left nothing whatever but the honours to the eldest? If Lady Sophia's construction of the clause be the sound one, such must have been the consequence; since in that view the eldest must have been finally excluded, by his mother holding both estates after the birth of her two sons—whatever became of Loudoun (or was done with it) in her lifetime—which is said to be a consideration utterly irrelevant and immaterial, in any question relating to the succession of Rowallan only. I must ask, however, whether any more flagrant case of a *reductio ad absurdum* could well be imagined, than is made out by thus showing that, by a legitimate and unimpeachable application of the construction contended for—a clause confessedly devised for the sole purpose of preventing the conjunction of the estates—should thus necessitate that conjunction; with the additional absurdity of disturbing the primary destination to Rowallan, and displacing the heir of investiture—not only without a motive, and though the only condition of his exclusion had neither happened, nor was any longer possible—but when in reality the only way left to prevent the union of the two estates, was to leave him to take that to which he was preferably called by the express terms of that destination?

Upon this first ground alone, therefore, of the late Marquis not having succeeded to Loudoun in the sense of the Rowallan entail, I should have no difficulty in deciding in his favour; and if we were now sitting in a court of final resort, I should not be disposed to go further. But as we are not in such a court, and especially as several Judges of great authority have been of opinion that this is not a sound view of the question, it is evidently necessary that we should express our opinions on the other points also of the case; which involve questions, perhaps of greater difficulty, but at all events turning on more subtle views and distinctions.

Now, the first of these, in what strikes me as the natural arrangement, is this, Whether the provisions of exclusion in this entail of Rowallan have truly any ap-

No. 1. plication whatever to females succeeding under it to that estate? or to the descendants of such females? And I am of opinion that they have no such application.

Nov. 12, 1844.
The Marquis of
Hastings, &c.

To explain, clearly, however, the grounds of this opinion, it is necessary, I think, to premise, 1st, That there is no absolute or general provision in this entail, that the two estates shall never be held together—but only a declaration that certain persons, in certain circumstances, shall not be entitled so to hold them; and, 2d, That as there is a much larger class of persons primarily called as heirs of entail, so their right of succession, in their proper places, can only be taken away on their succeeding to Loudoun also, by showing that they come truly within the description of persons disqualified from holding both together; and that either by express nomination, or such plain reference as leaves no reasonable doubt as to the intention to include them. What I mean, in short, is, that there is no need that they should be expressly excepted from the provisions of exclusion; or that their general right of succession should be repeated, and saved, as it were, as often as these provisions are referred to. That right being once constituted, it will undoubtedly remain, unless there be reasonable evidence that it was intended to be taken away; and it is plainly enough, therefore, to entitle any one to take Rowallan, though already in possession of Loudoun, that he is in a condition to show, 1st, That he is distinctly called by the primary destination of the entail; and, 2d, That there is no provision in it by which he can be held to be excluded. There is no real dispute, I think, about these propositions:—And I may appear now to announce them with too much formality. But they are of vital importance to the view I am about to submit; and as long as they are borne in mind, I really do not see how that view can be rejected. Let us look then to the primary destination, and the import of the clauses of exclusion.

The first is clear and simple enough—the destination, in so far as concerns this question, being in reality a mere destination, 1st, to the heirs-male of the marriage; and, 2d, and expressly to the heirs-female, all in their legal order; and this, though somewhat redundantly expressed, is in reality the whole import of the destination to the issue of the marriage.

The clauses of exclusion again are constructed in this way:—There are precise and specific provisions for the two first generations of those heirs: And then there is a general clause, which may be held to mean, that the same rules shall be applied, under similar circumstances, to all after cases. Now, it so happens that the precise and pattern provisions are different for the two cases specified; and are both of a very limited and particular description. That for the first generation is merely, that if the eldest son of the marriage shall succeed to Loudoun, he shall be superseded in his succession to Rowallan by his younger brother, if he have one, but not by a sister; and there is confessedly nothing else in the deed to touch the original right of the immediate issue of the marriage to succeed to Rowallan. The eldest son might, therefore, take it in addition to Loudoun, if he had no younger brother, however many sisters he might have. And if there were no sons of the marriage at all, but a daughter, (or daughters only,) it seems equally clear, on the grounds already stated, and from the absence of any words of exclusion, that the eldest or only daughter would, in like manner, have taken both properties.

As to Lord Fullerton's novel, and, I will confess, to me very startling, suggestion—that the fee of Rowallan was actually meant to be kept in abeyance,

or to remain *hereditate jacente* of Lady Jane Boyle, in the event of her only son succeeding to Loudoun, and having himself no children—or rather, not having an only son and daughters at the time of her death—I can only say that it assumes a purpose and intention in the maker of this entail so extremely fantastical, and, to me at least, so inconceivable, as I could only be brought to admit on the compulsion of the most precise and unequivocal expression : While, in fact, it has nothing whatever to rest on but that very loose and unintelligible provision about managing and improving the rents—on which I shall have a remark or two to make in the sequel ; but on which I do not think I need say more at present, than that all the parties, as I understand them, and all the consulted Judges, have agreed that it does and can import no change or variation in the original destination of the fee, or affect in the least degree the rights of succession to that fee ; but provides only for some practical suspension or abridgement of the fiar's right to the rents, in certain states of his family. I rest in that as the broad and plain proposition, that no party distinctly called to the succession of Rowallan by the terms of the original destination, can ever be prevented from taking it except by direct and special exclusion : And therefore that, as the only son of the marriage is undoubtedly called to that succession first, and in preference to all the world, and certainly is in no way excluded except in the special case of his having a younger brother—I must hold that he, at all events, was entitled to hold both estates, at least as clearly as an only daughter must confessedly have done if the only issue of the marriage had been female : And that the succession to Rowallan, which, in certain events, is provided to the second son, or the daughter of such only son, clearly means the succession to that only son himself, and not a succession to his mother—to be left, it might be for centuries, in her *hereditas jacens*, and remaining in *pendente*, without one word of direction to that effect, or the support even of a trust—till, in the course of Providence, another only son should have two sons, or one son at least and a daughter. It would be easy, I think, to show that such a construction would give rise to inextricable puzzles in many probable conditions of the family, even in the two first generations ; but I forbear going further (for the present at least) into this enquiry, and shall leave my exposition of the provision for the first generation of heirs on this explanation I have now given.

The regulation for the second generation (the only other that is regulated) is still more minute and special. It is, in distinct terms, no more than this—that the eldest son of the only son of the marriage (succeeding to Loudoun) shall be excluded from Rowallan, either by a younger brother, or by a sister ; and this, again, is all that is expressly provided for this second—or, consequently, for any other generation. If such son, therefore, should have neither brothers nor sisters, he also plainly might take both properties, although he might have aunts procreated of the marriage, and called in another place to the succession ; and if the only issue of this only son of the second generation should be females, it follows, upon the principle already explained, that the eldest daughter and her issue might lawfully take and inherit both estates. Nay, so strangely are these clauses conceived, or so imperfectly expressed, that I see nothing in them that would prevent even an eldest son of either generation, who had been at one time actually and fairly excluded from Rowallan by his younger brother, from afterwards taking up that succession also, and holding it along with Loudoun, in the event of his said younger brother predeceasing him without issue. It might happen, that, in that

No. 1.

Nov. 12. 1844.

The Marquis of Hastings, &c.

No. 1.

Nov. 12, 1844.
The Marquis of
Hastings, &c.

event, the elder brother was the only surviving issue of the marriage; and, consequently, entitled to take without competition. But even if there were other issue, such as sisters in the first generation, or aunts in the second, I do not see how he could be prevented from taking preferably, on the predecease of his only brother—both as heir to that brother, and as the only remaining heir-male of the marriage, the whole of which class must, at all events, be exhausted before any female could inherit, except by special provision—there being, in point of fact, no more reason for excluding him now, on this second opening of the succession to him, when he is found in the condition of an only son without sisters, than would plainly have been insufficient for that purpose, if he had possessed that character at its first opening.

These, however, are probably but idle speculations; and I dwell too long, I fear, on what may be regarded as subtleties. The main thing, however, (and in this, I conceive, there is no subtlety,) is, that all the persons specially excluded in these leading or pattern clauses, are heirs-male of the marriage—and that there is nowhere within their four corners any thing that either expresses, or even looks like an exclusion of heirs-female, in the event of their succeeding also to Loudoun—or in any other event. And, therefore, if it be clear that the late Marquis was truly an heir-female, there would seem to be no ground on which his exclusion could be maintained.

But that he was a proper heir-female of the marriage, and is distinctly called to the succession in that, and in no other character, is manifest, I think, from the plain terms of the original destination to which I have already referred. I understand this, indeed, to be admitted by Lord Moncreiff; though, I think, he mistakes the class of heirs-female to which he belongs, and is in a still graver error when he supposes that he might also have claimed as heir-male of the body of the late Countess—a description of persons nowhere mentioned or recognized in any part of the destination; and to clear this, in passing, it may be right to refer shortly to the specific provisions. The persons first called are “the heirs male of the marriage, and the heirs-male of their bodies,” which is just the heirs-male of the marriage simply; and under this primary destination, it is plain that no other descendants of the marriage could possibly succeed till all male persons connected with the original spouses, through males only, were exhausted. The second express destination is, to “the heirs-female of the bodies of the heirs-male of the marriage;” and I take it to be incontrovertibly clear that the late Marquis belonged to this class, and that it was under this description that he was called to the succession, he being the son of a daughter of the first (and, in fact, only) heir-male of the marriage, and consequently the undoubted heir-female of the body of that heir-male. The last substitution is, to “the heirs-female” (or daughters) of Lady Jane Boyle by the same marriage, “and the heirs-male or female of their bodies;” which means, I think, merely their children. But, at all events, I hold it to be plain that it was not under this, but the previous substitution, that the Marquis was called; inasmuch as, though undoubtedly an heir-female of Lady Jane, as well as of her son, the appropriate character under which he is called is as the heir-female of that heir-male; for which description of persons, as the preferable class of heirs-female at common law, there is a prior and separate substitution, which contains nothing beyond that description, and makes no mention of any secondary or subordinate class of heirs-male. In any view of the matter, however, I think I may now assume that the Marquis was truly an heir-female of the marriage, or of James Mure

Campbell, the first heir-male, and could only take the succession of Rowallan (like his mother before him) after all the heirs-male of that marriage, not expressly excluded in certain cases, were run out and exhausted.

No. 1.

Nov. 12, 1844.
The Marquis of
Hastings, &c.

But on this view, I am at a loss to discover any grounds on which his exclusion, under the original or leading clauses, could possibly be maintained. I am fully aware, however, that it has been attempted to supplement this defect in the original excluding clauses, by referring to that by which they are extended to future generations; in consequence of which, it seems to be supposed that the terms of exclusion have been in some way enlarged, so as to comprehend cases and persons not originally within their operation. But as it is admitted that the clause referred to merely generalizes, or continues to future descents, the identical provisions, and no others, enacted for the two first, it is not easy for me to conceive how such a proposition can be maintained. But let us look a little more closely to the words of this clause. They are, that "in case any of the heirs of this marriage shall succeed to Loudoun, the succession to Rowallan shall take place according as is above mentioned, in all time coming." The important words are, "according as is above mentioned." But there are others that also call for observation. In the first place, the provision is not, as seems sometimes to be assumed, that there shall be an exclusion from Rowallan in case any of the heirs shall also succeed to Loudoun; but only that, in that event, the succession to Rowallan "shall be as above provided." That is, some of the heirs so succeeding shall be excluded, and some allowed to take both properties. In the next place, I cannot but think it clear that the words, "as is above mentioned," do not refer merely to the immediately preceding provisions as to the two first generations, but to the whole antecedent parts of the deed which relate to the succession to Rowallan; and particularly to the primary destination, of which these special provisions are truly no more than limited and contingent qualifications: And with reference to the whole together, the clause merely imports that, when any of the heirs succeed to Loudoun, effect shall be given, in parallel cases, to these limited and contingent qualifications, by which some of these heirs, as we have already seen, are to be excluded, but others allowed to hold both successions together; and then, is it possible to doubt that those who are to be excluded, and those who are not, must be the same, "in all time coming," with those who were so dealt with in the first two generations—the same, I mean, in circumstances and family relation, though not of course as individuals? and consequently that the whole question, for any generation, is truly, What description and manner of persons were to be excluded if they succeeded to Loudoun in the two first descents, and who were not to be excluded though so succeeding.

I do not perceive, indeed, that this as a general proposition is disputed by any of the parties, though it does appear to me, when rightly understood, to be conclusive of the whole question; for can it be doubted, that by these leading clauses the exclusion is confined, 1st, To sons and grandsons of the marriage—that is, to heirs-male succeeding to Loudoun; 2d, Only to such heirs-male, if they have younger brothers in some cases, and brothers or sisters in others; 3d, That it does not extend, therefore, even to heirs-male, if they happen to be only sons, in certain cases, and in no case if they are only children; and, 4th, That it does in no case extend to females, or to their descendants, called as heirs-female? If all this be clear as to the two first generations, I am unable to conceive that there

No. 1. should be any difficulty in applying the same exclusions, and exemptions from exclusion, to the same description of persons in all that come after. Nor, indeed, **Nov. 12, 1844.** does this, to a certain extent, appear to be disputed. I do not understand, at least, **The Marquis of Hastings, &c.** that any judge has distinctly questioned the right of an only child, whether male or female, to succeed, in any generation, to both properties—or even that of a female without brothers, although she may have sisters, one or more—and I have also looked in vain through all the opinions for any attempt to distinguish between the case of the actual heirs-female being of the one sex or of the other. All these classes of persons, it may be observed—only sons, only children, and women without brothers—are privileged from exclusion, and entitled to take Rowallan through all generations, though succeeding also to Loudoun, upon no other ground than this, that they are called to the former succession by the clear words of the primary destination, and not removed from it by any words applicable to them in the leading clauses of exclusion. But is this not equally true of all heirs-female of the masculine, as much as of the feminine gender? Where are the words, in these original clauses, that remove them from the places to which they are confessedly called, and called expressly and exclusively by the technical and generic denomination of “heirs-female of the marriage,” in the primary destination? and, if not struck at by these leading clauses, how can they be affected by one which merely continues them, and renders their express provisions operative, but under the same original exceptions, for all future generations?

Neither am I in the least moved by what has been so much pressed as to the effect of the words in this generalizing clause, that the succession shall be as above-mentioned, “in case any of the heirs of the marriage shall succeed to Loudoun,” &c.; or the assumption that the word *any*, as here used, must include female as well as male heirs. Though perfectly satisfied that it was not used in this case for the purpose of including females, or with any special reference to them, I admit that it might comprehend them. But I do not see that this invalidates or affects, in the slightest degree, the view on which I am now insisting. I assume the provision to be, that when any of the heirs of the marriage, male or female, succeeded to Loudoun in any future generation, the Rowallan succession should go as provided by the primary destination, and the limited and specific exclusions, applied in terms, and in the first instance, to the two first generations only. But how does this vary or touch the question, as I have already considered it? which is, and must always be, What are the circumstances, and what the description of persons, that are to be excluded or exempted from exclusion respectively, in those future generations? And the answer, in like manner, is, and must always be, The very same circumstances and descriptions of persons which are so directly dealt with in the two first, by the terms of the original clauses; and these I have already endeavoured, as far as possible, to define.

Consider only upon how very shallow and narrow a ground the mere vagueness or comprehensive quality of the words “any heirs,” in the preamble or recital of this clause, is maintained to import an enlargement of its substance and tenor; or rather, as I think, a plain contradiction to its precise declarations. If no female heirs were ever to be excluded, how does it happen, they say, that in specifying the occasions on which exclusions are to be looked after, an expression is used which may import that the succession of a female heir to Loudoun is one of these occasions? The answer is, That there is nothing whatever to show that such a succession was specially or really in the view of those who used that general ex-

Nov. 19, 1844.
The Marquis of
Hastings, &c.

pression; but that, at all events, the sequel and context of the clause demonstrate that there was no thought of enlarging or varying the original terms of exclusion. I have already observed, that the succession, even of male heirs, to Loudoun, is not declared always, or even generally, to import their exclusion from Rowallan, but truly and substantially only to be an occasion on which it is to be considered whether they are to be so excluded or not; and this is to be determined by a comparison of the place they hold in the family, and the circumstances under which they have succeeded, with the condition, in these respects, of the persons excluded or not excluded, by the clauses applicable to the two first generations. If the words of the recital, therefore, had been, not in case of "any heirs" succeeding, &c. generally, but of "any male heirs" so succeeding, as it would not have followed that even such heirs would have been excluded if they had happened to be only sons, or only children, or the only surviving issue of the marriage, what reason can there be for holding that the mere use of a general term, which may include heirs-female, should imply an absolute exclusion of all such heirs (succeeding to Loudoun,) not only not "as is above mentioned," but in flagrant contradiction to all that was originally provided? The true answer to this cavil, therefore—and it is really no more—is, that this general phrase occurs only in specifying the occasions on which the conditions of exclusion are to be looked into; and is immediately followed by an express and substantive provision, that these are to be applied, not according to any new or broader construction of their original terms, but precisely as they had been laid down for the first two generations—"as is above mentioned," and not otherwise. Every thing, therefore, necessarily depends, and falls back, on the question of, What was the true import and effect of the original clauses—what description of persons did they exclude—and what did they admit to the succession of Rowallan, although also in possession of Loudoun; and if heirs-female were left free (as I think they clearly were) to take both estates by these original clauses, I find it impossible to hold that they were excluded by any other.

There is but one other suggestion on this part of the case, on which, though it has been but slightly noticed by the parties, I think it right, before leaving it, to say a word or two. Though I think it clear that there is no exclusion of heirs-female of the marriage, it may yet be said that there is a provision for the exclusion of the son of a female heir of Rowallan, (I mean Lady Jane Boyle,) if he succeed to Loudoun, and have a younger brother; and that this provision, being among those "above mentioned," might have warranted the exclusion of the late Marquis, though succeeding to an heir-female, in the event of his having had a younger brother. As, in point of fact, he had no brother, it is not, perhaps, worth while to go at large into the answer to this suggestion; but the sum of it is in these considerations: 1st, That Lady Jane Boyle was not an heir of the marriage at all, but the stirps merely, from whom all these heirs, male or female, were afterwards to spring; while it is certain that it is only against heirs of the marriage that any of the exclusions are directed. 2d, That she never could have succeeded to Loudoun, and therefore never could have lost Rowallan, either for herself or her issue, under any of these clauses. 3d, That, in reality, she was not an heir under the Rowallan entail at all; but the contemplated, and, as it turned out, the actual institute in that entail, and took up the estate in that character accordingly, on the expiration of the mere life interest of her parents; it being thus, only after her death, that the series and distinction of heirs, male and female, either of the entail or the marriage, could possibly begin. Her eldest son, there-

No. 1.

Nov. 12, 1844.
The Marquis of
Hastings, &c.

fore, was not an heir-female, like the late Marquis, in any sense ; but, on the contrary, the first (and, as it turned out, the only) heir-male of the marriage, expressly called to the succession by that, and no other, designation ; and therefore affording no ground of analogy, by the terms of his special exclusion, in certain events, for the case of a proper heir-female, whose condition was parallel to his in no other respect than this—that his mother also was a woman !

The only remaining questions are, in my view of the case, of subordinate importance, and, at all events, admit of a much shorter discussion.

The first of them is, Whether the whole provisions of exclusion were not meant, in all cases, to cease and determine after the running out of two generations subsequent to the Loudoun succession actually opening to heirs of the Rowallan entail ; and whether the actual conjunction of the two estates, for that period, without any violation of these provisions, does not import their final extinction ? Undoubtedly these provisions, as they actually stand, apply only to the two first generations ; and the whole question of their subsistence *ultra*, depends therefore on the true meaning and effect of the generalizing clause to which (for another purpose) I have just been adverting at so much length. But I now return to it only as bearing on the question last stated ; and with that respect, I must say that, after great consideration, I have come to be pretty much satisfied that its true object and effect was merely to provide for keeping the estates apart (in the circumstances originally specified) for the same limited period of two generations, in the event of the Loudoun succession not coming to any of the heirs of the marriage till after the two first generations of these heirs had elapsed : But that if, after such succession had actually opened, at whatever time that might happen, the two estates had yet been allowed, without violation of the entail, to be held together for two successive generations, the whole conditions of exclusion should be held to be worked off and so pit, and no future disjunction of them allowed ; the generalizing clause not truly warranting any such disjunction, after a lawful union had subsisted for such a period, but only providing that the same limited chance or opportunity for keeping them separate, which was given to the two first generations, should be competent whenever the Loudoun succession first came to the heirs of the marriage, though this should not happen till these first generations had expired.

The reasons for this construction, I think, are pretty obvious ; and I shall state but a part of them. In the first place, it seems most in accordance with the substantive directory, to apply to future generations, in similar circumstances, the rules precisely laid down only for the two first ; these being subjected to limitations (and to different limitations) for two descents only after the Loudoun succession opened to the heirs of Rowallan ; and no provision whatever being made, any where, for a disjunction of the properties, if once lawfully united for these generations. In the second place, this construction is strictly analogous, in its policy and general character, to that specialty in the original provisions, by which an heir, once lawfully taking both successions, was entitled to retain them for his life, though circumstances might supervene during his possession, which, if they had happened earlier, would have effected his exclusion ; for which very reason, as I think, and no other, the chance of giving effect, and fair play, as it were, to such exclusion, is continued for one generation more, but no further. It is precisely parallel to this, to put an end to the exclusion altogether, if there are no legal means for effecting it, even upon this second opportunity. In the third

place, the moral or rational reasons for such a limitation of the exclusion are very strong. While the two estates were still held apart, or only united for the remainder of a life during which the specific grounds for having kept them apart had actually emerged, it might naturally appear desirable, to one at least of the contracting parties, that they should, in certain states of the family, be held by separate members of it; and it probably was thought most likely that a permanent separation of them might be effected within two generations after the succession to both had first opened to the same persons. But if, for all that time, they had been lawfully united, and the smaller property of Rowallan thus merged in and consolidated, as it were, with Loudoun, and the owners of that estate, and the accompanying honours, accustomed to reckon it as among the settled means for supporting their dignity, it might reasonably be thought harsh to enforce a disjunction which had ceased to be thought of, it might be, for the better part of a century.

No. 1.

Nov. 12, 1844.
The Marquis of
Hastings, &c.

If such a disjunction, in short, had been contemplated, I cannot but think that it would have been distinctly provided for; and that the preventive provisions—for they really are no more—would neither have been qualified by so many exceptions, nor laid directly upon no more than two generations; while the whole words and object of the generalizing clause will, in every view of it, be abundantly satisfied, by holding it to provide, not for the revival of exclusions already *separatim* by the lapse of two generations, after both successions had come to the same individual; but only for allowing them to have the same chance of operating, in the event of the said two successions not coinciding till after these first generations were exhausted.

In this view, it seems not quite immaterial to observe, that the words of this generalizing clause are not—that the rule of succession there referred to shall be applied as often as any of the heirs of the marriage shall succeed to Loudoun, but only “in case any of the said heirs shall so succeed,” being the very form of expression employed in the context to denote the first opening of the Loudoun estates to the heirs of the marriage—the youngest immediate son being to take Rowallan, “in case the eldest shall succeed to Loudoun:” and it is obviously a phrase much better fitted to express a new and single event in the course of the entailed succession, than the mere recurrence of one that might have happened, and produced (*pro tanto*, at least) all its appointed effects at some prior time.

If this, however, be the true meaning of all these clauses taken together, it is clear that their whole virtue was expended, and the occasions for their application fully passed away, before the succession to Rowallan opened to the late Marquis by the death of his mother in 1840. For the succession of Loudoun did come to the heirs of Rowallan, in the person of James Mure Campbell, so long ago as 1782; and he, being the only son (and, in fact, the only child) of the original marriage, held both unimpeachably for the remainder of his life, and left them at his death to the late Marchioness his daughter; who again, in her character, either of an only child or of an heir-female, was doubly entitled to maintain a like unchallengeable possession of both till her death, of the date above mentioned. But the succession to both estates having thus coincided, and the heirs of Rowallan having actually succeeded to Loudoun upwards of sixty years ago, and held legal possession of both properties for the two entire generations, during which alone they were liable to a contingent exclusion, there was no longer room, on

No. 1. the succession of the late Marquis, for the operation of the generalizing clause ;
 Nov. 12, 1844. which I conceive to have been intended only for the case of there having been no
 The Marquis of such coincidence of rights, or legal conjunction of properties, till after these gene-
 Hastings, &c. rations were exhausted.

I have certainly come to have the strongest conviction that this, and no more, was the true meaning, object, and effect of the whole of these clauses taken together ; though I think it right to add, that I am fully aware of the uncertainty that must attend any construction of a provision apparently so capriciously conceived, and so very imperfectly expressed ; and that I have, consequently, less confidence in what I have last addressed to your Lordships, than in any of the other views of the case I have ventured to submit.

Upon the last question of all, however, I have no such difficulty. It is, as I have already intimated, Whether, supposing all the preceding views to be erroneous—holding that the late Marquis did succeed to Loudoun in the sense of the entail—that the excluding clauses applied to heirs-female as well as heirs-male, and might be revived and called into operation after the estates had been lawfully united for centuries, they are yet so framed and expressed as to import his exclusion ? And, even upon these assumptions, I humbly conceive that they are not ; and shall explain, in a single sentence, the grounds of this opinion.

The terms of exclusion, as I have already observed, are materially different for the first and for the second generation of heirs of the marriage. In the first, the eldest son (taking Loudoun) is to be excluded only by a brother. In the second, he may be so excluded by either brother or sister. It is not easy, at first sight, to understand why this distinction should have been made ; but, in enquiring after its probable cause, it is natural, and indeed necessary, to consider whether there was any material difference in the way in which these two excluded persons were respectively connected with the family, and in the description given in the deed itself of the nature of their relation ; and here we shall find, that the eldest son of the first generation is expressly described as the heir-male and successor of a female—that is, of Lady Jane Boyle, the institute in the deed ; while the heir who might be excluded in the second is still more specifically described as the heir-male, or eldest son of an only son—or, at all events, the heir and successor of a male ; and, as there is no particular in which the condition of these parties is in any respect different, so it seems reasonable to refer the difference, in the extent of their liability to exclusion, to this original distinction in their position in the family. Upon this view of the matter, however, the exclusion now contended for will not apply to the late Marquis, who, like James Mure Campbell, the first heir of the marriage, was the heir and successor of a female, and had no younger brother. The generalizing clause undoubtedly refers to both these original provisions, and stands, indeed, in immediate contact with that which regulates the rights of the first generation ; and therefore, when the question comes to be, which of them (if either) was truly applicable to the case of the late Marquis ? I have no difficulty in answering, that it must be that which expressly relates to the son of a female, who, though he might have been excluded by a brother, could in no case be obliged to give way to a sister.

If the decision is ultimately in favour of the late Marquis, upon all or any of the three first questions, it will be equally available in favour of the present Lord, and all future heirs of the marriage ; as importing that the clauses of exclusion

are now all extinguished, and no longer applicable to the condition of the family, or the rights of these heirs. But if the exemption of the late Marquis should finally be thought to rest only on the view involved in the last question, I apprehend that the right of the present Marquis might be excluded, in a proper action, by that of his younger brother, Lord Henry, born two years after the death of the late Marchioness, and after most of the present processes had been instituted. But as the whole of these processes relate, as I understand them, only to the question of who was entitled to succeed to Rowallan on the death of the Marchioness in 1840, I apprehend that no question is now raised, or competent to be raised under them, as to the merits of any competition between Lord Henry and his brother, the present Marquis, as to the right of succession to the late lord. The claim hitherto maintained by Lord Henry, is to the character of successor to the late Marchioness; and amounts in fact to the assertion of a right preferable to his father's:—as to which I shall only say, that I think it more untenable even than that of Lady Sophia; and that, as he was not in existence when that succession opened, any right which his previous existence might have, prevented his father from acquiring, (though I think there was no such right,) must, as things then stood, have vested in the father, and remained so vested till the period of his death; when the only question could be, who was entitled to succeed him in the right to Rowallan? a question which, as I have just said, I do not think competent to entertain under the present proceedings.

I have now delivered my opinion, it will be observed, without any reference to the clause in the entail about “managing and improving the rents” in certain specified cases; and I have done this, principally because I am myself satisfied that there is really no contingency between the question now before us, which is merely, who was entitled to succeed to the fee of Rowallan on the death of the late Marchioness, and that which may be afterwards raised, under this last-mentioned clause, was to the right of such person to enjoy the rents of that property free from any interference, or his liability to have them “managed and improved” at the sight of other persons. But I also think that, in thus declining to enter into any consideration of the import of this clause, as irrelevant to the present discussion, I am not only following the example of the majority of the consulted Judges, but really acting up to the views of the parties themselves, who have all (as I think) professed to desire no present judgment in regard to it; though, no doubt, under an unlucky reservation of a right to refer to it, in so far as it may affect the construction of the clauses which do regulate the succession. But it is manifestly impossible, I think, to act upon this reservation without at once abandoning the pretence of not going fully into a discussion of the merits and meaning of this clause about rents; since it is obviously impracticable to say any thing as to its effect on the construction of the other clauses, till it is settled what is truly its own meaning, object, and effect? And, accordingly, I find that a very definite and precise meaning is, in fact, assumed, and assigned to it by all those, whether judges or parties, who have hitherto referred to it as elucidating the proper clauses of exclusion. For my own part, as I have already said, I should much prefer discharging it entirely from our present consideration. But if I am not permitted to do this—and after what has fallen from some of your Lordships, I do not know that such a course would be safe or proper—then I also must be allowed to give my construction of it; and to explain how it appears to me to bear (or not to bear) on the question properly before us: And upon this I have come to a pretty

No. 1.

Nov. 12, 1844.
The Marquis of
Hastings, &c.

No. 1. clear opinion, that, upon the only reasonable construction I can put on it, it does not in the least interfere with any of the views I have already submitted as to the other parts of the deed.

Nov. 12, 1844.
The Marquis of
Hastings, &c.

My own impression, however, I ought perhaps to premise, certainly is, that it is so obscurely and absurdly framed as really to admit of no clear or perfectly satisfactory interpretation; and is, therefore, entitled to no practical effect. But if a meaning must necessarily be put on it, on the principle of giving effect, if possible, to every word in the deed, I think one or other of the two following must be adopted:—and it will at once be seen why I thus put them alternatively.

If “managing and improving the rents” is held to mean sequestrating and accumulating them at interest, for a longer or shorter time, (which I am far from thinking either certain or probable,) then I am of opinion that this was only meant to be done when the original heir of the investiture had been actually excluded from the succession—and that the provision was intended merely for the cases where the surrogated heir was under some incapacity, as from defect of age, mental infirmity, absence in a far country &c., to take charge of the property for himself; which construction would be only more fully brought out by reading and understanding the words directing this management to take place, “so soon as the son of this marriage, or others aforesaid, shall accept of the honours and estate of Loudoun,” as if they had been immediately followed up by these words—“in such circumstances as to be excluded from the succession to Rowallan, according as is above provided”—which I take to have been the true meaning and understanding of the parties.

But if, on the other hand, it should be held that the mere succession to Loudoun, though not importing an exclusion from the fee of Rowallan, under any of the preceding clauses, was yet to subject the rents to “management and improvement” at sight of the persons named, then I am of opinion that such managing and improving did not, and could not, mean a sequestration and accumulation of these rents, so as to deprive the heir, legally possessing and in se in the property, from the enjoyment of its ordinary profits; but only such equitable and proper administration of them as might be necessary to protect the fair rights of any surrogated heir who might, on his death, be entitled to exclude his natural heir (on his also taking Loudoun) from the fee of Rowallan; and that the provision was truly meant only to guard against long leases at elusory rents, granted on fines or grassums, for the lessor’s own benefit—or leases granted to the heir of Loudoun, or other favourite, at the like low and inadequate rents—or any other such devices by which the fair interests of an excluding heir, ultimately taking up the succession under the preceding clauses, might be forestalled or prejudiced.

Having these opinions on a point which has never been properly argued before us, it is enough perhaps that I should thus indicate them; and I certainly do not mean now to go into any detail of the reasons on which they are founded—though a word or two of explanation may be necessary.

If managing and improving the rents really means sequestrating and accumulating them, then I think some limitation of the general words describing the occasions on which this is to be done, is absolutely necessary to reconcile that provision with the other parts of the deed. The clause containing it is manifestly a relative and subsidiary clause, and must be read in connexion, and construed in consistency with the previous clauses of exclusion. As it stands, however, it would import that the mere succession to Loudoun of any heir of the marriage (or, indeed, any

heir of entail) should be followed by such a sequestration of the rents of Rowallan, without any consideration of such heir being an only child, or being without children, or brothers or sisters, or even of his being the last and only remaining issue of the marriage. And it also necessarily imports that this accumulation is to take place, as well as when there is no second brother, or son, or sister, in existence at the time of this succession, as when there are such heirs expectant; and, consequently, that the heir in the fee is to be finally deprived of the rents for his whole life, and obliged to let them be accumulated for the benefit of some unknown and contingent party, who may not be a descendant of the marriage at all. In the case that actually happened, there was but one child of the marriage, who happened to be a son, and he succeeded late in life to Loudoun; but suppose that, instead of a son, there had been only a daughter, (as there was in the next generation,) and that she too succeeded to Loudoun, unmarried, at the age of seventy, and, consequently, after all possibility of issue was extinct. If the words of the clause are to take effect without limitation, the rents of Rowallan, in which she had been in debt for years, must have been taken from her "so soon as she accepted of the honours and estate of Loudoun," and accumulated, not for the benefit of any other heirs of the marriage, of whom there could then be none, but of other remote substitutes of entail; for whom it is nothing less than a contradiction in terms to say, that any of the heirs of the marriage were ever to be deprived either of the fee or the rents of Rowallan.

I hold it to be impossible, therefore, to read this description of the occasions on which the rents were to be sequestrated, without some limitation; and I must say, that that which I have suggested appears to me by much the most reasonable and probable of any.

To say, as Lady Sophia appears to do, that it might be limited to the case of the heir of possession having a second brother, or more children than one at the time of his succession to Loudoun; that is, to the case where he would himself have been excluded if Loudoun had come to him before being vested with Rowallan, appears to me to be not only without the least warrant or countenance from the deed, but to be even more improbable, and, I must say, absurd, than to suppose it chiefly intended for the case of there being no such subsidiary heirs in existence, but in *spe* only. In the latter case, it is conceivable that there might be a dim and confused notion of providing for their contingent succession. But if there were persons already in existence, to whom the benefit of what was at all events to be taken from the heir in the fee might be immediately made over, for what intelligible or conceivable purpose could it be provided that the rents were to go—neither to the fiar nor to the party for whose sake alone he was deprived of them—but to be accumulated and lie dormant for the whole life of the former, who might, after all, outlive the latter and all the other heirs of the marriage, and thus leave the board to go in the end to utter strangers to his family? But the absurdity, it appears to me, is still deeper and more radical; since, if the accumulation was only to take place when there were parties who, if born a little sooner, would have precluded the necessity of it by taking the fee, how should it not have been provided that, upon their emergence, the actual fiar should be bound to decede and devolve the whole property upon them? It could not be from any tenderness to the actual fiar that this ordinary and familiar provision was omitted; for, in point of fact, he is put in a much worse position by this construction than

No. 1.

Nov. 12, 1844.
The Marquis of
Hastings, &c.

No. 1. if he had been subjected to such a direct clause of devolution. For he is to be denuded of all substantial interest in the property, and left in the strange, anomalous, and degrading condition of a sole and undivested fiar, whose act is necessary for every inputting or outputting of a tenant, but who is bound to exercise all such acts, without the least benefit to himself, at the dictation of a dozen of managers, who are not even trustees, and for the future and contingent benefit of persons who, as well as himself, may be starving for forty years in consequence of this preposterous accumulation.

Nov. 12, 1844.
The Marquis of
Hastings, &c.

I do say, therefore, that this limitation of the general words of the clause is wholly inadmissible; and as it is scarcely denied that they must receive some limitation, I conceive that none is so reasonable, or half so consonant with the whole of the antecedent provisions, as that which I have already suggested.

Upon the other alternative view, that if there is to be absolutely no limitation, the words "managing and improving the rents" cannot possibly mean sequestering and stocking them out for an indefinite period, and for the benefit of uncertain persons—it is not necessary to add much. Provisions for withholding and accumulating rents, and even for long periods, are common enough in our conveyancing; but I do not imagine that it ever before entered into the mind of any conveyancer, or even of any unskilled party, to think of effectuating such a purpose by a direction merely to have certain rents managed and improved. The Thelluson case in England, and those of Strathmore, Fife, and others among ourselves, are striking and familiar illustrations of the way in which an object of this kind is every day accomplished; and I confess that I do not understand how it could ever be made effectual without a constitution of trust, and an assignation, at least, of mails and duties, if not a disposition of the fee; or, at all events, an obligation directly imposed on the heir of entail under the usual penalties for contravention, of none of which is there a vestige in the clause now in question. But upon the mere question of intention, I find it difficult, if not impossible to believe that any rational person, acquainted with the ordinary meaning of words, and really intending that the rents of his estate should, in certain events, be withheld from the heir in the fee, and accumulated for the use of some other person, should think he had effectuated this intention by a mere declaration that the rents should, in certain cases, be managed and improved at the sight of certain neighbours and friends of the family. I cannot, therefore, on the assumption now made, give such effect to these words; and I think that they will be best satisfied, as I am sure their natural and ordinary meaning will be best given effect to, by the construction I have already suggested; though I do not pretend to say that they are very apt or proper words, in the circumstances, to express that, or indeed any other meaning. On the whole, however, I am satisfied that there is nothing in the clause now in question (on any construction of it) at all to disturb the views I have already expressed as to the right of the late Marquis to be served proper successor to the late Marchioness, his mother, in this estate of Rowallan.

THE COURT pronounced the following interlocutor:—"In conformity with the opinion of the majority of the whole Judges, Find that the deceased George Marquis of Hastings was entitled to succeed to, and complete feudal titles to the estate of Rowallan at the death of his mother, the late Countess Marchioness, as heir of tailie under the Rowallan entail, and

No. 1.

Nov. 12, 1844.
The Marquis of
Hastings, &c.

that his right was not excluded by the clause of exclusion or devolution in the said entail, in terms of the first declaratory conclusion of the summons at the instance of the late Marquis;* and in respect thereof, find that the present Marquis of Hastings, the eldest son of the late Marquis, is now entitled to succeed to, and possess the estate of Rowallan as nearest and lawful heir of tailzie and provision to his father, and has the sole right and title to the said estate: And, *separatim*, Find that the clause of exclusion or devolution, according to its sound construction, did not apply to, or affect the late Marquis, and did not exclude him from the succession to the said estate of Rowallan: Therefore, in the action originally raised in the name of the late Marquis, and now insisted in by the present Marquis, decern and declare to the effect foresaid, in terms of the first and fourth conclusions of the summons,† and repel the whole defences of all the defenders thereto: And in the counter actions at the instance of Lady Sophia Hastings, Lord Henry Hastings, and Lady Edith Hastings, respectively,

* This conclusion was in these terms:—"It ought and should be found and declared, by decree of the Lords of our Council and Session, first, that in virtue of the Acts of Parliament before mentioned, (relative to the substitution of Loudoun for the English estates,) and in part recited, and deeds of entail executed in fulfilment thereof, and titles completed thereupon in the person of the pursuer's father, under which the pursuer, on his father's death, obtained right to, and took the said lands and estate of Loudoun in manner before mentioned, the pursuer has not succeeded to the said lands and estate under any sense whatever of the term succession, much less in the sense contemplated by the clause in the said contract matrimonial and tailzie of Rowallan, hereinbefore specially set forth and referred to; and that the said clause cannot apply to the foresaid transaction right and title, by which the said estate of Loudoun was settled on the pursuer, and by which he has right to the same, by force and in fulfilment of the terms of the said Acts of Parliament, and in satisfaction of the pursuer's rights under the indenture and last will and testament therein set forth; and in lieu of, and as the serious consideration for, his vested interest in the English estates, to which, under the deeds of the said Francis Earl of Huntingdon, he had right not by succession, but by purchase, in the same manner as if they had been bought with his own monies; as also, that the said clause does not declare any devolution, or change of succession, against the heirs of the said marriage, in respect merely of their succession to the honours of Loudoun; and consequently, that the said clause has no application to, and does not affect the pursuer, or prejudice in any way his right to succeed to, possess, and enjoy the said lands and barony of Rowallan, as nearest and lawful heir of tailzie and provision to the said deceased Flora Mure, Marchioness of Hastings, Countess of Loudoun, his mother, under the destination of heirs contained in the said contract and tailzie, and found by his said retoured service; and that the said clause is wholly superseded and extinguished."

† The fourth conclusion was in these terms:—"It ought and should be further found and declared, by decree foresaid, that the title completed as before mentioned, in the person of the pursuer, to the lands and barony of Rowallan, as the nearest and lawful heir of tailzie and provision to his said deceased mother,* is the sole good and undoubted, and is a legal, unchallengeable, and indefeasible title thereto; and that the pursuer is entitled, by virtue thereof, to enter to, possess, and enjoy the said lands and barony of Rowallan, and the rents and duties thereof, agreeably to the terms and conditions of the same, as freely, amply, and beneficially, as any heir of entail called by the said destination, and entered and infeft therein, could do."

* The Marquis made up this title in May 1840.

No. 1.

Nov. 12, 1844.
Cameron v.
Anderson.

sustain the defences of the late Marquis of Hastings, and assoilzie the present Marquis of Hastings from the conclusions of all these counter actions: And in respect of the agreement entered into between the late Marquis and the other parties to the cause, find it unnecessary to pronounce any judgment on the question of expenses, and decern."

HUNTER BLAIR and COWAN, W.S.—PATRICK IRVINE, W.S.—DALMAHOY and WOOD, W.S.—
M. N. MACDONALD, W.S.—Agents.

No. 2.

REV. ROBERT CAMERON, (Anderson's Trustee,) Nominal Raiser.—
Penney—Moncreiff.
MARGARET ANDERSON and OTHERS, Claimants.—*Rutherford—
Macfarlane.*

Trust—Expenses—Legacy—Testament—Factor.—1. In the administration of a testamentary trust, the trustee made payment to certain of the special legatees, and also to the residuary legatees, of part of their provisions under the settlement; a special legatee, who had not been paid to the same extent as the others, brought an action for the amount of her provisions; this action the trustee resisted, on the ground that, till the truster's debts were paid, there could be no claim for a legacy; eventually, however, he agreed to pay her rateably with the others, and to pay her expenses of process. In a question, whether the trustee was entitled to state the expense of this action against the trust estate, or whether he was personally liable therefor,—Circumstances in which held, that he could not so state it, as in a question with the legatee, pursuer of the action, but that having acted in bona fide, he was entitled to do so, as with the other special and the residuary legatees, it being understood that, if there were funds to pay the special legatees in full, and also a residue, the expenses would fall to be paid out of the residuary fund. 2. A trustee, who, it was declared, should not be liable for omissions or neglect of diligence, but only for his own intromissions, held not liable for arrears of rent caused by the want of due care, and by failure to do diligence on the part of the factor on the trust estate.

Process—Accountant's Report.—Observed, that a remit to an accountant is not of the character of a quasi reference, but that parties are entitled to object to all grounds on which he forms his opinion.

Nov. 12, 1844.

2D DIVISION.
Lord Ivory.
T.

THE late John Anderson, writer in Glasgow, died in May 1826, leaving a trust-disposition and settlement for the following purposes:—1st, Payment of the testator's debts, and sick-bed and funeral charges. 2d, Payment of an annuity of £30 to his sister, Margaret Anderson, and, after her death, to his sister, Janet Anderson, beginning the first term's payment at the first term of Whitsunday or Martinmas after his death. 3d, Payment of an annuity of £80 to Mrs Jane Reid or Hay, who had lived some time with Mr Anderson as his housekeeper, commencing at the first Whitsunday or Martinmas after his death. 4th, Payment of a legacy of £100 to the same party, payable at the same term. 5th, Payment of £1500 to each of his natural daughters, Margaret and Ann Anderson, in liferent, and to their children in fee, with interest from the first term of Whitsunday or Martinmas after his death. 6th, Payment

of £300 to the children of a deceased brother, Forbes Anderson, equally among them, payable twelve months after the first term of Whitsunday or Martinmas after his death. 7th, Payment of a legacy of £50 to the Royal Infirmary of Glasgow. 8th, The residue of the estate, under the burden of the above legacies and annuities, was declared to pertain and belong to the testator's natural sons, Alexander and Thomas Anderson, equally betwixt them.

No. 2.
Nov. 12, 1841.
Cameron v.
Anderson.

The trust-deed conveyed to the trustees Mr Anderson's whole property, heritable and moveable, and conferred on them power to sell and to borrow money on the estate, and to grant all necessary deeds for carrying the trust into effect. It was also declared that the trustees should not be liable in omissions, or for any neglect of diligence, nor the one for the other, but each for his own intromissions only; and power was given to them to appoint a factor, and to allow him a reasonable gratification for his trouble. The trustees were further appointed to be the testator's executors, and were nominated to be tutors and curators to his children and their issue.

The trust thus constituted by Mr Anderson was accepted of by three of the trustees named, of whom the Rev. Robert Cameron became, after some years, the sole survivor.

On the trustees entering upon the management of the estate, they found the heritable property left by Mr Anderson burdened to a large amount, and experienced considerable difficulty in realizing the estate, from the confusion in which his affairs had been left. It appeared, however, at that time, that there would be a probable balance remaining over, after the payment of the debts. Shortly after Mr Anderson's death, the trustees made considerable payments to the annuitants and legatees, including the residuary legatees, and the other children of the testator, who were then in minority, and were entirely dependent for support on the funds left by their father. Among the other annuitants and legatees, some payments were made to Mrs Jane Reid or Hay.

About eighteen months after Mr Anderson's death, actions were brought against the trustees by Mrs Reid, claiming immediate payment of the annuity of £80 left to her in the trust-settlement; and also for her legacy of £100. To these actions the trustees returned defences, in which they pleaded, 1. That Mrs Reid being a married woman, could not maintain the action without concurrence of her husband, or without a mandatory, her husband being resident abroad; and, 2. That the action was premature, inasmuch as, till the estate was realized, and the trustee's debts paid, payment of the legacies and annuities could not be made. The first defence was obviated by the appointment of a curator ad litem. In the course of the process, Mrs Reid averred that there had been a misapplication of the trust-funds on the part of the trustee, and that he had made payments to the other annuitants and legatees to her prejudice, and more especially to the reversionary disponees, to whom the residue

No. 2. had been conveyed, only subject to the payment of all the annuities and legacies. In answer, it was admitted by Mr Cameron, the trustee, that he had made some advances to the truster's sisters and children, as they were otherwise totally unprovided for; and that, although he had at first made some payments to Mrs Reid, he had afterwards declined to do so, on account of the unpromising state of the trust affairs, and in respect she had no natural claims like the sisters and children of the truster; and that upon enquiry as to the causes of Mr Anderson having bestowed upon her a provision, there seemed reason to question its validity.

Nov. 12, 1844.
Cameron v.
Anderson.

The Lord Ordinary in the case remitted to Mr Cleghorn, accountant, for the purpose of ascertaining the amount of free fund then in Mr Cameron's hands, and also to what amount payments had been made by him to the residuary legatees, not warranted by the terms of the trust-deed; and to the other legatees, not rateably with the payments made to Mrs Reid, but to a greater amount in proportion to their legacies.

The results of Mr Cleghorn's report, under this remit, were, *inter alia*, 1. That the free fund in the hands of the trustee had been diminished by payments made to the residuary legatees, Alexander and Thomas Anderson, unwarranted by the trust-deed, to the extent, as at 31st December 1834, of £664 : 4 : 8. 2. That Mrs Reid had been paid at the rate only of 2s. 3d. per pound upon the principal sums due to her; while some of the other legatees had received 10s. 1d. per pound, and one of them, the Infirmary of Glasgow, had got nothing; and, 3. That to pay Mrs Reid rateably, or in proportion with the most favoured legatees, she ought to receive, above what had been paid her before 31st December 1834, £383.

Upon this report being lodged, an arrangement was entered into by Mr Cameron with Mrs Reid, (carrying out a suggestion by the accountant to that effect,) by which he agreed to pay to her the above sum of £383, and also the accounts of expenses, which had been incurred by her in the process; and these sums were accordingly paid.

Thereafter the whole affairs of the trust were brought into Court by an action of multiplepounding raised in the name of Mr Cameron, by Alexander and Thomas Anderson, the residuary legatees, in which the various beneficiaries under Mr Anderson's settlement, or those in their right, appeared as claimants. In this action the Lord Ordinary, in June 1838, before answer, remitted to Mr Donald Lindsay, accountant, to examine the process and productions, and to report, recommending him to adopt the report by Mr Cleghorn, so far as available.

Under the report which Mr Lindsay gave in on this remit, the following questions were raised:—(1.) Mr Lindsay reserved for the consideration of the Lord Ordinary the question whether the expenses of the actions between Mrs Reid and the trustee (amounting in all to £530 : 17 : 2) ought to be placed to his credit in the trust-accounts, or whether he was to be held as individually liable for these expenses? Objections were

stated for Mr Cameron to the report. (2.) In so far as the accountant had struck off £44 : 8 : 11 from the commission paid to Mr Robert Anderson as factor on the estate, which had been allowed by Mr Cleghorn in his report in the action with Mrs Reid. (3.) A sum of £205 had been paid to Mr Cleghorn for making out the report in the action with Mrs Reid. As this report was to a great extent available to Mr Lindsay in his statement of the trust accounts, independently of the special questions with Mrs Reid which it embraced, he stated one half of Mr Cleghorn's fee among the expenses of the trust management, the other half being held as part of the expenses of Mrs Reid's actions. To this Mr Cameron objected, contending that the trust estate should have been debited with the whole sum. (4.) Mr Lindsay further, in reference to certain arrears of rent due by two tenants of the names of Barclay and Caldwell, expressed an opinion that the factor appointed by the trustee had not acted with sufficient prudence, nor used proper diligence. Mr Cameron objected to this part of the report, in so far as it went to intimate an opinion as to his liability for the arrears.

The Lord Ordinary pronounced this interlocutor :—" Having heard parties upon the accountant's report, and made avizandum, and having thereafter resumed consideration of the said report, as well as of a previous report by the late Mr Cleghorn, therein referred to, with the closed record and whole process, approves of the report generally, and finds in terms thereof, so far as the accountant has reported a definite opinion on the various matters embraced in it : And quoad ultra, Primo, As regards the special question raised between the parties as to the expenses of the conjoined actions at Mrs Reid's instance, which the accountant has submitted for the opinion of the Lord Ordinary, finds that, at all events, as between the nominal raiser and the said Mrs Reid, the raiser is not entitled to charge the estate with any part of said expenses : Finds, that neither is he entitled, in the circumstances, to charge the estate therewith, even as in a question between him and the other parties, whether the special or the residuary legatees ; and, therefore, finds that the whole amount of said expenses, with the interest charged thereon, must be added to the balance, which the accountant has, in his general report, brought out against the raiser as at 31st December 1839 ; reserving, however, to the raiser any claim of relief that may be competent to him against his co-trustees, now deceased, or either of them : Secundo, As regards the arrear of rent due by John Barclay, as well as the sum of £26, being part of the arrear of rent due by Robert Caldwell, in regard to both of which the accountant has intimated an opinion that the factor had not acted with due prudence, nor exercised the proper degree of diligence prestable by him in the discharge of his said office ; finds that the raiser is not liable, in his character of trustee, for any failure in diligence on the part of the factor : Finds, moreover, that in this process, to which the factor is no party, it is not competent to decide (so as to affect the fac-

No. 2.

Nov. 12, 1844.
Cameron v.
Anderson.

No. 2. tor's interests) whether there has been a failure of diligence on his part or not: And further, finds that in this process, which is a multiplepoinding, and therefore a process of distribution, only so far as there is a fund actually in medio, it is not competent in any view to call the raiser to account for a fund as yet unrecovered, and which has never been in medio, and to recover which would still require some separate and extraneous proceeding against a third party: Therefore, in hoc statu, refuses to ordain that the said arrears be placed to the raiser's debit: And, with these findings, appoints the cause to be enrolled, that such further order may be pronounced as shall be found fitting and necessary for bringing the same to a conclusion." *

Nov. 12, 1844.
Cameron v.
Anderson.

* "NOTE.—1. The Lord Ordinary, in approving generally of the accountant's report, means to repel the raiser's objections, 1st, To the deduction of £44: 8: 11, which the accountant has made from the factor's commission; 2d, To the disallowance of £14: 11: 4, as the amount of an alleged but unvouched payment to Thomas Binny; and 3d, To the accountant's proposal, that only £102, 10s., being one half of Mr Cleghorn's charge for his report in the former question with Mrs Reid, should be allowed, in consideration of the extent to which that report has been found available in the present process. 4th, The finding is also intended, on the other hand, to repel the objection taken for the legatees to the sum of £20, which the accountant has allowed credit for as in payment of the raiser's charge for board to the truster's son Thomas—understanding, as the Lord Ordinary does, that the claim is one which existed as a debt of the truster's incurred in his lifetime, and not to be dealt with as in *pari casu* with those voluntary advances (of which *infra*) which the trustees subsequently made to or on behalf of Thomas, as one of the residuary legatees.

"These seem all to be matters peculiarly fitted for the consideration of the professional accountant or person of skill, to whom it is customary to make such a remit as was made here. Indeed such remits being now held to partake very much of the character of a quasi reference, the parties themselves must be prepared for a disinclination on the part of the Court to disturb any report returned under them, unless upon the strongest grounds. It is not thought that any ground of sufficient strength has been brought forward here. On the contrary, the Lord Ordinary, who has very carefully considered the report, is satisfied with the reasons assigned by the accountant for the course which he has followed.

"2. The finding by which the Lord Ordinary refuses to allow the raiser credit for the expenses incurred in the former question with Mrs Reid, (including, 1st, the expenses paid to her; 2d, the expenses incurred by himself; and 3d, the disallowed half of the expense of Mr Cleghorn's report,) has not been pronounced without much reluctance. But after weighing the matter with every favourable inclination towards the raiser, the Lord Ordinary did not feel that he had any alternative.

"The raiser and his co-trustees had a clear course before them. They had only to follow the declared purposes of the trust, without favour or partiality for any of the parties interested, and they would have been safe. If there were not funds for all, they should at least have made a rateable distribution. At all events, they should have thrown no obstacle in the way of Mrs Reid, who, in a question with the other legatees, was substantially a creditor of the estate, and should have left her to constitute and enforce her legal rights in competition or otherwise, as she might be advised. In any view, if there was the slightest hazard of an ultimate deficiency, they surely were most inexcusable in making advances to the residuary legatees, who could be entitled to nothing until all the primary ends of

Mr Cameron reclaimed. A reclaiming note was also presented for the claimants against the finding of the Lord Ordinary, that it was not competent in the process to decide whether there had been a failure in diligence on the part of the factor, or to call the raiser to account for a sum unrecovered by him or his factor.

No. 2.
Nov. 12, 1844.
Cameron v.
Anderson.

After the case had been heard in the Inner-House, their Lordships being equally divided in opinion, ordered minutes of debate. Mr Cameron having in the mean time died, the action was transferred against his trustees.

the trust were accomplished. If the trustees thought fit to pursue an opposite course, they must have known, when they did so, that they acted at their peril.

"It is no justification that the trustees were moved by feelings of humanity in favour of the more helpless objects of the trust, and those whom they esteemed to possess a stronger claim on the natural affections of the truster. Still less were they entitled to scan, with a jealous eye, the motives by which, as they presumed, the truster must have been induced to bestow his favour on Mrs Reid. Their business was simply to execute and fulfil the trust as it was written down for them. And, indeed, for ought that after all appears, they should have been at no loss to do this, even with reference to those more especial ends of humanity which are now urged in justification of the partiality shown by them to some of the parties. There was originally no ground for apprehending—and in point of fact there was no apprehension felt—that the trust-management would, in any view of it, result in a deficiency of funds. This is established, were there nothing else, by the payments unsuspectingly made to the residuary legatees. But had it been otherwise, there was, at all events, enough (even rateably distributed) to answer the necessities in point of maintenance or otherwise, of one and all of the special legatees, without doing injustice to any. Mrs Reid, more particularly being herself an annuitant, and her annuity intended as an alimentary fund for her maintenance, it was as much their duty to provide for her as for the rest.

"When the trustees turned a deaf ear to Mrs Reid, and refused her payment, while at the very same moment they thought proper to make advances even to the residuary legatees, she was necessarily driven to assert her rights by an action at law. Now, this action was brought within little more than a year of the truster's death, and while as yet little harm could have been done, and while there were ample means for the trustees retracing their false steps, whatever the course of management previously. Warned by such a decided proceeding, why should the trustees have persisted in refusing justice to Mrs Reid? Now, at least, if not before, they ought most assuredly to have paused. But they resisted. And the defence which they maintained was, in truth and substance, an attempt to defeat the trust.

"Now, no expense incurred, or caused by such an attempt as this, can ever, in the Lord Ordinary's opinion, form a legal charge against the trust-estate. Certainly it can afford no ground of charge as in a question with Mrs Reid herself. But neither can it afford a charge against the other special legatees; for, as the litigation could not enlarge their rights under the trust, the expense which it occasioned was necessarily to their lesion; and, minors as they were, they cannot be held to have approved or adopted the proceeding. Even as to the residuary legatees, they seem to be equally entitled to protection; for, if there was no residue, their interest had nothing to do with the matter, and they ought not now to be charged with the cost; while on the opposite assumption, that there was a free residue, the trustees had neither necessity nor pretence for resisting Mrs Reid's claim at all.

"3. The finding as to the two items of arrear of rent explains itself."

No. 2.
Nov. 12, 1844.
Cameron v.
Anderson.

Mr Cameron's trustees argued;—One ground on which the liability for the expenses of Mrs Reid's actions was sought to be imposed upon the trustee was, that they had not been beneficially incurred. So long as the trustee was in bona fide, the success of his administration was no element for regulating his responsibility.¹ The question was, whether the expenses were incurred in the proper and due administration of the estate. The demand made by Mrs Reid was for immediate payment of her provisions; this the trustee was entitled and bound to resist, as the testator's debts were then unpaid. The defence stated by him accordingly was, that she was not entitled to payment of her provision till it should be seen whether there would be any free estate from which it could be drawn. The subsequent limitation of Mrs Reid's demands to a rateable payment, along with the other legatees, proved that the original defence of the trustee was well founded. The whole proceedings of the trustee were taken in bona fide for the protection of the estate, in which he to some extent succeeded. As a part of the expenses of that litigation, the expense of Mr Cleghorn's report was fairly chargeable against the estate; but it was also chargeable on other grounds, as it embraced a general adjustment of the trust accounts, with the view to a system of management which was then in contemplation; and it was also available in whole to Mr Lindsay in his report in the present process.

The claimants argued;—The clear duty of the trustee in administering the estate was to have followed strictly the letter of the trust deed. Instead of doing this, he made payments to the other annuitants and legatees, and even to the residuary legatees, while he refused to make payment to Mrs Reid—even challenging the motives of the truster, and raising doubts of the validity of the provisions to her. Hence arose the necessity of the actions at her instance. The defence stated by the trustees to the action was the want of funds, yet they continued to make payments from the trust funds to the other legatees. As the result of her actions, Mr Cameron placed her on the same footing as the other legatees, and also paid the expenses of process which she had incurred. There was no ground on which the expenses of these actions could be charged against the trust estate. They were incurred in defending a course of management and distribution which was in contravention of the trust deed, and in resisting the claims of a party who, as in a question with the other legatees and annuitants, was a creditor of the estate; and they were not incurred for the benefit, or with the concurrence, of any of the beneficiaries. It was clear that no part of the expenses could be charged as against Mrs Reid—the trustee had paid to her the expenses which she had incurred in these actions, and by necessary inference he became bound to relieve her of the expenses which he himself had incurred in

¹ Dickson, Nov. 20, 1829, (8 S. & D. 99;) Kirkland, Feb. 3, 1842, (ante, Vol. IV. p. 614.)

resisting her demand. Nor could the expenses be charged as against the special legatees, both because they were not parties to the proceedings, and because the litigation could not have had the effect of enlarging their rights. Neither was it a proper charge as against the residuary legatees; because if there was no residue, they had really no interest in the result of the actions; and if there was a residue, the conduct of the trustee in defending the actions was indefensible. In reference to the half of the expense of Mr Cleghorn's report which Mr Lindsay had disallowed, the same argument applied, as a part of the expenses of the actions with Mrs Reid. It had been properly left with Mr Lindsay to say, how far it was available in the present process.

The case was of this date advised.

LORD JUSTICE-CLERK.—When this case was heard before us a long time ago, there was such difference of opinion as to render it necessary to have minutes of debate. Though I had not formed any decided opinion then, I felt some difficulties, which I cannot say have been removed. The first question to be considered is, whether the trustee can state in his accounts, as against Mrs Reid personally, the expenses of the actions of which she was pursuer; and as to which he made an arrangement that he was to bear her expenses. I do not go into the previous parts of the action, but I presume that Mr Cameron resisted Mrs Reid's actions for behoof of all parties, or of some of them, and that he did so bona fide. It turns out, however, that he had no good ground for resisting them. A remit is made to an accountant, and the result of the report which he gave in was this, that Mr Cameron agreed to pay the expenses incurred by Mrs Reid, and they were accordingly paid. I do not see, therefore, that any part of the expenses of the action can be stated as against her. Both the special and residuary legatees say that they had no interest in the action. I think that it is a fixed principle, that unless an action be one which goes to reduce a trust, special legatees cannot be made liable for expenses incurred in a litigation from which they can reap no benefit. My difficulty here is to see how the special legatees can be held to have had an interest in resisting Mrs Reid's actions. She only claimed to be put on the same footing with those who had received payments to account of their legacies. I wish to guard against the notion, that no difference is to be made between special and residuary legatees as to their being chargeable with the expenses incurred by a trustee in resisting an action. I think it must be shown that special legatees have an interest. Now, was the expense here incurred, merely to increase the funds for the benefit of the residuary legatees?—or had the special legatees any interest in the result of the actions? The point about which I am anxious is, that the special and residuary legatees should not be placed on the same footing with regard to an action, the defeat of which could only benefit the residuary. If the majority of your Lordships should think that the special legatees had an interest, then I think that the expenses are chargeable against them. But I am inclined to think that they had not an interest.

It is not stated in this case that the trustee had so misconducted the trust as to have an object to conceal the state of the trust affairs. It is said Mrs Reid's proceedings arose from his having made payments unwarranted by the trust deed to the residuary legatees. Now I cannot see how these residuary legatees can resist

No. 2.

Nov. 12, 1844.
Cameron v.
Anderson.

No. 2.
 Nov. 12, 1844.
 Cameron v.
 Anderson.

their being charged with these expenses, looking to the fact that it was to themselves that these payments were made. I think, therefore, that in a question with the residuary legatees, the trustee is entitled to state these expenses against them; and if the Court should think that Mr Cameron's defending the action was for the benefit of the special legatees, then, that the expenses form a proper charge against them also.

With regard to the other points as to the commission to Robert Anderson, the factor on the estate, I give great weight to the opinion of Mr Lindsay, and I think that the commission was too high. I do not, however, concur in the opinion of the Lord Ordinary, that when a remit is made to an accountant, it is to be considered as of the character of a quasi reference. It is not so. I consider that a party is entitled to object to all the grounds of the accountant's opinion. Again, as to the question with regard to the expenses of Mr Cleghorn's report, I here also give great weight to Mr Lindsay's opinion, that one-half of the accountant's fee should be disallowed.

I think, upon the whole, the Lord Ordinary is right to the extent that I have stated. I defer to the rest of the Court as to the interest which the special legatees had to resist Mrs Reid's actions; and I am clearly of opinion, that the trustee is entitled to charge the expenses as against the residuary.

LORD MEDWYN.—I agree with your Lordship that it is clear that Mrs Reid having been settled with, she cannot be called upon to repeat any part of the expenses incurred in her actions. I also concur with your Lordship as to the residuary legatees. The trustees seem to have thought that it was proper, and that they were in perfect safety to make these advances to them. It is impossible for the residuary legatees to maintain the pleas they are now stating. As to the special legatees, I must say I am inclined rather to look, whether it was right and fit for Mr Cameron to resist the actions, than to whether it has been actually of benefit. Mrs Reid does not wait for the extrication of the trust affairs, but makes an instant demand for payment. Were the trustees bound to pay this special legatee, while the trustor's debts were not all paid? I cannot reconcile it to my conscience to throw such a sum upon a gratuitous trustee, acting in these circumstances in bona fide, and to the best of his ability.

I concur with your Lordship as to the other points of the case.

LORD MONCREIFF.—I am nearly of the same opinion. Very hard words are used towards this gentleman, Mr Cameron, now dead. I may think that in some things he did not take the most judicious course for his own safety. But it is very apparent to me, that he throughout meant to act honourably, and did act honourably, in the trust committed to him; and throughout all these proceedings there is not the slightest trace of any sinister design on his part for his own benefit, or that of any one connected with him. Considering the way in which the case is treated in these papers, I feel it my duty to express this very deliberate conviction.

The case before us is on a very small point. It is in the chief question discussed, whether the representatives of Mr Cameron are entitled to credit, in accounting with the trust, for the expenses incurred in the litigation with Mrs Reid. Here there are two very distinct questions. One is, whether, in accounting with Mrs Reid herself for her annuity and legacy given by the will, the trustee is entitled to state, as against the trust in a question with her, the expenses paid to her, or incurred in litigation with her. I own I have great doubts, whether, if the

trustee had let her proceed in her action, according to its conclusions for full payment of the annuity, and she had simply got a decree for equalization with the other legatees or annuitants in the mean time, there would have been any ground for subjecting the trustee, even as trustee, in all the expenses of that discussion, and still less for a decree to subject him personally in all that expense. But the case did not stand so. The trustee had made a serious mistake. Though perfectly aware, that till the debts should be paid he had no free funds, he had, I believe, under the most honourable and compassionate feelings, made certain small advances for the support of the testator's sister, and the support and education of his natural children, in whom the trustor had taken the greatest interest. No one can blame him morally for this, though it is evident, and was always averred by Mr Cameron himself, that he did so on his own personal hazard, if there should not be funds of the trust ultimately belonging to them to satisfy those advances.

Perhaps it may be, that he had not the same feelings towards Mrs Reid; and that is probably the original source of these proceedings. But it does not appear to me to be a judicial view of such a case, to allow that consideration to enter into the only legal question before the Court. Even as to Mrs Reid, the only legal question is, whether the defender improperly resisted the only demand which she made by her summons against him. And, with all deference, it is clear to me, that he was both entitled and bound, specially with reference to the proper interests of the creditors of the trust, to resist that demand. It cannot alter my impression on this point, that, at that time, he himself, relying on certain valuations, was in the belief that the trust estate would be sufficient to answer all the special legacies and annuities, and even to yield a residue for the ultimate legatees. That he acted on this belief or hope, to any degree, at his own hazard, only proves his honesty. But the question, when Mrs Reid raised her action, was, whether she, in her own right, under the trust as it then stood, had a legal right to demand payment of her full annuity, and decree for full payment of it in all time coming. I think that it is now made clear by the progressive state of the accounts, not only that she had no legal right to make any such demand, but that she had no legal claim for payment of any thing whatever; for, till the debts of the trustor should be paid, there could be no claim for gratuitous legacies, whether annuities or any other.

Unfortunately for this trustee, he had been induced, from humanity and regard to the testator's blood, and perhaps too much confidence in his valuations, to make advances to the sister and children at his own hazard; and of this, Mrs Reid having, as she confesses, no knowledge of it when she raised her action, ultimately got the advantage, by obtaining a rateable allotment to herself in proportion to the other special legatees. And the defender submitted to this to stop the litigation, and by compromise agreed to pay Mrs Reid's expenses. Now, I have always thought, that after having agreed to this, Mr Cameron could not state the expenses so settled in his trust accounts in any question with Mrs Reid, because that would be in effect to take back, pro tanto, what he had by judicial settlement paid to her. And therefore, in so far as regards Mrs Reid, I am ready to adhere to the interlocutor; however I may think that the justice of that result is very doubtful, and however much I differ from the several impressions of the case in the Lord Ordinary's note. But the remaining part of the case stands on a very different footing. And I must own that I do not see, that either the other special legatees, or still more the residuary legatees, should be permitted to maintain such pleas. It is palpable that, throughout the argument, they continually put themselves in the

No. 2.

Nov. 12, 1844.
Cameron v.
Anderson.

place of Mrs Reid. But this will not do. Though they were not parties personally appearing in that action, the trustee appeared, and had a right and duty to appear for them—a right and a duty to resist for them the demand of full payment of Mrs Reid's annuity, in so far as it was not justified by the state of the trust funds. And, then, what was it that enabled Mrs Reid to obtain a decree to any effect? Nothing but the fact, that out of compassion for the situation of these very parties, the trustee had been induced to make advances to them, which the circumstances of the trust did not authorize; in consequence of which only Mrs Reid was enabled to make good a claim to a rateable payment at that time, to which neither she nor they had any legal right. Can these parties take advantage of this state of things, to deprive Mr Cameron of credit for the expense which he bona fide incurred in resisting an action which was untenable in its own conclusions, and which only obtained any effect, because of the advances alleged to have been improperly made to themselves. It seems to me to be inverting all principles of law or equity to sanction such a result.

It will be observed that this plea is maintained, not only for the other special legatees different from Mrs Reid, who had received the payments with which she at last claimed equalization, but for the residuary legatees, the natural sons of the deceased, the payments to whom constituted the gravamen of Mrs Reid's complaint against Mr Cameron's management. If no such advances had been made, and if the payments to the other special legatees had not exceeded the ratio of the payments to Mrs Reid, I must think, that, in the state of the trust funds, the defence to her action would have been insuperable; unless it were to be held, that a gratuitous trustee is bound by law, upon hypothetical calculations of the value of the trust estate, to make payment, at his personal risk, of gratuitous legacies, before funds have been realized sufficient for the payment of the trustor's proper debts. And if so, how can these very residuary legatees, who are indebted to Mr Cameron's liberality and generous devotion of his own responsibility on their account for their support in childhood, and the education by which they have been fitted for respectable conditions in life, be permitted to refuse him credit for the expenses thrown on him only in respect of those very advances?

This is the view of the case on the simplest equity of it. But I apprehend that there is a great deal more in it, upon the correct law, applicable to it. Mr Cameron was a gratuitous trustee, who had a right to act upon his own judgment, with such advice as he might obtain, both as to the necessity of resisting the conclusions of Mrs Reid's action, in the first instance, and as to the prudence of recognising it at last, when it was reduced to the limited demand of equalization as matter of equity, and such compromise was recommended by the annuitant. And if he acted in either case, with fair bona fides, under the guidance of a most respectable agent, is it for these residuary legatees, on whose account he had placed himself in any difficulty, to throw on him the expenses which he incurred, even supposing that he had (in respect of Mrs Reid) committed an error in judgment? The payment of the expenses to her agent was indispensable to the object of stopping the litigation. But if it is to be held, that in every case where a trustee is advised, as a matter of prudence, to settle by compromise, on qualified terms, a litigation likely to lead to much greater expense, he is to be regarded as having acted in mala fide towards the other objects of the trust whom he has been accused of favouring, and to have all the expenses thrown on himself personally, it will not be easy for any one to advise a man so situated to act upon such views of pru-

dance, however strongly recommended as for the interest or safety of the trust, and all the beneficiaries under it. No. 2.

The states annexed to the case for the respondents, and which I consider as only a part of their pleading, appear to me, as far as I can judge of them, to be accurately made up from the data in the reports of the two accountants; and to demonstrate that there never was, up to the termination of Mrs Reid's action, any existing fund on which a legal right to payment of any gratuitous legacy could have been established. The claimants have made strong assertions in general terms; but they have not shown in what respects they are not in exact conformity to the reports. Yet it is deserving of notice, that those reports, and all that was done or has been inferred under them, proceeded on the hypothesis of mere valuations of the property, bona fide stated by the trustee, but which have turned out to be altogether fallacious.

It may be thought that Mr Cameron did wrong, in not offering at first to equalize the payments to Mrs Reid with those which had then been made to some of the other special legatees. It had been better if he had done so, though her demand was not put in that form, and it may be greatly doubted whether it would then have satisfied her.

It is also much insisted on, that he made payments to the sister and residuary legatees, after he had said in his defences, that he was to make no further advances to any legatees, till the trust estate should be so realized as to extinguish the debts. From whatever urgent motives of feeling this might proceed, it was a great error in regard to Mrs Reid, of which she was well entitled to complain. But what right have these very parties—the sister and residuary legatees—to complain of it? I can see nothing but the most palpable injustice and ingratitude in their doing so.

On the whole, I still think that the expenses in dispute cannot be stated to the trustee's credit, in the question with Mrs Reid; but that they are justly to be so stated in accounting with all the other parties. I don't see how there is any question with the special legatees, unless the funds are short for their payment.

I have had great doubts of the correctness of the trustee's report, in restricting the commission appointed for Mr Anderson the factor, as being rather more than he, the accountant, would have allowed; leaving out of view, that the discretion was expressly committed to the trustee by the terms of the trust deed, and that this, at all events, was a bona fide act of administration. I have also had doubt as to the disallowance of one half of the fee paid to Mr Cleghorn, the whole of whose labours I am inclined to regard as a necessary, or, at any rate, a fair part of the administration of the trust. But on these points I only express my own doubts. On the other, which is the main subject of discussion, I have a very decided opinion.

LORD COCKBURN.—I agree with your lordship as to the main points decided by the Lord Ordinary, including the disallowance of half of the factor's fee.

As to the more general question, I should be sorry to give any opinion which, on the one hand, should expose gratuitous trustees to excessive risk; or should, on the other, encourage their negligence or litigiousness. The general rule is, that they are never to litigate with such gross unreasonableness as implies a disregard of their duty. But, in judging whether they have actually done so or not, we can rarely determine merely from the result. A reasonable action may have an unfortunate issue. We must look to the whole circumstances. And where a trustee, though not perhaps proceeding with perfect wisdom, appears, upon

Nov. 12, 1844.
Cameron v.
Anderson.

No. 2.

Nov. 12, 1844.
Cameron v.
Anderson.

the whole, to have acted substantially according to his warrant, and with a sincere desire to do right, a court is not called upon to visit him personally with loss which his honest and reasonable view of his duty may have occasioned to the estate.

Now, it appears to me, that, in the circumstances, the trustee here was not blameable in resisting Mrs Reid's demand.

Her first action was, not for ultimate and rateable, but for a full and immediate payment. She herself, however, seems to have been sensible that this claim was untenable; for she first let it sleep for about four years, and then, after it was awakened, she altered her demand to that of a proportional payment along with the other objects of the trust. But the trust was in such a state at the period, both of her original and her awakened process, that it would not have been safe, even if possible, for the trustee to have complied with either of her demands. He had no recovered and free funds. It is said, and the accountant sanctions this, that there would have been funds if he had not overpaid certain legatees. But this statement proceeds on a valuation of the real property, and an anticipation of rents; neither of which is any trustee bound to deal with as realized funds. I need not go into the details of the report; but the result is clear, that he never had funds out of which it would have been safe for him to comply even with Mrs Reid's abated claim. He was therefore bound, or at least entitled, to resist it. He did this under the advice of counsel. And I can discover nothing culpable in the mode in which he did so. As it turned out, it would have saved money if he had acquiesced in Lord Corehouse's interlocutor; but assuming, as I do, that the defence was proper, his taking the judgment of the Court was not improper.

I apply this view of the facts even to the half of the accountant's fee. If the trustee was entitled to maintain the defence, he could not avoid the report, since the Lord Ordinary thought it necessary. It was extended, by the consent of parties, to a general investigation of the whole affairs. And in this state it was available to the succeeding trustee and to the trust estate.

It is true, that the trustee was wrong in not equalizing his payments. He ascribes this to compassion for near connexions of the truster, who, he says, would have been otherwise destitute. This apology is, apparently, well founded. But really the motive is immaterial; because the disproportionate payments plainly did not justify Mrs Reid's action. She had no right to insist, as she did, for instant payment even of a rateable share; because the state of the funds did not admit of such payments—at least not with due safety to the trust.

Her claim, therefore, I think groundless, except in reference to the costs of her own action. The trustee arranged these with her; and having engaged to pay them, he cannot defeat this compact by laying them on the fund, to the effect of diminishing the means of paying her. But resisting her being beneficial to the trust—i. e. to the others interested in the trust—I think the expenses payable to her may be stated against them, and are not to be paid by the trustee personally. The resistance of those who have been overpaid, is worse than groundless. It was they who were benefited by what was done. They took the benefit; and now they wish the trustee to pay for it.

THEIR LORDSHIPS accordingly pronounced this interlocutor:—"Adhere to the interlocutor, in so far as it approves generally of the accountant's report, and to the extent stated in the first paragraph of the note of the Lord

Ordinary : Also adhere to the first special finding in the interlocutor complained of, in so far as relates to the right to state against Mrs Reid as a claimant under the trust, any part of the expenses of Mrs Reid's actions : But alter the interlocutor, to the extent of holding that the trustee is entitled to state these expenses in the trust-accounts in a question with both the other special legatees and the residuary legatees—it being understood, that if there are funds to pay the special legatees in full, and also a residue to the residuary legatees, these expenses must fall to be paid out of the residuary funds : Find Mrs Reid entitled to her proportion of the expenses of this discussion since the date of the interlocutor complained of, and the trustee's representatives entitled to their whole expenses of the same discussion since the date of the said interlocutor, both out of the funds of the trust estate."

No. 2.

Nov. 13, 184
Railton v.
Mathews.

THOMAS JOHNSTONE, S.S.C.—JOHN CULLEN, W.S.—Agents.

EDWARD RAILTON, Pursuer.—*Rutherford—Buchanan.*
MATHEWS and LEONARD, Defenders.—*G. Bell.*

No. 3.

Mandatory—Expenses—Process.—In a question as to the sufficiency of the mandatory of a person furth of the kingdom, it is enough if he be solvent, and of the same station with the mandant, and it is not relevant to enquire whether he may be able to pay the expenses of process.

SEE ante, Vol. VI. p. 1348.

Railton having been ordered to sist a mandatory, proposed his nephew, a writer in Glasgow.

Nov. 13, 18—

2d DIVISION:
Jury Cause

G. Bell, for Mathews and Leonard, objected to the sufficiency of the proposed mandatory, that he was a young man without capital, who had recently been admitted as a procurator in Glasgow, and unable to be responsible for the heavy expenses in the cause, in the event of their being awarded against him.

It was answered ;—The sufficiency of the mandatory to bear the expenses was a point which could not competently be enquired into. It was enough if he were solvent, and of the same status as the mandant.¹

LORD JUSTICE-CLERK.—When I was applied to during the vacation to sustain the appointment of this mandatory, in terms of the interlocutor leaving it to me, I had then doubts whether he was sufficient, being at the time only a clerk—for a person calling himself a *writer*, who is not entitled to practise, is no designation ; but his situation is better now than it was then, as he has since acquired an addi-

¹ *Duncan v. Duncan*, March 4, 1830, (8 S. & D. p. 641 ;) *Turnbull v. Paul*, Nov. 26, 1829, (8 S. & D. p. 124 ;) *Gifford v. Gifford*, Feb. 11, 1834, (12 S. & D. p. 421.)

No. 3. tional status, having been admitted as a procurator in Glasgow. He is now engaged in a profession, and must have paid a considerable sum for admission into that body. I am disposed to hold him as sufficient.

Nov. 13, 1844.
Thomson v.
Simpson.

LORD MONCREIFF.—I agree that we must hold the mandatary as sufficient in the circumstances. It is not relevant to show that the mandatary may be unable to pay all the expenses. It is enough if the mandatary be solvent, and of the same status with the mandant.

The other Judges concurred, and the mandatary was sisted accordingly.

JOHN CULLEN, W.S.—SIMON CAMPBELL, S.S.C.—Agents.

No. 4.

JOHN THOMSON, Pursuer.—*Buchanan.*
JAMES SIMPSON, Defender.—*A. M'Neill.*

Oath on Reference—Process—Summons.—Held incompetent to refer the whole cause to the oath of a defender, where there were allegations set forth by the pursuer in the condescendence, which were not embraced within the media concludendi of the summons.

Nov. 13, 1844. **THE** estates of John Donald, auctioneer and appraiser in Glasgow, having been sequestrated, the bankrupt, at the meeting for electing the trustee, made an offer of composition of 5s. per pound, payable by two instalments at two and four months after he had obtained his discharge, and also to provide for the expenses of the sequestration. John Thomson, wine and spirit merchant, Glasgow, having undertaken to be cautioner for payment of the composition, some friends of the bankrupt, ten in number, came forward and subscribed an obligation, by which they bound themselves, separately, each to the extent of £50, to relieve Thomson of his cautionary engagement. At the meeting subsequent to the bankrupt's examination, this offer was taken into consideration; but the offer was not accepted of, and the trustee was instructed to proceed to realize the estate.

2D DIVISION.
Lord Ivory.
T.

A few days after this, the bankrupt, along with Thomson as his cautioner, made a new offer of a composition of 5s. 1d. per pound, payable by two instalments of 2s. 6d. per pound at two months, and 2s. 7d. at five months from the date of discharge, and also to provide for the expenses of the sequestration. This offer was subsequently accepted of by the creditors at a meeting which had been called for disposing of it; and the bankrupt as principal, and Thomson as cautioner, having granted bond for the amount, the bankrupt was discharged.

This composition was thereafter paid to the creditors by Thomson, the bankrupt having died without making payment.

James Simpson, writer in Glasgow, one of the parties who had granted to Thomson the obligation of relief, having refused to pay his proportion

under it, Thomson raised an action against him. The only ground of action libelled on in the summons was the above obligation in relief, granted in reference to the original offer of composition of 5s. per pound. It concluded for payment of "£48 : 19 : 8, being the just proportion of the said composition and expenses falling on and due by the defender, under the terms and effect of the obligation of relief granted by him as before libelled." No. 4.
Nov. 13, 1844.
Thomson v.
Simpson.

In his defences Simpson pleaded that, although he had become bound in relief for the original composition of 5s. per pound, which was rejected, he had not become bound for the new and subsequent offer of 5s. 1d. per pound, which was different in amount, and in the term of payment, from the first, involved greater risk, and had been carried into effect without his knowledge or sanction.

To meet this defence, statements were introduced by the pursuer in his condescendence, (art. 7,) That the offer of 5s. 1d. per pound had been communicated to, and acquiesced in by the defender, and that he had agreed that his obligation of relief should remain in full force and be applicable to that offer of composition, and that he had never retracted that obligation, or intimated that he considered his position to be varied by the alteration from the terms of the original offer.

The pursuer having given in a minute, referring "the whole cause" to the oath of the defender, it was objected to the competency thereof, that the allegation and grounds on which the pursuer sought, in his condescendence, to affix liability on the defender, were not embraced within the media concludendi of the summons.

The Lord Ordinary pronounced this interlocutor,—“ Having considered the closed record and relative productions, as also the reference now made by the pursuer of the whole cause to the oath of the defender—Finds that the only ground of action libelled against the defender is the ‘separate agreement or obligation of relief’ granted by him along with certain other parties mentioned in the summons, and of which the production No. 5 of process is admitted to be a correct copy: Finds that this agreement or obligation, which bears date 21st August 1840, had reference only to the original offer of composition, whereby the pursuer was to have become bound as cautioner for a composition of 5s. per pound on the debts of the bankrupt, payable by two instalments, at two and four months: Finds it admitted that that offer was rejected by the creditors, or at least that it was not accepted by them, and fell to the ground, in consequence of their proceedings at a meeting held by them on 14th September 1840: Finds that thereafter a second offer of composition was made by the bankrupt, wherein the pursuer was also to be cautioner, and whereby it was proposed to pay an extended composition of 5s. 1d. per pound, by instalments of 2s. 6d. and 2s. 7d., at two and five months, and that this offer was eventually accepted by the creditors on 23d October, and bond granted therefor by the pursuer as cau-

No. 4. **Nov. 13, 1844.** **Thomson v. Simpson.** tioner on 7th November 1840: But finds that the special agreement and obligation of relief libelled against the defender had in itself no reference to this new transaction, and that, on the contrary, it is in gremio essentially at variance therewith. Finds that in this situation it is incompetent, under the conclusions of the summons, by reference to oath or otherwise, to establish the claim of relief now pursued for against the defender, in so far as it is a claim made 'under the terms and effect of the obligation of relief granted by him as before libelled,' considered by itself: And finds that there is no other medium concludendi libelled as regards any separate or renewed obligation; more especially finds that the allegations set forth in art. 7 of the pursuer's condescendence would be insufficient, even if admitted, to support the conclusions of the present summons, the relief there sought for being not relief from a composition of 5s. per pound in instalments of two and four months, as in terms of the agreement and obligation foresaid, but relief from an extended and totally distinct and separate composition, different as well in amount as in the time of payment: Finds accordingly, that in so far as under the proposed reference to oath it is intended to support the said allegations, there is no medium concludendi in the summons on which to rest, or wherewith to connect the same, and on that ground holds the reference inadmissible: Therefore, on the whole matter, refuses the reference; and in respect that the agreement or obligation libelled does not bear out the conclusions of the summons, sustains the defences, assoilzies the defender simpliciter, and decerns: Finds expenses due."

Thomson reclaimed, praying the Court to sustain the reference, or, if necessary, to allow a new and competent reference to be made.

LORD MEDWYN.—I should consider that the defender was not bound, unless the pursuer can show that he extended his obligation of relief to the offer for five shillings and a penny. To establish this, he has referred the whole cause to the defender's oath. But there is the preliminary question, whether the summons be broad enough to allow of the reference of the whole cause to the defender's oath. I think that the summons may be supplemented by the condescendence, and that the extension of the obligation may be proved by oath.

LORD MONCREIFF.—I have some difficulty on the point. The equity of the case appears to be plain enough, but the Judicature Act seems to prevent so complete a change in the averment as takes place here between the summons and condescendence.

LORD COCKBURN.—I think the interlocutor must be adhered to. The agreement the defender entered into was in reference to a composition of 5s. But, while the pursuer lays his action entirely on this agreement, he wishes to enforce fulfilment of a different agreement. In the condescendence, he says, you agreed to relieve me under the second offer; but he does not say this in his summons, which refers only to the agreement for relief under the first offer. I do not think the summons here is correctly or technically framed, for that is just what the question comes to be.

LORD JUSTICE-CLERK.—I have come to the same result, and can find no grounds for altering. The explicit statements in the condescendence show more distinctly the want in the summons. The condescendence (Art. VII.) contains the distinct statement of a transaction subsequent to the signing of the obligation of relief in reference to the offer of 5s. But is that within the summons? It is admitted that there is no averment of a subsequent agreement there. It concludes, after narrating the obligation in reference to the first offer, that the defender should be decerned and ordained to make payment of a specified sum, "under the terms and effect of the obligation of relief granted by him as before libelled." Now, is there any agreement or obligation of relief before libelled subsequent to that in regard to the first offer? If not, then the condescendence is at variance with the summons, and refers to a transaction that is not founded on in the summons at all. The media concludendi ought to be set forth in the summons; and as that has not been done here, I think there is a complete defect, and that it is not competent to refer the case to the defender's oath.

LORD MONCREIFF.—I am satisfied, if it be understood that this decision will not preclude another action properly laid.

THEIR LORDSHIPS accordingly adhered.

JOHN CULLEN, W.S.—CHARLES FISHER, S.S.C.—Agents.

No. 4.

Nov. 15, 1844.
Dundee Gas-
Light Co. v.
Dundee New
Gas-Light Co.

THE DUNDEE GAS-LIGHT COMPANY AND OTHERS, Complainers.—
Macfarlane.

No. 5.

THE DUNDEE NEW GAS-LIGHT COMPANY AND OTHERS, Respondents.
—*Inglis.*

Process—Bill-Chamber, A. S. 24th December 1838. § 5—Interdict.—The Lord Ordinary, upon advising a note of suspension and interdict with answers, passed the note, but recalled the interim interdict, which had been granted when answers were ordered; the complainers reclaimed against the recal of the interdict, and applied to the Lord Ordinary to prohibit in the meantime the issuing of a certificate of the recal;—The Court, upon his Lordship's verbal report, instructed him to do so.

In this case, which was a suspension and interdict with reference to certain operations by a Gas Company on the streets of Dundee, the Lord Ordinary on the bills in vacation (Jeffrey) pronounced the usual interlocutor, appointing intimation to be made, and answers to be given in, and granting interim interdict.

Nov. 15, 1844.
1ST DIVISION.
Ld. Robertson.
N.

Upon advising the note and answers, the Lord Ordinary (Robertson) passed the note, but recalled the interdict.

The complainers presented a reclaiming note against the interlocutor, so far as it recalled the interdict, and in the meantime applied by note to the Lord Ordinary, under the Act of Sederunt of 24th December 1838, § 5, to prohibit the clerk from issuing a certificate of the recal.

No. 5.

Nov. 15, 1844.
Williams v.
Williams.

This was opposed by the respondents as incompetent under the Act of Sederunt founded on, which referred only to the passing or refusing of notes of suspension, making no mention of interdicts. The note of suspension here had been passed in favour of the party making the application. The respondents did not ask a certificate of the recal of the interdict. The fact that it had been recalled, was enough to entitle them to go on with the operations which had been stopped by it.

The Lord Ordinary reported the point verbally to the Court.

LORD PRESIDENT.—Independent of the Act of Sederunt, I think the Lord Ordinary is entitled to keep matters in their present state, by prohibiting the clerk from issuing certificate of the recal of the interdict.

LORD MACKENZIE.—The *interim* interdict subsists till a new deliverance is pronounced. The Lord Ordinary has pronounced a new deliverance, but the parties are not entitled to know of it till they obtain a certificate; and this the Lord Ordinary may prohibit the clerk from giving—thus allowing the *interim* interdict still to subsist.

LORD JEFFREY.—I quite agree. There being a reclaiming note, the case is now the same as if the Lord Ordinary had merely said, I am inclined to pass the note and to recal the interdict, but I will consider farther of it. We are a continuation of the Lord Ordinary's judicial mind. No interlocutor is a judgment, but is still *sub judice* till certificate of it is allowed to be given to the parties.

LORD FULLERTON.—I am inclined to take the same view.

THE COURT accordingly instructed the Lord Ordinary to prohibit the issuing of the certificate.

LOCKHART, HUNTER, and WHITEHEAD, W.S.—JOHN YULE, W.S.—J. M. LINDSAY, W.S.—
Agents.

No. 6.

DAME J. S. WILLIAMS OF ERSKINE.—*Sol.-Gen. Anderson—Neaves.*
PHILIP WILLIAMS AND OTHERS, (Marriage Contract Trustees.)—
Rutherford—H. Bruce.
Competing Claimants.

Husband and Wife—Debtor and Creditor—Competition.—The trustees under an antenuptial contract were directed, out of the wife's estates, to set aside a certain sum annually for behoof of the younger children of the marriage. Instead of doing so, they for many years paid this sum over to the husband. Having at length claimed repetition, the husband borrowed the money, and, along with his wife and the trustees, granted security over her estates. He died leaving the debt unpaid, and a burden upon his wife's estates;—Held that she was entitled to rank therefor upon his estate, though insufficient to meet the claims of the younger children under his obligation by the contract to pay certain sums for their behoof out of his own estates.

By antenuptial contract between the late Sir David Erskine and Miss Williams, (Lady Erskine,) the trustees therein appointed were directed, out of the produce of the lady's estates in Wales, to invest £500 yearly in their own names until £10,000 was accumulated, for behoof of the younger children of the marriage—the interest being directed to be paid to Lady Erskine during her life. Instead of doing so, the trustees annually remitted the whole income of these estates to Sir David Erskine. They continued this practice down to 1837, at which time the arrears of the annual £500 amounted to £10,000. They then required that this sum should be raised and invested, so as to satisfy the provision in the contract. For this purpose Sir David borrowed £10,000 from the Bank of Scotland, for which he granted bond, and in security assigned two policies of insurance upon his wife's life for £5000 each, binding himself to pay the premiums, and, along with his wife and the trustees under the marriage contract, assigned in further security her interest and his in the Welsh estates.

No. 6.

Nov. 15, 1844.

Williams v.

Williams.

1st Division.

Lord Cuning-

hame.

W.

Sir David Erskine died in January 1841, leaving unpaid the debt to the Bank, which consequently remained a burden upon Lady Erskine's estates. His testamentary trustees having brought a multiplepinding for the purpose of distributing his executry, Lady Erskine lodged a claim for the amount of interest, and also for the premiums upon the policies which had fallen due since her husband's death, and which she had paid. She also claimed to be preferred for the full amount of the debt itself, with accruing interest and penalties, to enable her to relieve her estates, unless sooner relieved of the burden by payment of the debt from other funds.

In a previous question under this same multiplepinding, the marriage-contract trustees were found entitled to rank for £12,951 : 2 : 4, as the arrears of the annual sum of £1000, which, by the contract, Sir David was bound to lay aside out of his own estates for behoof of his younger children. (See *ante*, Vol. VI. p. 226.) The fund *in medio* being insufficient to meet all claims upon it, these trustees opposed that of Lady Erskine. The question at issue was whether the debt to the Bank, of which she claimed to have her estates relieved, was the proper debt of Sir David?

With reference to this question, the narrative upon which the deed of security to the Bank proceeded was thought important. It first narrated the provision of the marriage-contract for the accumulation of £10,000 by the annual investment of £500, and then proceeded to state that, by reason of the trustees "having received, and paid or applied, to and for the use of the said Sir David Erskine and Dame Jane Silence Erskine, the whole income of the said estates and funds, no such accumulation as was so provided to be made as aforesaid hath hitherto been made, and the said Sir David Erskine hath become liable to pay over, and make good to the said Thomas Williams and Philip Williams, (the trustees,) all

No. 6. arrears of the said annual sum of £500, now amounting to £10,000 or thereabouts, and he hath agreed to complete and invest the said entire sum of £10,000 so provided to be invested as aforesaid: And whereas for these purposes, the Governor and Company of the Bank of Scotland have advanced in loan to me, the said Sir David Erskine," &c.

Nov. 15, 1844.
Williams v.
Williams.

The Lord Ordinary repelled Lady Erskine's claim.*

Lady Erskine reclaimed.

LORD PRESIDENT.—I think it clear that the trustees neglected their duty in paying over the whole proceeds of the Welsh estates to Sir David Erskine, and that, if they had not succeeded in getting the arrears of the annual sum which they were directed to set aside and accumulate made good, they would have been personally responsible. But they took measures to have their error corrected; and Sir David Erskine, who had spent the money, had no difficulty in acquiescing in the justice of their demand, that he should repay it, in order that the provision of the contract might be implemented. He borrowed the money from the Bank of Scotland, and the terms of the bond which was granted is distinct evidence of his acknowledgment, that the obligation to make good the sum to the trustees lay upon

* **NOTE.**—The Lord Ordinary considers the question now occurring new and difficult; but as he can find no precedent for such a claim, he has disallowed it. By the marriage contract of Sir David and his wife, trustees were appointed over Lady Erskine's Welsh estates, who were taken bound to apply £500 yearly of her rents, in accumulating a fund for the younger children of the marriage, and to remit £2500 to herself, for her own exclusive use. It seems that the trustees, for many years after the marriage, remitted both these yearly sums to Sir David, along with the surplus rents of the Welsh estate; but at last in 1838, the trustees in the marriage-contract taking the alarm, insisted that her ladyship should raise a sum sufficient to satisfy the obligation in the contract, which she procured from a bank, partly on security of her interest in the estate, and partly under guarantee of policies of insurance. She now claims as a creditor on her husband's funds for relief of this sum, on the ground that he (the late Sir David) received her whole rents, and expended on domestic or personal expenses the annual sum that should have been set apart to the children.

"The Lord Ordinary cannot sustain that plea. The parties must be presumed to have mutually agreed to expend the rents in question; and although donation between husband and wife of subjects that may be vindicated and recalled, are notoriously revocable, there is no authority for holding that sums of money given by one spouse to another, and employed by mutual consent for their joint gratification, can be reared up as a debt against the husband's estate, in competition with onerous creditors after his death. In cases of too frequent occurrence, when a wife makes over her personal funds to her husband, and these are exhausted without mutual consent in course of liberality or profusion, there is no precedent for a wife being allowed, in a case of insolvency, to rank with her husband's creditors for repetition of the sums so expended by the husband. In the present instance, if any such claim were sustained, Sir David's estates might, by the same rule, be charged with the whole £2500 yearly of his wife's separate allowance, which it was said was regularly remitted to Sir David, and perhaps not very strictly accounted for by him to Lady Erskine. Such a claim would hardly be maintainable in any case, and still less ought it to be sustained when the effect of it would be to diminish, to a very serious amount, the claim of his younger children on the funds of their father, for another provision under the contract of marriage, which he omitted to set aside and secure, in terms of that deed."

him, and that he borrowed the money, merely getting his wife to concur in granting the security. He, as the head of the establishment, spent the money, and was liable for it. I therefore think the interlocutor ought to be altered, and Lady Erskine's claim sustained.

No. 6.

Nov. 16, 1844.
Wilson v.
Laing.

LORD MACKENZIE.—I am entirely of the same opinion. In point of fact, the trustees merely got back the money which they had improperly paid to Sir David.

LORD FULLERTON.—I am entirely of the same opinion.

LORD JEFFREY.—I also am of the same opinion. It is not possible that the question could have been raised if there had been no insolvency. Sir David acknowledged that he actually got this money, which was not his own, but his children's.

THE COURT accordingly altered the interlocutor, and sustained Lady Erskine's claim.

JAMES DALGLEISH, W.S.—DAVIDSON and SYME, W.S.—Agents.

ROBERT WILSON, Pursuer and Advocate.—*Rutherford—Deas.*

No. 7.

REVEREND FRANCIS LAING and DAVID DICKSON, Defenders and Respondent.—*Whigham—Cook.*

Property—Boundaries—Expenses.—The titles to a certain field described it as being "enclosed by a ditch and seal dyke," and as being bounded on the north by the "loan at the march-stones set betwixt the town of Cupar and the heritor of Carslogie,"—the loan and stones having in course of time disappeared;—Held, is a question as to the boundary between Carslogie and the field, 1st, upon the titles, that the ditch and dyke at that part, with a hedge and trees which had been planted on the dyke, belonged in property to the proprietor of the field; and, 2d, upon the proof, that there had been no contrary possession sufficient to change the right under the titles.—II. The pursuer of a possessory action in an inferior Court, after proof but before judgment, brought a declarator of property, and advocated the inferior Court process *ob contingentiam*; having succeeded in the conjoined processes, and been found entitled to expenses—Held that it was no ground for modifying expenses, that a case for a possessory judgment against him had been made out in the inferior Court.

THE Reverend Francis Laing was proprietor, and **David Dickson** tenant, of the lands of Carslogie; and **Robert Wilson** was proprietor of a small park adjoining these lands on the south. The present question related to the property of an intervening ditch and hedge. The hedge was planted, in the line of the ditch, on a seal dyke, made of the stuff thrown out in making it, and was next Wilson's park, the ditch being next Carslogie. Wilson claimed the exclusive property of both, while the proprietor of Carslogie claimed the exclusive property of the ditch, and a right to the hedge as a common fence.

Nov. 16, 1844.
1st Division.
Lord Murray.
W.

* Decided 14th June.

H

No. 7. Wilson first applied, by petition, to the Sheriff, to have the tenant of Carslogie ordained to remove a paling which he had put up in the hedge; but after a proof as to the possession had been led, and before judgment, he brought a declarator of property against both the proprietor and tenant, and advocated the inferior court process *ob contingentiam*. The processes were conjoined, and the proof in the inferior court, of consent, held as repeated in the declarator.

Nov. 16, 1844.
Wilson v.
Laing.

Wilson's park was originally feued by the town of Cupar, in 1748, to one Robert Johnston, and was described in his sasine as bounded on the north by the "loan at the march-stones set betwixt the town of Cupar and the heritor of Carslogie," and as being "enclosed by a ditch and feal dyke." It passed through various hands, and was similarly described in all the titles, down to 1802, when, in a conveyance to a purchaser by the then proprietor, it was described as enclosed "with a ditch and hedge," a hedge having been planted on the feal dyke; and as bounded on the north by the lands of Carslogie, the loan having ceased to exist, and the march-stones having been removed. In this conveyance the seller reserved some ash-trees which he had planted in the line of the hedge, and, a few years afterwards, sold them (to the purchaser of the field) for £25 by a separate transaction; and in the subsequent conveyances the subject was conveyed with the "haill trees growing thereon, and was described as enclosed with a ditch and hedge, and bounded on the north by the lands of Carslogie, as in the conveyance of 1802.

Thomas Horsbrugh became proprietor of the park in 1807, and of the lands of Carslogie in 1808. His title to these lands described them as being bounded on the south partly by the property belonging to himself (these extending further than his park.) He continued in possession of both subjects down to 1825, when he sold Carslogie to Mr Laing, describing them in the conveyance as bounded on the south "partly by other lands belonging to me." In 1835, Wilson acquired the park from Horsbrugh's trustee by a conveyance describing it as above stated.

It appeared from the proof that the park had, from beyond the memory of man, been surrounded on all sides by a ditch, and within it by a feal dyke formed of the stuff thrown out in making it, and that the hedge and trees were planted some few years prior to the conveyance of 1802. There was no conclusive evidence as to the state of possession previous to Horsbrugh's becoming proprietor of both properties. After that, it was proved his tenant in Carslogie possessed up to the hedge, and pruned the side of it. Wilson complained of this use immediately on acquiring the property of the park, though he instituted no legal proceedings till 1844. It was further proved that the ditch was necessary for carrying off the water from Carslogie, which sloped towards it, and that drains had been run into it for that purpose; but that it was unnecessary as a drain for the park, which was higher where it adjoined the ditch, and sloped in the

opposite direction. Nothing appeared with reference to the hedge and ditch along the other sides of the park. No. 7.

The Lord Ordinary pronounced the following interlocutor :—" Finds, 1st, That the petitioner in the inferior Court, and pursuer in the declarator in this Court, has not produced a special conveyance to the ground claimed by him in his petition to the inferior Court, and in his summons of declarator in this Court: 2d, That the evidence which has been adduced does not establish an exclusive right of possession in his favour: Therefore, in the declarator, sustains the defences, assolizies the defenders from the conclusions of the action, and decerns; and in the advocacy, advocates the cause, dismisses the application, and decerns: Finds the pursuer and advocator liable in expenses in the conjoined actions."

Nov. 16, 1844.
Wilson v.
Lalng.

The pursuer and advocator reclaimed.

LORD MACKENZIE.—I am for altering the interlocutor. Look to the way in which the boundaries are stated in the original feu in 1748; it says the northern boundary is "the loan at the march-stones set between the town of Cupar and the heritor of Carslogie;" and then it says that the park is "enclosed by a ditch and a feal dyke." If the ditch or the dyke had belonged to any other body, it would have been described as the boundary. But it is not so on any side, and the loan, which of course was beyond the dyke and the ditch both, is the boundary stated on the north. Now, what motive could "the heritor of Carslogie" have for leaving a piece of his land between the loan and the property of his neighbour? The subsequent titles are all in accordance with this original one, and I must therefore hold that they include the ditch and the dyke as part of the subject conveyed. Then, I think, there is nothing in the possession to change the right. One thing alone is, in my opinion, quite conclusive—it is not disputed that the trees belong to the pursuer, and they are in the hedge. I cannot separate the trees from the hedge in which they are; and I cannot separate the hedge from the ditch, for the one is planted on what was taken out of the other. I admit that there was a use of the ditch by the proprietor of Carslogie, but it was just the use necessary from the position of the lands; the ditch necessarily received the water of an adjoining higher tenement. The proprietor of Carslogie ran drains into the ditch, and I think he had a right to do so from the situation of his property. I think he has right to the use of the ditch as a drain. I see no reason to think that there was any possession to disprove the evidence arising from the title.

LORD FULLERTON.—I have formed the same opinion. The Lord Ordinary sustains the defences, which I do not think necessarily follows from the previous findings in his interlocutor. I think there is what is equivalent to a special conveyance of the hedge and ditch in the title. The northern boundary is a loan, which means a passage, and the hedge and ditch are within it. I, therefore, hold that they are within the property conveyed. That being the case, I think there is nothing in the possession to alter the right given by the title. I, therefore, think we must alter the interlocutor. As to the right of the proprietor of Carslogie to have the water of his lands carried off by the ditch, I do not think that is disputed.

Deas.—No, my Lord.

No. 7.

Nov. 16, 1844.
Wilson v.
Laing.

LORD JEFFREY.—I concur in the views that have been taken. The titles to the park, which are not contradicted in their tenor by opposite titles to the lands of Carslogie, are in themselves decisive of the question, unless possession had changed the right. But if the titles had been doubtful, I think the possession has been such as would have explicated them into a conclusive title in favour of the pursuer. The ditch is used to direct and turn aside the water running from the superior tenement, and could only be constructed on the ground of the lower. I, therefore, quite concur that this interlocutor must be altered as to the property. I also quite concur, that the ditch being a surrogatum for the natural servitude upon the lower to receive the water of the higher tenement, the proprietor of Carslogie has right to the use of it as a drain.

The trees, if there were any doubt in the matter, would be quite conclusive. Actually a considerable sum was paid for them by one of the pursuer's predecessors.

I think we ought to find that the property is in the pursuer, but that the drains and water of Carslogie have for a long time run into the ditch, and may be continued.

The **LORD PRESIDENT** concurred.

THE COURT pronounced the following interlocutor :—"Recal the interlocutor complained of: In the declarator—find, decern and declare, in terms of the conclusions of the libel, but under the qualification that the defenders are entitled to a servitude right of carrying off the water from the lands by the ditch in question: And in the advocacy—advocate the cause, ordain the defender and respondent, David Dickson, to remove any paling which may have been placed by him in the line of the hedge and trees in dispute; and in respect of the judgment in the declarator, and of consent of parties, find it unnecessary to pronounce any further findings or decerniture (except as to expenses) in the advocacy: Find the defenders and respondent liable in the expenses incurred in the inferior Court, and in the expenses incurred in the conjoined processes in this Court; but, before answer as to any plea for modification of the same, appoint accounts to be lodged in process, and remit the same to the auditor of Court, to tax and report, and decern."

When the auditor's report was given in, the defenders moved that the expenses should be modified, upon the ground that a good case for a possessory judgment had been made out in the inferior Court, and that the whole expense there would have been saved if the declarator had been brought at first.

LORD JEFFREY.—If, before a possessory question is ultimately decided, a declarator is brought, and in it the property is found to be different from the possession for the last seven years, the wrongous possession can have no effect on the question of expenses.

The other Judges concurred, and the Court therefore refused to modify.

W. MASON, S.S.C.—LAMONT and NEWTON, W.S.—Agents.

REVEREND WILLIAM LOWE, Pursuer.—*Rutherford—Macfarlane.*
 GEORGE TAYLOR and OTHERS, Defenders—*H. J. Robertson.*

No. 8.

Nov. 16, 1844.
Lowe v. Taylor.

Slander—Process—Jury-Trial—Issues.—In an action for libel—1. Held that a counter issue was incompetent, proof of which did not amount to a justification of the whole or a distinct part of the libel; and observed, that by allowing a counter issue, (in such action,) the Court pronounced upon its relevancy as a justification. 2. Terms of counter issues, which were disallowed in respect the facts proposed to be proved under them were therein too vaguely and loosely set forth.

SEQUEL of case reported *ante* Vol. V. p. 1261.

The following issues were framed by the issue clerks :—

Nov. 16, 1844.

1st Division.
 Lord Cuning-
 hame.

“ It being admitted that during the months of July and August 1842, the defender, George Taylor, was the editor and conductor; that the defender, James Watt, was the printer and publisher; and that the defenders, Robert Lyall and George Robertson, were proprietors; of the newspaper or periodical published weekly in Montrose—entitled ‘The Montrose Standard and Angus and Mearns Register.’

“ It being also admitted that Nos. 265 and 270, volume six, of the said newspaper or periodical, and of which the productions Nos. of process are authentic copies, were printed and published at Montrose, on or about the 22d of July and 26th of August 1842, respectively.

“ 1. Whether the said No. 265 of the said newspaper or periodical contains the words or passage set forth in No. I. of the schedule hereto annexed; and whether the statements in the said passage are of and concerning the pursuer, and hold up his character and conduct, individually and professionally, to discredit and contempt, and accuse and impeach him of disloyalty and disobedience to the laws, or at least, bring his loyalty and obedience as a good and peaceable subject into doubt and question, by falsely, injuriously, and calumniously representing the pursuer as a person who had deviated from the proper discharge of his duties as a clergyman, and become an apostle of sedition, and as a person who was in the practice of addressing revolutionary tirades or harangues to the mob, encouraging disobedience to the laws, exciting turbulence and insubordination among the lower orders, and calling on the people to refuse to pay the taxes justly due by them; to the loss, injury, and damage of the pursuer.

“ 2. Whether the foresaid No. 265 of the said newspaper or periodical also contains an article, or passage, or letter in the terms set forth in No. II. of the said schedule; and whether the statements in this article or passage are of and concerning the pursuer, and hold up his character and conduct, both as an individual and as a clergyman, to contempt and discredit, and accuse him of deception and falsehood, by falsely, calumniously,

No. 8. and injuriously representing him as a person who, at a public meeting on the Market Muir of Forfar, and in giving an account to his constituents of his actings as a corn-law delegate, stated, contrary to the truth, that he had delivered a speech on a certain occasion, which had never been delivered or uttered by him, and that effects were produced by the said speech, on the persons to whom it was addressed, which never were produced ; to the loss, injury, and damage of the pursuer ?

Nov. 16, 1844.
Lowe v. Taylor.

“ 3. Whether the foresaid No. 270 of the said newspaper or periodical, contained an article or passage in the terms set forth in No. III. of the said schedule ; and whether these statements are of and concerning the pursuer, and falsely and calumniously hold him up to the scorn, ridicule, and contempt of the public ; and, in particular, whether they falsely and calumniously hold up and represent the pursuer to the public as a clergyman, who, both by his bad example and the pernicious doctrine he preaches, has been the cause of an open and scandalous desecration of the Sabbath, and has created groundless discontent and dangerous commotion among the lowest of the people—the offscourings and dregs of society ; and has done his utmost to stir up and excite the passions of the people for improper purposes ; and been an enemy to the poor, and a bad man, and the cause of mischief in the community in which he lives and officiates ; and tampered with the Bible, and purposely inculcated among the poor false and foolish notions ; to the loss, injury, and damage of the pursuer.”

Damages laid at £1000.

SCHEDULE.

“ No. I.—‘ A letter from a Forfar correspondent, which will be found in another column, gives us some account of a rather extraordinary exhibition made there by the Rev. Mr Lowe, the delegate from that place to the anti-corn law conference which lately met in London. Mr Lowe, with some of his fellow-delegates, had the honour of an interview with Sir Robert Peel, of which we have read an account in the London papers, and which left us in doubt whether most to wonder at the forbearing courtesy of the premier, or the ignorant impertinence of the delegates. We have been told by a Forfar friend, for whose opinion we have much respect, that Mr Lowe is personally a respectable man, and we are not unwilling to believe it, because we know that, generally speaking, the clergy of all denominations in Scotland bear that character ; but, if his address to Sir Robert Peel be correctly reported, he must be a most injudicious and wrong-headed man. He may be of opinion that he is performing his duty as a Christian minister ; but if he is a fair sample of dissenting ministers generally, we hesitate not to say, that never was an unhappy country visited with a greater curse than the existence of such a set of so-called teachers of religion, who seem to think their sacred office warrants their becoming with impunity apostles of sedition. The distress under which the country suffers so grievously, may or may not be

removable by legislative interference; we are fully satisfied it is beyond the reach of any such remedy; but surely if the Word of God be the rule by which Christian ministers ought to be guided, the lessons they are called upon to inculcate upon their people are—to humble themselves under the mighty hand of God, and to be in the midst of all their suffering steadfast in well-doing—not to rise up in rebellious resistance against the authorities which God has placed over them. That minister is, even for his own interest, a very short-sighted man who prefers the temporary popularity which he may enjoy with an ignorant, and not generally religious mob, by tickling their ears with revolutionary tirades, to the praise which he will receive from all good men, when in a time of adversity he encourages them by precept and example to bear their sufferings with fortitude, to endeavour to remove them by patient perseverance in well-doing, and in all things to remember and follow the example of peacefulness and obedience to established authority, set before them by our blessed Lord, and those who drew lessons of the highest wisdom from his lips. Whether is a minister more suitably employed in lecturing against the corn-laws, and calling upon the people to refuse payment of taxes, or in telling those who look up to him for instruction, that man doth not live by bread alone, but by every word which proceedeth from the mouth of God doth man live.”

No. 8.

Nov. 16, 1844.
Lowe v. Taylor.

“No. II.—‘To the Editor of the Montrose Standard.—Forfar, July 20, 1842. Sir—The Market Muir here, on Tuesday last, was the scene of one of those mountebank exhibitions, with which the public have of late been so often troubled, from a one-horse drosky, hired for the purpose of transporting the orator from the Market Cross of Forfar to the Muir, and while there to serve as a platform. This grand exhibition was for the purpose of hearing from the reverend delegate, who attended from Forfar the great anti-corn-law conference in London, and who had the honour of an interview with Sir Robert Peel while there, an account of his proceedings on these occasions. The rev. gentleman commenced by reading and reciting the speeches which he and some of the others had delivered while at the conference; amongst many other things, detailing misery which he said existed in Forfar, but which was certainly overcharged, the working-classes in Forfar being generally employed, although the wages are small; and how he had stated to the conference, that a general recommendation should be made by them to their constituents to refuse to pay their taxes, and that he was sure this district would join heartily in such a measure. The rev. gentleman, on uttering these words, looked around for a response; but, alas! what was his bewildered eye met with? a numerous shaking of heads. He then proceeded to inform the audience of what took place at the interview with Sir R. Peel. He read to them a speech said to have been delivered by him on the occasion, and which was copied from some Edinburgh paper into the Review of last Friday, but which speech, I am much inclined to think, had

No. 8. been written down afterwards, and that Sir R. Peel has yet to learn that such was ever intended to be addressed to him. He stated
 Nov. 16, 1844. that he was the last of the delegates who addressed Sir Robert on this
 Lowe v. Taylor. occasion ; that the preceding speakers had expatiated on other matters, such as free trade, &c., but that he had confined himself to the subject of morality and religion—forsooth because he knew nothing of the principles of free trade ; that when he concluded his all-powerful harangue, Sir Robert shook like an aspen leaf, and, staggering back, laid hold of a sofa to prevent his falling until he should recover himself. A universal doubt in the minds of the audience, on this being expressed, began to show itself—and well it might. This same gentleman stated, that he had suggested when in London, that the delegates should proceed to Constitution Hill, and, while Her Majesty was passing, that the people's petition, as he was pleased to call it, should be thrown into Her Majesty's coach. I am, however, inclined to think, that the Whipping Act coming into operation, put a stop to this intended proceeding. There is, no doubt, distress in the country—distress seated too deep for the rev. agitator to devise a plan of relief ; and it ill becomes a clergyman to go about exciting the multitude and the working classes, on subjects in regard to which the government are at this moment doing every thing in their power to alleviate public suffering. This comes, too, with peculiarly bad grace from a man who refuses to pay the very poor for whom he so loudly pleads, a pittance of 4s. 2d. of poor rates for which he is assessed ; and threatens to allow his furniture to be sold, sooner than pay what every neighbour around him is paying to the poor. From the general appearance of Mr Lowe's audience at the conclusion, I am inclined to think that he will not again be troubled with a similar mission, but be allowed to continue in quiet obscurity, where, if he had any respect for his character as a clergyman, he should have always remained.—I am, &c.—L. M. N.'”

“ **No. III.—‘SABBATH DESECRATION AND THE REV. MR LOWE.’**—
 ‘The working classes here have been in a state of great ferment for the last few days. Placards of an inflammatory nature have been pasted up through the town. Communications, said to have been received from Manchester, were read to large crowds, urging them to follow what they termed the *noble* example set them by the operatives of Manchester, &c. On the afternoon of Sabbath last, a meeting was held in the Market Muir, which, without being told, we may well imagine consisted of the offscourings of Forfar, the very dregs of society. Another meeting, consisting principally of idle women and boys, met on Monday morning in the same place, and were harangued by several individuals, who recommended them to strike work, but advised them not to use any violence. Where were our authorities, and what kind of authorities are they, it may well be asked, who wink at such an open and scandalous

desecration of the Lord's day; Ought they not to have caused the **No. 8.**
 spokesman and chairman of such a meeting be apprehended? Most **Nov. 16, 1844.**
 assuredly. All are loud in condemnation of the supineness which our **Lowe v. Taylor.**
 magistracy have, on this occasion, displayed. They seem to have been
 set over their fellow-townsmen for no other purpose than to show with
 how little wisdom they can govern. But whom have we to thank that
 such disgraceful proceedings should have been enacted on Sabbath?
 We hesitate not to ascribe them to the Rev. Mr Lowe, for they are only
 the natural consequences of the example which he sets them, and the
 pernicious doctrine that he preaches. All that was in the power of man
 to do, to excite and stir up the passions of the people, he has done, and
 still continues to do. Instead of being the poor man's friend, he is his
 greatest enemy. He is one of those who sedulously spread the damnable
 doctrine, that the legislature are bound to provide bread for the
 people. Better had it been for Forfar, that such a man as Mr Lowe
 had never appeared among its people; and would to God we had the
 power, as we have the will, to extirpate him and his brother demagogues
 from the land, for, till that be accomplished, Britain will not experience
 one moment's repose. At the conference held with Sir R. Peel lately,
 he delivered one of the most foolish, and, at the same time, presumptuous
 speeches that ever was uttered. His presumption and impudence has
 never been surpassed. Picture to yourself, reader, the very personifi-
 cation of ignorance, and the quintessence of vulgarity, daring to address
 the learned and accomplished Premier of Britain. The mouse contrasted
 with the elephant is not greater than is the contrast between Mr
 Lowe and Sir R. Peel. In the same speech also, he dared to tamper
 with the Bible—he said, “cursed is he that withholdeth bread from the
 poor,” and we say and the Bible says, “cursed is he that putteth fool-
 ishness into the heart of the poor, and placeth a lie in the lips of the
 hungry.” ”

OR,

“ 1. Whether the pursuer, on several occasions, in the months of February and July 1842, whilst he was in London as a delegate from an association connected with Forfar to the Anti-corn-Law Convention or conference; as also within the town, or in the neighbourhood of Forfar, towards the beginning or middle of November 1841, and on or about the 21st of February, the 20th of June, the 19th and 21st of July 1842; and at Montrose, on or about the 26th of July 1842, or at one or more of them, did address political harangues to the assembled multitudes, and did make use of inflammatory and exciting language in reference to the existing corn-laws, calculated to excite the indignation of the people against the Government of the country and the two Houses of Parliament?

“ 2. Whether, on these occasions, or on one or more of them, the pursuer gave an account of his proceedings when in London as a delegate

No. 8. as aforesaid, and reported the terms of a speech which he stated he had addressed to Sir Robert Peel, by which he represented himself to have
Nov. 16, 1844. addressed Sir Robert Peel in the terms contained in schedule No. IV.,
Lowe v. Taylor. hereto annexed, or in words of similar import; and whether, by the terms of his speech, as thus reported, he represented the existing corn-laws as contrary to the Word of God as declared in the Bible, and those by whom they were supported as liable to a curse, contained in the sacred volume?

“3. Whether one of these occasions, in the month of July 1842, was the day appointed by the General Assembly for a national fast; and whether on that day the pursuer was instrumental in collecting a public meeting in the neighbourhood of the town of Forfar, for the purpose of political discussion; and whether he did then and there address the people assembled in a violent and inflammatory style on the subject of the corn-laws, and the miseries and grievances of the lower classes; and whether, in the month of August 1842, or shortly after the said occasion, another public meeting in the same neighbourhood, was held on a Sabbath-day, at which similar violent political harangues were addressed to the people? And whether the latter meeting, on the Sabbath-day, might not be considered as a natural consequence of the previous meeting on the Fast-day, and of the conduct of the pursuer on that occasion?”

“4. Whether, in the month of July 1842, or previous to that period, the pursuer was in arrear, and had refused to make payment of the assessment for poor's-rates due by him, and which rates were generally paid?”

SCHEDULE.

“No. IV.—‘The rising generation, too, were growing up without the means of education, except in one branch, a most fearful branch of education indeed, in reference to the rulers of our land. Our youth were trained to curse those laws which stood between them and the bounties of heaven, in that munificence which God gives them. He was persuaded that he (Sir R. Peel) could not but feel, standing as he did in the awfully responsible position of Prime Minister of England, at this crisis. Their youth were trained to hate those oppressors who had enacted and who maintain those laws by which they are literally starved. They were trained to this by practical parental example; and it was not to be wondered at, seeing that this is expressly predicted in that sacred volume, which they all hold to be the revealed will of Almighty God to man—‘He that withholdeth corn, the people shall curse him.’ He did not quote that Scripture—a Scripture which was now being literally fulfilled by starving millions—he did not quote it to harrow up his heart, but, being the truth, he wished it to tell upon his mind, if so be that it might lead him to use that power which was in his hand, in order to avert from himself and his party the predicted imprecations of an almost despe-

rate people. He pleaded, not on the ground of the distress—however deep and fearful that was,—but he pleaded and begged of him, on the ground of justice, in the sight of God, that he would remove the starvation laws, and redress the just grievances of the people.”

No. 8.

Nov. 16, 1844.

Lowe v. Taylor.

The pursuer's issues were not objected to, but the counter-issues for the defender were, upon the grounds explained in the subjoined note, issued by the Lord Ordinary on making avizandum to the Court.*

Rutherford, for the pursuer, consented to the second counter-issue being approved of.

LORD PRESIDENT.—I think this case important, for whatever we do will be considered a rule. I am very strongly impressed with the objections taken to some of the counter-issues; but, at the same time, I must observe that this is a case in which some degree of latitude in the counter-issues must be allowed, in respect of the latitude in the pursuer's innuendoes. There is a sort of variance in these innuendoes, and a set of inferences drawn which is very complicated; and I am not prepared to say that these innuendoes follow necessarily from the words alleged to have been used. A counter-issue, there can be no doubt, must go to a complete justification of the whole, or of a part of the libel. I have said that I think some latitude may be allowed to the defenders here, but still I am not satis-

* **NOTE.**—The issues in chief taken by the pursuer here are not objected to, but questions have been raised as to the relevancy and correctness of the counter-issues proposed by the defenders, which have been fully and elaborately argued before the Lord Ordinary. He conceives it fit that these should be at once carried before the Division in which the Judge presides, who will probably try the case.

“The counter-issues are objected to by the pursuer on the grounds, first, that the facts to be proved are too vaguely and loosely set out in the issues to form proper counter-charges of libel or sedition against the pursuer; and, secondly, it is argued that the counter-issues, when analysed, do not set out sufficient matter of justification for the defenders; and if so, it is added, that these issues can only have the effect of palliating the direct charges, and of mitigating damages—to which effect, it is maintained, that counter-issues are both incompetent and unnecessary.

“The defenders, as the Lord Ordinary understood them, are not averse to make any verbal correction on the counter-issues necessary to render them more precise as to the time when, and the place where, the alleged seditious language was used; and they contended that they were entitled to the counter-issues, as calculated to bring out facts which would form a material, if not an entire justification of the publications complained of by the pursuer.

“Upon conferring with the issue-clerk, he explained his view in admitting the counter-issues to be this—viz. that the defenders were entitled to counter-issues generally to the effect here proposed, as the alleged libels complained of by the pursuer in each issue, consisted of a variety of separate and distinct charges—and that the defenders might take an issue to justify a part of the charges libelled on as defamatory, although they were unable or not disposed to justify the whole; and that this was a case which, from its nature, and from the multiplicity of libels charged, formed an exception from the general rule, that matter in palliation or in mitigation of damage is unnecessary to be brought forward in a counter-issue.

“On the question as so stated, the Lord Ordinary has not been able to find any precedents directly in point in our reports. He submits it, therefore, as an important point of practice for the consideration of the Court.”

No. 8. **Nov. 16, 1844.** **Lowe v. Taylor.** fied that they have done what is required in their counter-issues; for if they are in a condition to lay any thing like evidence before a jury, they must know something of the expressions used. It is not enough to say that they were of a general description—that would be putting the relevancy of their issues into their own hands. I therefore think that there is a defect which must be amended. As to the third issue, I am not satisfied with the explanation we have got. It is said that the pursuer took part at a meeting on a fast-day, which is a very different thing from a meeting on a Sabbath-day. If the proof of this is meant as a mere palliation, it is not incumbent on the defenders to take an issue; indeed, if we are not prepared to hold that it amounts to a justification, we cannot allow them an issue.

LORD MACKENZIE concurred. A counter-issue is given as something opposed to the pursuer's issue, so that if the defender proves it, he shall be entitled to a verdict. I cannot think the third counter-issue here amounts even to a palliation, far less a justification.

LORD JEFFREY.—I take the same view. All that the Court does in allowing the pursuer's innuendoes, is to find that it does not appear improbable that such a case may be made out. The issue, with the innuendoes, forms a text and a commentary. But when you come to an issue in justification—whether the pursuer said or did the thing in question—will it do to state generally that he delivered violent and inflammatory harangues? The plain test is the question—what do you propose to prove? The law and common sense presume that you made enquiry by precognosing witnesses; and do you mean to say that your precognition consists of this, that the pursuer made a violent and inflammatory harangue? You are bound to give the other party some general view of the thing you mean to prove—of what the topics of violence were. I agree with your Lordships that we should allow a good latitude. I would not only say, “or words of similar import,” but I would give the copulative, “*and* words of similar import.” As to the third counter-issue, I think it is quite out of the question. We cannot allow an issue, that the meeting on the fast-day was the cause of the subsequent meeting on the Sabbath-day, unless the party sets forth in his condescendence *per quod*, it was the cause.

The defender may prove any thing on the record without a counter-issue, even though it amounts to a full justification, if it is part of the fact which is the subject of the action. Any thing in palliation may always be proved without a counter-issue, and indeed a counter-issue in palliation is incompetent; for, by allowing a counter-issue, we pronounce on the relevancy of it as a complete justification.

THE COURT accordingly disallowed the first, third, and fourth counter-issues, and remitted to the Lord Ordinary to allow an amendment of the record and of the counter-issues, and proceed further in the cause as to his Lordship might seem proper; reserving all questions of expenses.*

WILLIAM DUNCAN, S.S.C.—GEORGE MONRO, S.S.C.—Agents.

Authority cited by the Defenders.—*Leslie v. Blackwood*, July 22, 1822, (3 Murray, 157.)

* This advising occurred on 20th June last. The report was intended to be delayed till the final adjustment of the counter-issues; but the case has, without

MRS L. M. WILSON or WISHART, Pursuer.—*Shaw.*

No. 9.

ARCHIBALD WISHART, Defender.—*Sol.-Gen. Anderson—Robertson.*

Nov. 16, 1844.

Wilson v.

Wishart.

Cautioner—Husband and Wife—Provision—Title to Pursue.—By antenuptial contract, the husband bound himself and his heirs to invest a sum for behoof of the wife in liferent in the event of her survivance, and the children of the marriage in fee, so soon as he or they should be called on to do so by certain trustees, and by relative bond of caution, his brother bound himself to pay these provisions in the event of the husband failing to implement his obligation in regard to them. The husband having died insolvent, without having implemented the obligation, or having been called upon by the trustees to do so;—Held, 1st, That the brother was liable upon the bond; and 2d, That the wife had a good title to sue upon it, without the concurrence of the marriage trustees.

JOHN HENRY WISHART, surgeon, Edinburgh, was married to Louisa Melville Wilson in 1810. By antenuptial contract, he bound himself and his heirs “to provide and secure the sum of £1500 sterling on good and sufficient security, heritable or moveable, or in the purchase of land or houses, and to take the rights and titles thereof to himself, and the said Louisa Melville Wilson in conjunct fee and liferent, for her liferent use allenary, in case she shall happen to survive him, and to the children to be procreated betwixt them; whom failing, to himself and his heirs and assignees whomsoever in fee; and that so soon as he or they shall be called upon to do so by the persons at whose instance action and execution for implement of the provisions made in favour of the wife and children of the marriage by these presents are hereinafter appointed to pass.”

Nov. 16, 1844.

1st Division.

Lord Cuning-

hame.

W.

By relative bond of the same date, his brother, Archibald Wishart, bound himself and his heirs, “in the event of the said John Henry Wishart’s failing to implement the provisions above mentioned, by providing and securing the foresaid sum of £1500 sterling, in the manner provided by the said contract of marriage allenary, and no otherways, to make payment to the said Louisa Melville Wilson, in case she shall happen to survive the said John Henry Wishart, of the legal interest of the foresaid sum of £1500 sterling, beginning the first payment of said interest at the first term of Whitsunday or Martinmas that shall happen after his death for the half-year preceding, and so forth half-yearly thereafter during all the days of her life;” and further, to grant security for implement of this obligation, “to the satisfaction of the persons at whose instance action and execu-

any further procedure, been taken out of Court by a compromise, to which the authority of the Lord Ordinary was interposed.

* Decided June 25.

No. 9.

Nov. 16, 1844.
Wilson v.
Wishart.

tion is, by the foresaid contract of marriage, stipulated to pass for implementation of the provisions in favour of the said Louisa Melville Wilson and children of the marriage, and that so soon after the death of the said John Henry Wishart as they may require us to do so, in case it shall be the opinion of Robert Dundas and James Balfour, Esquires, writers to the signet, (or failing of them, or either of them, by death, of any other person or persons to be nominated in their or either of their places mutually by me and the persons at whose instance execution is to pass as aforesaid, and, in case of difference between the said referees, of any person they may appoint to decide between them,) that I ought to grant other security than these presents, under the circumstances of the case."

John Henry died insolvent in 1834, without having implemented the provision in favour of his wife, or having been required by the contract trustees to do so. She, therefore, gave Archibald a charge of horning upon the bond. He presented a bill of suspension, which was refused by the Court.—(See report, of date May 16, 1835, 13 S. 769.) This judgment was reversed on appeal, upon the ground that it was incumbent on the widow, in the first instance, to discuss the estate of her deceased husband, which Archibald did not admit to be insolvent.—(See report of date May 12, 1837, 2 S. & M'L. 564.) She accordingly took the necessary steps for this purpose, and obtained a dividend upon the arrears of interest due to her of £30 : 19 : 8½, being at the rate of 11½ per pound.

In 1843 she raised an ordinary action against Archibald upon the bond, concluding for payment of the legal interest of £1500, from the first term after her husband's death, half-yearly, during all the days of her life, under deduction of the sum which she had recovered from her husband's estate. By subsequent minute she restricted her claim to the interest of £1200, consenting to hold £300 as secured over a house of her husband's in York Place. He had purchased this house in 1819 for £3300, to pay which he borrowed £2700 of his wife's funds from the marriage-contract trustees, who held them with authority if they saw fit to lend to him. For this loan of £2700, he granted security over the house to the trustees for £3000; and this the widow, by the minute alluded to, consented to hold as a security for her provision, to the extent of the £300, by which it exceeded the amount of the loan out of her funds for which it was granted.

The titles of this house were taken by the husband in favour of himself and his heirs generally, as were also the titles of another house in the same locality, of nearly equal value, which he subsequently purchased.

The defenders pleaded, as a preliminary defence, that the action was incompetent, in respect of its being at the instance of the widow alone and not of the persons at whose instance execution was appointed to pass by the marriage contract, and relative bond.

This defence the Lord Ordinary repelled by interlocutor of 19th January 1844, in which the defender acquiesced. No. 9.

On the merits, the questions were, 1st, whether, the husband's obligation in the marriage contract, with reference to which the bond of caution by the defender was granted, being to secure £1500 for behoof of his wife, only so soon as he should be required to do so by the trustees at whose instance it was provided that execution for implement should pass, and he having died without having been so called upon, action upon the bond was competent? and, 2d, whether the investments made by the husband, in the purchase of the two houses in York Place, with the knowledge of the trustees, were to be considered as implement of his obligation? Nov. 16, 1844.
Wilson v.
Wishart.

The Lord Ordinary decerned in terms of the libel, as restricted, and found the defender liable in expenses.*

The defender reclaimed, but

THE COURT unanimously adhered, with additional expenses.

JOHN PATTEN, W.S.—HUNTER, BLAIR, and COWAN, W.S.—Agents.

* "NOTE.—The pleas of the defender against implementing the obligation undertaken by him in the contract of marriage and bond libelled on, seem to be palpably untenable.

"It was contended generally that there had been great negligence on the part of the persons authorized to enforce the contract of marriage, and that there were *termini habiles* now for insisting on the obligation, as it was not practicable to make the investment stipulated in the precise terms of the contract after the death of Dr Wishart. But the pursuer could not suffer by the neglect of the trustees appointed to enforce the contract, even if a case of negligence were made out, which is not clear. And, separately, it is an entire mistake to suppose that an obligation was not prestable after Dr Wishart's death, as the bond expressly provided that the defender should be obliged 'to grant security for the payment of the foresaid sums of principal and interest, to the satisfaction of the persons at whose instance action and execution was, by the foresaid contract of marriage, stipulated to pass for implement of the provisions in favour of the pursuer and children of the said marriage, and that so soon after the death of the said John Henry Wishart as they might require him, the said Archibald Wishart and his foresaids, to do so, in case it should be the opinion of Robert Dundas and James Balfour, Esquires, writers to the signet, (or failing them by death, of other persons to be nominated,)' that be the said Archibald Wishart ought to grant other security than the said bond, under the circumstances of the case.'

"It was thus clearly contemplated by the defender and other parties under the contract, and at the very time of its execution, that the defender might not be called on to give the additional security he became bound for till after the death of Dr Wishart."

No. 10.

JAMES JARVIS, Pursuer.—*Ld.-Adv. McNeill—A. McNeill.*

Nov. 19, 1844.

WILLIAM WOTHERSPOON, Compeerer.—*Maitland.*

Jarvis v.

Wotherspoon.

Process—Expenses.—A party having appeared and proposed to sist himself as defender in a process, and having failed to do so, the Court found him liable in the expense he had thereby caused to the pursuer.

Nov. 19, 1844.

2d Division.
Jury Cause.

JAMES JARVIS pursued a reduction of a bond against Alexander Anderson, writer in Glasgow. After issues had been adjusted, and the case set down for trial, Anderson, the defender, died. The process was then transferred against the Officers of State, Anderson being a bastard. The Officers of State having declined to appear as defenders in the action, decree was pronounced in favour of Jarvis in terms of the conclusions of the libel. Before this interlocutor was signed, however, a motion was made at the bar for William Wotherspoon, S.S.C., stating that he was a creditor of Anderson, and that he meant to proceed without delay to get himself confirmed executor-creditor, and craving the Court to supersede signing the interlocutor, to afford him an opportunity of appearing as defender in the cause. On the 6th June 1844, the Court granted the delay craved. After some proceedings, the Court, on the 19th of July, allowed Wotherspoon to give in a minute sisting himself as defender by the first box-day in the vacation, and also allowed the pursuer to give notice of trial as against him, in the event of his so sisting himself.

The pursuer accordingly gave notice for the then ensuing Glasgow Circuit, and proceeded to make the requisite preparations for trial.

Wotherspoon having failed to give in a minute sisting himself as allowed by the Court, the pursuer moved that he should be found liable in the expenses which he had caused by his appearance and proposal to sist himself as defender.

LORD MONCREIFF.—If a third party appears in a process proposing to sist himself, and thus causes expense, I think that he must be liable for it.

THEIR LORDSHIPS accordingly found Wotherspoon liable in expenses.

CHARLES FISHER, S.S.C.—WM. WOTHERSPOON, S.S.C.—Agents.

TRUSTEES OF MRS HELEN ANNA FISHER, Pursuers.—*Rutherford—Hector.*

No. 11.

DR HENRY FISHER and OTHERS, Defenders.—*Sol.-Gen. Anderson—More.*

Nov. 19, 1844.
Fisher's Trustees v. Fisher.

Provision—Legitim—Marriage Contract—Parent and Child.—By antenuptial contract of marriage, the whole goods in communion were provided to the spouses, and the longest liver of them in liferent, and to the children in fee, but there was no express exclusion of the legitim: the wife having survived,—Held that the children were barred by the terms of the marriage contract from claiming legitim as at their father's death.

Succession—Collation—Fee and Liferent—Parent and Child.—A father disposed certain heritable subjects to his daughter and her husband "in conjunct fee and liferent, and the longer liver of them," and to their eldest son nominatim, his heirs or assignees whatsoever, heritably and irredeemably, in fee: the disposition bore to be granted for love and favour, but by a subsequent deed the husband bound himself to pay a price for the subjects, which was considerably less than their value:—Held that the terms of this conveyance did not vest the fee of the property in the wife, who was the survivor, nor in the son, but that the fee was vested in the husband, and that as the son was his heir alioqui successurus in these subjects, and did not obtain them by singular title from his grandfather, he was bound to collate them with his brothers.

Is the year 1779, a marriage was contracted between John Fisher, Nov. 19, 1844. writer in Dunkeld, and Miss Helen Kea. By an antenuptial contract, which was entered into between them, John Fisher, and his father, be-^{2D DIVISION.} Lord Caning-^{same.} came bound to provide 7000 merks Scots, which, to the extent of 5200 merks, was, along with a like sum out of a patrimony of 7000 merks provided by the father of Helen Kea, to be invested in proper security, the rights to which were to be taken in favour of the spouses, "and longest liver of them two in liferent, for their liferent use allenarly, and to the children, one or more, to be procreated of the marriage, in fee." The contract further provided, that, in the event of a child or children existing at the dissolution of the marriage by the death of either party, the survivor should be bound to maintain, clothe, educate, and entertain them, suitably to their rank and station, aye and until they should arrive at the age of twenty-one years, or marriage, whichever should happen first; and if sons, put them to trades, pay their apprentice-fees, and maintain them during their apprenticeship. It was also further provided and agreed to by both parties, "that all and every sum or sums of money, or subjects, both heritable and moveable, that shall be conquest or acquired during the standing of the marriage, by the mutual industry of the parties, or otherways, shall be liferented by them, and longest liver of either of them. And, in case of children, the fee thereof is declared to pertain and belong to them, and to be proportioned amongst them in such way and manner as their father shall direct by write, and fail-

No. 11. ing thereof equally." It was declared that all above the foresaid 10,400
 Nov. 19, 1844. merks was to be deemed conquest.
 Fisher's Trustees v. Fisher.

Of the marriage there were born four sons. James Fisher, the eldest, and John, Henry, and George Fisher. John, the second son, died intestate, and unmarried.

The marriage was dissolved by the death of John Fisher, the father, on the 19th July 1803, leaving a considerable heritable and moveable succession. In exercise of the power of distribution reserved to him by the marriage contract, he had invested a part of his funds in bonds, which were taken payable to himself and his wife in conjunct fee and liferent, and to his children nominatim in fee. Mr Fisher was for many years survived by his wife, Helen Kea.

George Fisher was eight years old when his father died in 1803. He went abroad in 1811, when sixteen years of age, and he died in 1823. He left a daughter, Helen Anna Fisher, who, at the time of his death, was five years old. Shortly after her father's death, her uncle, Dr Henry Fisher, was appointed tutor-dative to her; and upon her attaining puberty, she chose her uncles, James and Dr Henry Fisher, to be her curators. Previous to 1839, when she attained majority, she was married to Mr William Fisher of Ferryhill.

James Fisher, the eldest son, had attained majority before his father's death. He was confirmed executor to his father, and took upon himself the management of the whole funds and estate for behoof of the widow, and also for his own behoof and his brothers. Mrs Fisher enjoyed the liferent of the whole of her husband's estate till her death, and maintained and brought up the family.

Part of John Fisher's estate consisted of the lands of Hillhead, and a house and garden in Dunkeld. These subjects had been disposed in July 1791 by John Kea, the father of Helen Kea, "to and in favours of the said Helen Kea and John Fisher, in conjunct fee and liferent, and longe liver of them, and to James Fisher, their eldest son, his heirs or assignee whatsoever, heritably and irredeemably in fee." The disposition bore to be granted for love, favour, and affection to Helen Kea and John Fisher and certain other causes and considerations. It appeared, however, from a bond granted by John Fisher some days after the disposition, that although the latter deed bore to be granted for love and favour, yet the Mr Fisher had purchased the house and garden for the price of £240 and that Mr Kea was to "give me, my spouse, and son, his lands of Hillhead, valued by him at £500 sterling, on my paying him £200;" and Mr Fisher accordingly granted a bond for £440 to Mr Kea in liferent and certain of his grandchildren therein mentioned in fee. The titles of these subjects were, after the sale, retained by John Fisher in his own possession, and neither his wife nor son were infest during his lifetime.

James Fisher died in 1840, and Mrs Fisher senior in 1841. Mrs Fisher had executed a settlement in favour of her surviving sons, under which

Dr Henry Fisher came to be surviving disponent and executor. He was also a trustee and executor of his brother James. No. 11.

In 1842, the trustees under the marriage contract of Mrs Helen Anna Fisher brought an action of count and reckoning in reference to her father George's share of John Fisher's estate. The summons was directed against Dr Henry Fisher individually, and against him and the other trustees of James Fisher, as representing James Fisher and Mrs Fisher senior, and concluded that they should hold count and reckoning with the pursuers for the intromissions had by them, or those whom they represented, with John Fisher's estate, and George's share of it. In this action two questions were specially raised—1. Whether George Fisher was entitled to legitim at his father's death; and 2. Whether James Fisher, while claiming his share of his father's personal estate, was bound to collate the lands of Hillhead, and the house and garden in Dunkeld. Cases were ordered on these two points.

Nov. 19, 1844.
Fisher's Trustees v. Fisher.

The pursuers pleaded;—

1. In accounting, the defenders were bound to give credit for George Fisher's share of legitim as at his father's death, with interest from that date. There was no clause in John Fisher's marriage contract excluding the legitim, nor were the provisions contained in it declared to be in satisfaction of that right, and it could not be excluded by implication. In so far as regarded the obligation to secure the specific sum of 10,400 marks to the spouses in liferent, and the children in fee, it was not disputed that it constituted a proper *jus crediti* against John Fisher, and so far diminished the fund for legitim. But all the funds and estate beyond that amount were left entirely under the control and administration of the husband, without any obligation upon his part to secure them for the benefit of the survivor in liferent, and the children in fee. With regard to these, it could not be maintained that the settlement had the effect of excluding the legitim.¹

2. James Fisher having collated the heritable with the moveable estate of his father, the defenders were not entitled to exclude from the collation the heritable subjects conveyed by the disposition of July 1791, seeing that these subjects were purchased by, and belonged to John Fisher; and though James was his heir of provision, by virtue of the destination, he was also heir *alioqui successurus*. The import of the disposition 1791 was to constitute John Fisher directly as fiar, and not his son James. The conveyance to John Fisher and his wife was in conjunct fee, and this fee

¹ Bell's Princ. § 1587; Ivory's Ersk. 3, 9, 22-23, & 3, 8, 40; Stirling, (Elchies, Vol. I. voce Legitim, No. 1, July 17, 1732;) Burder v. Smith, June 29, 1738, (Elchies, voce Mutual Contract, No. 7, and Craigie & Stewart's Reports, p. 214;) More's Notes to Stair, voce Executry, p. 353; Bell's Law Dict. voce Legitim.

No. 11. was not controlled or limited to a liferent by the word "allenary." The whole value paid for the subjects also was from John Fisher.¹

Nov. 19, 1844,
Fisher's Trustees
v. Fisher.

The defenders pleaded ;—

1. By the contract of marriage between John Fisher and Helen Kea, the whole goods in communion were destined in favour of the spouses in liferent, and the children of the marriage in fee. It could not be disputed that, by antenuptial contracts, parents might by express declaration exclude the legitim, and substitute other provisions in its place; and it was evident that the same result followed, where the contract disposed of the whole goods in communion in such a way as necessarily to preclude the claim. Here, the whole fund out of which legitim could be drawn was subjected to the liferent of the survivor of the spouses, thus, by agreement of the parties, appropriating it to another purpose incompatible with the claim.²

2. James Fisher was not bound to collate the lands of Hillhead and others, as he was not the heir alioqui successurus to these lands, but acquired them by singular title from his grandfather. The result of the transaction by which Hillhead was disposed by Mr Kea, must be taken to be, that John Fisher paid for the liferent of these lands (which were valued at £500) the sum of £200, while the right of fee was conveyed to and vested in James Fisher as a gift from his maternal grandfather.³ The effect of the disposition was not to vest the fee of these lands in John Fisher, and they were not taken by James as heir of his father.⁴ If the fee did not vest in James, it must be held to have vested in the survivor of the spouses, which equally would exclude the claim for collation. Even supposing that the subjects in dispute had been a purchase by John Fisher to the extent of the £240 paid for the house and garden, this was nothing more than a special provision made to James Fisher by his father, in terms of the reserved power in the antenuptial contract, which he was not bound to collate.

The Lord Ordinary pronounced this interlocutor :—" 1mo, Finds that the children of the marriage between John Fisher and Helen Kea were barred by the terms of the antenuptial contract of marriage of these parties, dated in 1779, from claiming legitim till the death of the said Mrs Helen Kea in 1841, she having, by the said contract, an universal liferent of the whole goods and funds in communion conferred on her, under the burden of alimenting, clothing, educating, and fitting out the children in life: 2do, Finds that James Fisher, the eldest son born of the said

¹ Ersk. 3, 8, 35, 36; Madden, Feb. 22, 1842, (ante, Vol. IV. 749;) Burrows, July 6, 1842, (ante, Vol. IV. 1484.)

² Home v. Watson, Jan. 28, 1757, (5 Sup. 330;) Henderson v. Henderson, July 26, 1782.

³ MacIntosh, Jan. 28, 1812, (F. C. 498.)

⁴ Macgregor v. Forrester, June 3, 1831, (9 S. & D. p. 675.)

marriage, is not bound to collate the lands of Hillhead, in respect of the title under which the fee of the same was disposed to James by John Kea, his grandfather; and remits the process and accounts produced to Mr William Moncreiff, accountant, to make up a state of the succession of John Fisher in terms of these findings; but supersedes the transmission of the process to the accountant till this interlocutor is final, or otherwise till it is reviewed by the Court.”*

No. 11.

Nov. 19, 1844.

Fisher's Trustees v. Fisher.

* **NOTE.**—The questions which now occur for the consideration of the Court, arise in an action commenced by certain parties, as trustees for Mrs William Fisher, a grand-daughter of the deceased John Fisher, writer in Dunkeld, who died in 1803.

* John Fisher was survived by four sons. The lady for whom the pursuers act is the only child of George Fisher, the youngest son. George was in infancy at his father's death in 1803. He died in 1823, when he was only a few years above majority. His daughter was then in infancy, and only attained majority in 1839. In these circumstances, although many years elapsed between the death of old Fisher and the institution of the present action, the claims of the pursuers are not cut off by any pleas of prescription or taciturnity. There appears also to be no room for any plea of homologation against the pursuers.

“The history of the family, and the grounds on which the claims of the pursuers are maintained and opposed, are very clearly and satisfactorily stated in the revised cases. With reference to these, a short explanation will suffice as to the grounds of the Lord Ordinary's judgment on the two points discussed in the cases.

“1. The pursuers, on the part of George Fisher's daughter, claim legitim, as exigible by her father at the death of John Fisher senior, in 1803, which, from the long arrears of interest that would be computable, would form a serious claim against the successors of John's widow, who liferented the whole subjects, and only died in 1841. To the claim of legitim, it is objected that the whole funds out of which it could have been claimed in 1803, were conveyed by an onerous antenuptial marriage contract between John Fisher senior, and his wife, in 1779, to his widow, in case of her survivance, in liferent, and to the children of the marriage in fee, and therefore that no legitim was exigible, at least till the widow's death in 1841. The pursuers answer, that as the contract of marriage did not bear that the provision thereby made for the children should be in full of legitim, it did not exclude the claim of George Fisher for his share of legitim, as in 1803.

“It is manifest, however, that the children could not have claimed legitim in 1803, without diminishing the liferent interest to the extent of one-third conferred on the wife by her antenuptial contract of marriage. If that plea were sustained, it would be virtually finding that such a provision to a bride, though one of the stipulations on which the marriage has been allowed to proceed, is null and ineffectual in law. This doctrine appears to the Lord Ordinary to be of great importance in the law of parent and child; and therefore it deserves very deliberate enquiry whether there be any sound principle in law or good policy on which a provision to a wife, such as that now founded on, can be successfully challenged. At present, he finds it difficult to discover any.

“When parties contemplate a union with each other, they have large powers by law in making such stipulation before marriage as they think necessary for the future comfort and prosperity of themselves and their families. They may exclude the legitim altogether, perhaps for a small and inadequate provision. Multo magis, then, must it be competent for them to stipulate that the whole common stock shall be enjoyed by the parents and survivor in liferent, and descend to the children in fee only on the death of the surviving spouse. This is truly giving the children more than legitim, though postponing the period of payment during the time that the spouses themselves required the use of the fund.

No. 11. The pursuers reclaimed.*

Nov. 19, 1844.
Fisher's Trustees
v. Fisher.

LORD JUSTICE-CLERK.—Had this case come before us in an earlier stage, I am not prepared to say that I could have concurred in the propriety of the course of

“ Suppose it had been provided in such a case as this, that the children should receive £100 each in full of legitim at the father's death, no doubt could exist of the validity of that stipulation ; but surely the provision of the whole common stock to the family, on the death of the surviving parent, is a much more advantageous stipulation to the children.

“ Hence, if there be no legal principle on which such a contract as the present can be impeached, it is thought that it is in different views most expedient that it should be sanctioned and enforced in the administration of the goods in communion. It would be contrary to the common interest of families, as well as to the just right of parents, if children were allowed to challenge and set at nought an antenuptial contract securing a liferent of the common stock and conquest to the parents and the survivor, with a right in fee to the whole of the children. And it will probably be found that, in general, the provision of a general liferent to the widow is a most beneficial arrangement for families. The provision would imply an obligation on the wife (which is here specially expressed) to aliment, upbringing, and educate the family ; and, if so qualified, the liferent of the widow is often the best mode of securing the permanent benefit and well-doing of the children.

“ The plea of the pursuers, in support of their constituent's claim of legitim, seems to be rested mainly on the well-known rule, that legitim is never held to be compensated or discharged by any separate provision, unless it expressly bear to be in full of legitim. That maxim in the abstract is indisputable ; but the question here is, whether legitim can be claimed out of funds, the liferent of which has been legitimately provided to the wife by an antenuptial marriage contract ? Have children ever been allowed to reduce or object to such a contract in respect of their legitim ? On reviewing the authorities, there appears to be no case which affords any sanction to that doctrine.

“ On the contrary, it has been twice ruled in this Court, that when the whole stock and conquest are settled in an antenuptial contract of marriage on the wife in liferent, and the children in fee, it bars the legitim, at least as exigible at the husband's death. This was found in the case of *Stirling of Glorat* in 1732, (reported in *Elchies*, voce *Legitim*, No. I.,) and afterwards in the case of *Home v. Watson*, in 1757, reported by *Kilkerran*, (5 *Brown's Supplement*, p. 330.)

“ But it is said that these decisions are outweighed and overruled by the decision in the House of Lords in the case of *Burden* against *Smith* in 1738, reported by *Elchies*, voce *Mutual Contract*, No. 7. The case of *Burden*, however, is quite inapplicable to the present question. It is only necessary to read the statement of the case as argued in the House of Lords, (reported in *Craigie and Stewart's Reports*, p. 214,) to perceive that no such question as arose in *Stirling* and *Home's* cases, and as occurs here, could have been tried there. The whole stock and conquest were not provided to the widow in *Burden's* case, but only one-half thereof, so that there was abundance of free fund left in the other half to answer the claim of legitim at the date of the father's death. The Court of Appeal certainly found legitim due in that case ; but that decision affords not the most remote inference that a settlement, by antenuptial contract, of the liferent of the

* At the discussion in the Inner House, there was no argument upon the view implied in the first finding of the Lord Ordinary, viz. that legitim was due on Mrs Fisher senior's death, neither party having any interest to maintain or dispute it.

procedure adopted. The interlocutor of the 16th November 1843, appoints the parties to prepare cases upon the points of legitim and collation; but there remained on the record a very serious question, to which the defenders attach great importance—a plea of homologation and acquiescence depending upon a variety of matters of fact, and requiring probably the examination of various witnesses who acted for the parties, as to their knowledge of the family affairs at the time they made their enquiries, and as to the object of such enquiries. Although the interlocutor thus limited the cases, in the most express terms, to the two questions of law above stated, the defenders most irregularly made a very great part of their statements and arguments turn on this point of homologation, in which the pursuers naturally followed them. Then the Lord Ordinary, on reading the cases, asked very naturally, in the interlocutor of the 23d May 1844, if the parties intended to renounce probation on the question of homologation. A joint minute

No. 11.

Nov. 19, 1844.
Fisher's Trustees v. Fisher.

whole conquest on the surviving parent would have been invalid or challengeable by the children.

* It will be remarked, however, in going over the cases, that the brief notice of the case of Stirling, in *Elchies* voce *Legitim*, is very inaccurate. It is so expressed as to lead the reader to suppose that that case (which occurred in 1732) was appealed. But the extracts from the journals, given by Mr Swinton, show that Stirling's case was never carried to the House of Lords. The meaning of Lord Elchies, therefore, (or of the editor of his decisions,) is, that the point ruled in Stirling's case in 1732, was overruled by the subsequent judgment of the House of Lords in Burden's case in 1738. But it has been shown that that is a mistake, and that Burden's case was decided on specialties of its own, which essentially distinguish it from Stirling's, Home's, and the present. Accordingly, Burden's case was never alluded to in the latter case of Home and Watson in 1757, probably because it was known, by all well-informed men in the profession, that it was not in point.

* The pursuers take one distinction as to the provision here of the liferent of the stock and conquest to the widow, the force of which the Lord Ordinary is at a loss to perceive. It is said that no adequate stipulations were made in the contract of marriage to secure, during the husband's life, the stock and conquest for the widow's liferent beyond the special sum of 10,400 merks Scots, to be invested in trustees for the future use of the spouses in liferent, and the children in fee. But surely that circumstance cannot affect the widow's provision of liferent when the period for its vesting arises. The administration of the conquest was no doubt left with the husband during the subsistence of the marriage, of course with a view to its increase and advantageous management. But when the death of the husband occurs, and when the fund is capable of being traced and vindicated for the wife's liferent, her claim cannot be affected by the mode in which it was previously invested or used by the husband for the common benefit of the family.

* II. The other question argued in the revised cases relates to the demand of the pursuers on the defenders, as now in right of James Fisher, the eldest son of John, to collate the lands of Hillhead, acquired by James Fisher from his grandfather. On the grounds stated in the defenders' case, it is thought that there is no room for collation. The subjects in dispute were conveyed to James in fee by his grandfather, John Kea. It is true that John Fisher paid £200 of the price of the lands of Hillhead, but as that property was estimated as worth £500, the payment of £200 is manifestly the portion of the price corresponding with the value of John's liferent.

* There was also included in the conveyance by John Kea to his grandson James, a house and garden at Dunkeld. As the history of this subject is not specially detailed in the cases, it is left to parties to be further heard on it, if they see cause."

No. 11. was then given in, stating that the parties consented to take judgment on the points of legitim and collation, to which the cases ought to have been confined, but reserved the right to lead proof on the other points in the cause.

Nov. 19, 1844.
Fisher's Trustees v. Fisher.

His Lordship, on advising the cause, had not recollected this procedure, and gives his opinion at once and decidedly in the note against the plea of homologation. Of course any opinion on that question is premature and out of place, because, first, The cases were ordered on the two points of law; and, second, The parties have proof to give on that question, if necessary. Now that the points of law have been argued, and have received decision, I am willing to give judgment upon them; but I regret the shape the cause took in not clearing the case of a question of fact, which might supersede all points of law, viz., a deliberate adoption of, and settlement of all claims, under the deed of old Mr Fisher; and this is the more to be regretted, if our opinion on one point shall lead after all to an enquiry and proof on the point of homologation.

Upon the first point, the claim of legitim, I have no doubt whatever. Before marriage, a man is the free and uncontrolled proprietor of his whole disposable means and fortune, whether actually possessed or acquired. He is at liberty to enter into any obligations he chooses as to such property, and most certainly he is in a condition to contract effectually in favour of an intended wife, any obligation he thinks proper, over the whole property which may then, or at any future time, be at his disposal. Such obligation is a proper debt, and a debt, therefore, under an onerous contract antecedent to marriage, which must be fulfilled before any claims to children can arise. If the obligation entered into before marriage is to settle his whole property on his wife, whether in fee or life, that is a valid and effectual obligation, which, in competition with the claims of the children, must be fulfilled. The marriage, which leads to the birth of children, takes place on the faith and in respect of that obligation. The children are born, and come into legal existence after that onerous and valid obligation has been contracted in favour of their mother; hence they cannot subsequently obtain rights, by reason of being children of that marriage, which are to compete with, or narrow, or exclude to any extent the effect of the obligation in favour of the mother, previously contracted.

To contend, therefore, that a man before marriage cannot effectually secure his intended wife in the life or fee of all his disposable property, by reason of the rights of legitim, which may emerge by the birth of children by that wife, is really an absurdity; and although some parts of the argument seem to point to that result, yet the plea seriously maintained seems to be, that an *express* exclusion of the legitim was necessary to give effect to the obligation in favour of the wife. This is a complete fallacy, and in truth does not vary the question, which is one of *competency* before marriage to contract an onerous debt. 1. Exclusion of the legitim is only necessary where a provision for the child is intended to be substituted for it, and to be in lieu of it; and this is the meaning of the general expressions quoted from Mr Bell, who is treating of the right of children to legitim, notwithstanding provisions in their favour not declared to bar a claim for legitim on the death of the father. 2. When the father, before marriage, contracts the obligation as to his *whole* means in favour of the intended wife, he thereby constitutes an onerous debt, which must be satisfied before there can be any fund for legitim, and hence the obligation excludes it of necessity; and there is no reason for any express exclusion, for there is no fund to which any provision

in lieu of legitim, which is a claim at the father's death, could be applicable, and No. 11.
no provision to be made in lieu of such claim.

I concur entirely in the Lord Ordinary's remarks on the decisions. It is quite true that the terms of the interlocutor, which seem to suppose legitim might be claimed at the death of the wife, are not quite correct. Legitim is a claim emerging at the father's death, when, by antenuptial contract, he provides the whole to the wife in liferent, and to the children after her death in fee. He disposes, by onerous obligation, of the whole funds in such a way as to exclude the claim of legitim, and thereby gives himself the power to substitute this other provision in favour of the children; but we are informed by both parties, that the terms of the interlocutor could not have any practical effect.

Nov. 19, 1844.
Fisher's Trustees v. Fisher.

On the second point, the question of collation, raised in this case, I am unable to concur in the interlocutor.

Looking to the facts proved by the deeds, I must hold the property in question to be a purchase by John Fisher the elder. That it was made on easy terms, through the attachment of the wife's father towards his daughter, her husband, and their son, may be true. But still it was a purchase for a price, in the disposal and application of which old Mr Kea had a great interest, as a provision for other descendants who might not be so well provided for.

Then I am of opinion that, by the terms of the conveyance, the fee was in the father. There is always room, doubtless, for great discrimination and nicety as to this class of cases, and one must carefully attend to the distinctions settled by previous cases, which distinctions seem to me to rest on broad and marked grounds of variance in the terms employed in the conveyances.

1. It has been contended that the fee was placed in the wife by this deed. This appears to me to be adverse to principle and all authority. It is just such a case as that stated by Erskine, in which he holds that a conveyance, exactly in the same terms, puts the fee in the father, and that although the child of the marriage is called nominatim. I stated my opinion fully on this class of cases in *Madden v. Carrie*, and need not repeat the grounds of that opinion. The terms of the conveyance in *Forrester* were quite different; and the difference is as marked between this case and *Burrows*, in which the terms of conveyance following the conveyance of conjunct fee and liferent, gave to the survivor separately a fee, by calling in the heirs of the survivor.

2. It was contended that the fee was in the son, James Fisher. I think that plea quite untenable. The case on this deed is the very one chosen by Erskine in order to illustrate and bring out the operation of the settled rule of law, which places the fee in the father, notwithstanding the son is called nominatim in the deed, unless there is in the deed itself other and clear evidence of the intention to state the fee in the son. If the fee is not in the wife, then it makes no difference that there is a conjunct fee and liferent for the benefit of a liferent to the wife. On the latter question, therefore, on which I entertain no doubt, I think the interlocutor should be altered.

LORD MEDWYN.—In 1779, an antenuptial contract of marriage is entered into between John Fisher and Helen Kea, by which each party was to provide 7000 merks, and of this, 10,400 merks were to be laid out on proper security in favour of the spouses for their liferent use allenary, and the children of the marriage in fee, the survivor of the spouses being bound to maintain and educate the children; and also it was provided—(His Lordship read the clause as to the conquest.)

No. 11. The husband died in 1803, leaving considerable funds, both heritable and moveable, which were liferented by his widow, who survived till 1841.

Nov. 19, 1844.

Fisher's Trusts

Kea v. Fisher.

The pursuer, in right of her father, who was a son of the marriage, claims legitim, with interest from 1803. The Lord Ordinary has not found that legitim was excluded by the antenuptial contract, in which there is no clause to that effect, but he has found that the widow having liferented the whole funds, the claim for legitim is necessarily excluded till her death; so that, although it may vest on the death of the father, the subject is so situated as not to be available to the child, and therefore interest cannot run upon it during the subsistence of the liferent. It was competent for the parties to introduce the clause as to the conquest into their marriage contract, giving the liferent to the survivor, and the fee to the children; and moreover, as they provided for the maintenance, education, and putting out into the world of the children by the survivor, they might have specially excluded the children's right to legitim, so this has at least been effectually postponed, though not held to be excluded, by giving the liferent of the whole to the widow. I should rather have been inclined to hold that, under the provisions of this contract, which disposed of the whole goods in communion by giving the fee to the children, burdened with the liferent of the survivor, the claim to legitim was necessarily excluded, and that each child took his share as far as the dissolution of the marriage, and at the expiration of the liferent. It will probably, however, come to the same, to state it as a claim for legitim, with interest only from the death of the widow. The parties have treated it as a case of legitim—so the Lord Ordinary has found—that is not reclaimed against, and we must so hold it.

The next point regards the collation by James Fisher, and whether it should include the heritable subject in the deed of July 1791, by which John Kea conveyed his lands of Hillhead to Helen Kea and John Fisher in conjunct fee and liferent, and longest liver of them, and to James Fraser, their eldest son, his heirs or assignees, in fee. It is pleaded that, as James acquired these lands by a singular title from his grandfather, John Kea, he is not bound to collate them, and this plea has been sustained. The subject was valued by the seller at £500, but he made it over for £200, which is assumed to be the value of the father's liferent, the conveyance being substantially intended as a gratuitous gift for James by his grandfather Kea.

There is some difficulty in this view. I have already noticed that I incline to doubt whether there is room for collation at all, and whether the right does not depend on the provision in the marriage contract which destines the fee of the conquest to the children of the marriage. But, holding that collation applies, is it conquest by the spouses, or specially destined by the grandfather to James, his grandson, so as to exclude collation on that ground, giving it to James as donee of his grandfather? This seems the view of the Lord Ordinary; but I have a difficulty in so viewing it. The narrative of the deed contradicts this supposition, as it bears to be granted "for the love, favour, and affection which I have and bear to Helen Kea, my youngest lawful daughter, and to John Fisher, her husband, and in respect of certain other causes and considerations." These other were the payment of the £200. But there is not a word of favour to James, the donee alleged to be chiefly favoured; and, in terms of this narrative, Helen Kea is the first donee named, then her husband, showing, I think, in whose favour the abatement of the price had been made,—not of the grandson, to secure the liferent

to his daughter. The bond which Fisher grants for the price bears that it was a purchase by him; and I cannot help thinking that the further destination in favour of their eldest son was at the instance of the father, and following out the plan of his settlement for his children, and not of the grandfather at all. In Art. VIII. of Condescendence (p. 26) are noticed four personal bonds, amounting to £4500, specially destined to certain of the sons after the death of the father, and expiration of the liferent of his wife; £1500 to James and John; £1000 to Henry, and George £1500; to Henry £500, and George £1000; £500 to Henry. It was natural that he should make his eldest son fiar in the heritable subjects he had acquired, as part of the provision he meant for him in terms of the marriage contract, after the death of the survivor of him and his wife. In all the personal bonds he reserved full power to uplift and discharge the amount; and by law he had the same power over the heritable property so destined, as, when "a father takes a right to himself and his son nominatim, and to his son's heirs, he continues the only fiar, and the son is barely an heir-substitute to him, though he should be infest by his father in the right."¹ I think, then, the fee was in the father, as a purchase by him. Here, too, I may notice that Fisher never infest his son, nor delivered the deed to him, retaining it in his power to dispose of the subject at his pleasure. Had it really been that the grandfather meant the conveyance for his grandson, selling the liferent only to his son-in-law, he would have stated this in the narrative, and the destination would have been to Fisher and his wife in liferent, and his son in fee, instead of putting his daughter foremost in the conveyance, and then her husband, and confining the cause of granting it to his favour of them alone, without any notice of his grandson. Now, this leaves the presumption strongly in favour of the supposition, that the son's name appears solely at the desire of the father, who had acquired right to the subject by purchase, though no doubt on favourable terms, as the husband of his daughter. I have examined the cases referred to at the pleading, and this is the result I have arrived at. I think, then, that the father was fiar of these subjects at the time of his death, and that his son James was heir alioqui successurus in them, although, *ex figura verborum*, he may have a title under the deed of his grandfather. I am inclined to hold that, viewed as a case of collation, he must collate Hillhead.

LORD MONCREIFF.—I am of opinion, in the first and leading point of the case, that the claim of legitim cannot be maintained. It appears to me to be a very clear matter, that the entire liferent of the whole of the husband's property having been settled by antenuptial marriage contract in favour of his wife, if she should survive him, there could not possibly be any fund from which legitim could be claimed at the husband's death, otherwise than subject to the full satisfaction of that liferent as an onerous debt. The legitim can only be claimed from the free personal estate of the father at his death. But as, by onerous contract, he had given to his wife the liferent of his whole property after his death, that debt must necessarily be paid, before there could be any such free estate. I agree that this excludes legitim altogether.

The question of collation here raised is attended with much difficulty. I have hesitated, and still hesitate, on that question. At first, I was very much influ-

No. 11.

Nov. 19, 1844.

Fisher's Trustees v. Fisher.

¹ Ersk. 3, 8, § 35.

No. 11.
 Nov. 19, 1844.
 Fisher's Trustees v. Fisher.

enced by the argument of the defenders, that the property came to the deceased from his maternal grandfather. But, though this may be true as matter of fact, I am now satisfied that it was a purchase from Kea, and, by the nature of the title by which it came to the deceased, it must be considered as coming to him by his father, unless the fee was either vested in himself or in his mother. This is the difficult point of the case.

None of the cases quoted appear to me to come fully up to the present case.

In *McGregor v. Forrester*, it was to the husband and wife "in conjunct liferent during all the days of their lives, and to the longest liver, and their heirs and assignees in fee." This was held to be to the heirs of the longest liver, and to place the fee in the survivor. In *Madden*, it was to the husband and wife, "and longest liver, in conjunct fee and liferent, and the heirs of the marriage—whom failing, his or her heirs or assignees," &c. As the heirs of the marriage were necessarily the husband's heirs, the fee was held to be in him. In *Burrows*, it was to the husband and wife "in conjunct fee and liferent, and to the survivor, and their heirs;" and the fee was held to be to the survivor. Then, in *Mackintosh*, it was simply to the husband and wife, "and the longest liver of them in liferent, and to Janet Mackintosh, their daughter, and her heirs, &c., in fee;" and this was held to be a fee in the daughter.

The present case differs from them all. It is (*Record*, p. 41) to "the said Helen Kea and John Fisher in conjunct fee and liferent, and longest liver of them, and to James Fisher, their eldest son, his heirs and assignees whatsoever, heritably and irredeemably, in fee." In none of the cases were all these things combined.

If this destination to the son nominatim be held to be equivalent to "the heirs of the marriage," it may be within the principle of the case of *Madden*; and I rather lean to this opinion. But if the calling of the nominatim heir precludes this inference, I should see no alternative but to hold the fee to be in that son.

The passage in *Erskine*, 3, 8, 35, (*Pursuer's Case*, p. 35,) seems to me hardly to solve this, as it does not relate to conjunct rights to husband and wife, but to a very different case, of proper conjunct fees to two strangers in the first instance, and then to father and son, as two parties simply joined together in words. It is in the paragraph which precedes that which explains the effect of rights in conjunct fee and liferent to husband and wife, and children or heirs.

LORD COCKBURN.—I agree with the rest of the Court upon both points.

THEIR LORDSHIPS accordingly pronounced this interlocutor:—"Adhere to the interlocutor of the Lord Ordinary in so far as regards the first finding therein; alter the said interlocutor in so far as regards the second finding, and find that the lands of Hillhead must be collated; recal, in hoc statu, the remit to the accountant, and remit to the Lord Ordinary, before renewing the remit to the accountant, to dispose of any plea of homologation that may now be competently stated by the parties, and reserve all questions of expenses.

GRAHAM and WEBSTER, W.S.—ALEX. GIFFORD, S.S.C.—Agents.

THOMAS INNES, Pursuer.—*Marshall—Inglis.*
 LIEUT.-COLONEL JOHN GORDON, Defender.—*Rutherford—Deas.*

No. 12.

Nov. 20, 1844.

Innes v.
Gordon.

Superior and Vassal—Non-Entry—Jus Tertii—Accretion.—In a declarator of non-entry—Held, 1. *Generally*—That where the pursuer had an *ex facie* title and was infeft in the superiority, and there was no competing claimant, the defender (the vassal) had no title or interest to object to the pursuer's title: 2. *In particular*—That the vassal could not object to, or call for production of the title of a party whom he or his author had once recognised as superior by taking an entry from him: 3. That it was *jus tertii* for the defender, not being an heir of entail, to plead the prohibitions of an entail against the validity of the conveyance by which the pursuer acquired right to the superiority: 4. That a title to a specified feu-duty, payable "out of certain lands belonging in property to A B of Barra, with the right of superiority of the said lands out of which the said feu-duty is payable," was, in the circumstances, a sufficient title to the superiority of Barra;—Circumstances in which this held: 5. That a procuratory of resignation granted by a party uninfest was, with the title made up on it, validated *accretions* by the subsequent infestment of the granter.

This was a case of a declarator of non-entry defended on the ground that the pursuer had not a valid title to the superiority. Nov. 20, 1844.

The estate to which the question related was that of Barra. The state of the titles was as follows:—

1st Division.
 Lord Cuning-
 hame.
 W.

The Lords Macdonald held the superiority, as part of the Macdonald estates, under an entail executed in their favour, in 1726, by Kenneth Mackenzie, who purchased them for their behoof in 1724, when brought to sale by the Commissioners of forfeited estates. This deed, after the entailing clauses, contained a provision that it should, notwithstanding, be lawful for the heirs to sell or burden the estates with certain enumerated debts, and also to contract debts, and for each heir to sell or burden for such debts as should remain unsatisfied on his succession. This entail was not recorded till 1836.

The late Roderick M'Neill was the last entered vassal, and his entry was by charter of confirmation, in 1818, from Alexander Lord Macdonald, the admitted superior at that time. Roderick died in 1822, and was succeeded by his son of the same name, who shall be distinguished as Colonel M'Neill. In 1825, Godfrey Lord Macdonald, who was infeft upon a Crown charter as next heir of tailzie and provision to Alexander, sold the superiority to Colonel M'Neill, under reservation of a right to dispose of the liferent of one half to any one he chose, for the purpose of creating a freehold qualification. In implement of this transaction, which was entered into by minute of sale, Lord Macdonald, in 1827, executed a procuratory of resignation of the superiority in favour of himself, his heirs and assignees, upon which he obtained a Crown charter. In 1828, he executed a disposition of the superiority, under burden of the liferent of one half to his son Alexander, in favour of Colonel M'Neill, and

No. 12. assigned the Crown charter and precept, upon which Colonel M'Neill took infeftment the same year in the half not liferented; and he (Lord Macdonald) also at the same time executed a disposition in favour of his son Alexander of the liferent of a half, assigning to him the precept in the Crown charter, to the effect of giving infeftment therein, which was done.

Nov. 20, 1844.
Innes v.
Gordon.

In 1833, Godfrey Lord Macdonald died, and was succeeded by his son Wentworth, who expedite special services, and completed titles, 1st, as nearest and lawful heir of line to his father, in certain lands unconnected with Barra; and 2d, as heir of tailzie and provision of his father in *inter alia* the superiority of Barra, under the entail executed in 1726.

The titles stood in this situation till 1836, when the estates of Colonel M'Neill were sequestrated under the Bankrupt Act. Mr Barstow, the trustee in the sequestration, brought the estate of Barra, both property and superiority—the latter, of course, subject to Alexander Macdonald's liferent in the one half—to public sale in 1839. The superiority was purchased by Mr Donald Horne, on behalf of Mr Thomas Innes, the pursuer; and the property by Colonel John Gordon, the defender.

The title of Mr Innes, the pursuer, was made up in this way. 1st, As to that half of the superiority in which Colonel M'Neill had taken infeftment—viz. the half not liferented—he and Mr Barstow executed a disposition in favour of Mr Horne in March 1841. To this deed, Wentworth Lord Macdonald was made a concurring party, in consequence of his father's disposition to Colonel M'Neill in 1828 having been lost. 2d, As to the other or liferented half in which Colonel M'Neill had not been infeft, Lord Macdonald executed a disposition of it to Mr Horne, with consent of Colonel M'Neill and Mr Barstow, and assigned to him the precept in the Crown charter of 1827, on which he was infeft in September 1841.

Mr Horne obtained a Crown charter of resignation, dated 2d June 1841, comprehending the whole superiority, proceeding, so far as regarded the liferented half, upon a procuratory executed by himself on 18th May 1841, in favour of himself, his heirs and assignees; and, as far as regarded the other half, upon the procuratory in the disposition thereof in his favour by Colonel M'Neill and his trustee. On 21st July 1841, he executed a disposition, in which he acknowledged the trust in his person, and conveyed the whole superiority to Mr Innes, and assigned to him the unexecuted precept in the Crown charter of 2d June 1841, on which he was infeft in September following.

On 2d February 1842, Mr Innes obtained from Alexander Macdonald a renunciation of his liferent.

It was subsequently discovered, that in Lord Macdonald's disposition in 1841, as to the liferented half, the service, under which he acted in granting it, was erroneously described as a general service. With the view of correcting this mistake, a new disposition to Mr Horne of the

same subject was obtained from him in October 1842, in which his service, as heir of line to his father, was narrated. This deed again assigned the precept in the Crown charter of 1827, and Mr Horne was again infest upon it in October 1842.

No. 12.

Nov. 20, 1844.
Innes v.
Gordon;

In 1843, the present action of declarator of non-entry was raised against Colonel Gordon. The action related solely to that half of the superiority which had been liferented by Alexander Macdonald, Colonel M'Neill standing as entered vassal in the other half. The titles above mentioned, subsequent to 1818, were produced, but none prior to that date.

The defender admitted the lands to be in non-entry, and defended solely upon the ground of the invalidity of the pursuer's title. His objections to the title and pleas in defence were in substance, 1st, That the title-deeds, prior to 1818, had not been produced. 2d, That the conveyance of the superiority to Colonel M'Neill by Godfrey Lord Macdonald, in 1828, was a contravention of the entail under which the Lords Macdonald held it.¹ 3d, That the disposition of 1828 had not been produced, nor its tenor proved.² 4th, That the dispositions by Wentworth Lord Macdonald to Mr Horne, in 1841 and 1842, were null, upon the assumption that his ancestor Godfrey, whom he represented, had been divested of the superiority in favour of Colonel M'Neill in 1828. 5th, That the superiority in question was not contained in the titles of the Lords Macdonald prior to the procuratory executed by Godfrey in 1827, into which it had been unwarrantably introduced. (The ground of this objection was, that there was no sufficient identification of the superiority in the entail of 1726. The words in that deed which were referred to as embracing it, were these—"Together with a feu-duty of forty pounds Scots yearly, payable to the late Sir Donald Macdonald, out of certain lands belonging in property to ——— Macneil of Barray, with the right of superiority of the saids lands, out of which the said feu-duty is payable.") 6th, The procuratory executed by Mr Horne in May 1841, was null, he not being then infest. His infestment in September 1841, upon the precept of the charter of 1827, was null, in respect it proceeded in virtue of Lord Macdonald's disposition in 1841, which assigned a general service admitted never to have been expedited. And 7th, The pursuer's infestment in September 1841 was bad, in respect it proceeded upon a charter following on a procuratory executed by Mr Horne when not infest; and this could not be cured by Mr Horne's subsequent infestment in October 1842, the doctrine of accretion not applying.³

The pursuer answered—1st, That the defender's author having taken an entry from Lord Macdonald in 1818, the defender could not impugn

¹ 20 Geo. II. c. —.

² 4 Ersk. I., § 56, and II., 1, § 11; Maxwell, Nov. 9, 1742, (M. 15,820.)

³ 2 Ersk. VII., §§ 3 and 4; 1 Bell's Com. 698-9.

No. 12. his (Lord Macdonald's) title, and was not entitled to call for production.¹ 2d, That it was *jus tertii* for the defender to plead the entail, which, at any rate, permitted sales.² A vassal was in perfect safety to take an entry from a party producing an infestment in the superiority, and was not entitled to scrutinize his title, as no defect in it would invalidate his (the vassal's) entry.³ 3d, That the existence and terms of the disposition of 1828 sufficiently appeared from the other deeds produced. 4th, That by the disposition of 1828, Colonel M'Neill acquired only a personal right to the half of the superiority to which the action related, infestment having been taken by him in the other half only, and a personal right did not exclude a second conveyance.⁴ 5th, The superiority of Barra was sufficiently specified in the entail of 1726—the property of Barra having been uninterrupted in the family of the M'Neills for upwards of a century, and the feu-duty specified in the entail exactly corresponding with that which they had always paid for Barra; an infestment in the right of superiority of lands was a good title to pursue declarator of non-entry.⁵ 6th and 7th, That although a valid procuratory of resignation could be granted only by a vassal infest, yet a procuratory granted by one not infest was validated with all that had followed *accretion* by his subsequent infestment.⁶

Nov. 20, 1844.
Innes v.
Gordon.

Cases were given in, on advising which the Lord Ordinary pronounced the following interlocutor:—"Finds that the title-deeds and writs produced by the pursuer sufficiently establish that he now has an apt feudal title in his person to the superiority of the lands libelled on, at least in a question with the defender as the successor of Colonel Roderick M'Neill of Barra, who was the eldest son of Roderick M'Neill, the vassal last infest: Therefore sustains the said title and repels the defences, in so far as founded on objections thereto; and in respect the record and the cases relate entirely to these objections, finds the pursuer entitled to the expenses hitherto incurred, and remits the account thereof to the auditor to tax and report, and decerns: *Quoad ultra*, and before further answer, appoints the case to be enrolled in the motion-roll *quam primum*, that the parties may be prepared to state whether any other pleas *hinc inde* are to be insisted on, or if the terms of entry can now be adjusted so as to supersede proceeding on the penal conclusion of the libel." *

¹ Mackenzie, July 10, 1838, (16 S. 1326.)

² Campbell, Feb. 5, 1760, (M. 7783;) Houston, Jan. 23, 1781, (M. 8794.)

³ 2 Stair, 4, § 6; 2 Ersk. 5, § 41; Gibson-Craig, July 10, 1838, (16 S. 1332, and 2 Robinson's App. Cases, 446.)

⁴ Bell, June 22, 1737, (M. 2848.)

⁵ Gardner, Feb. 9, 1841, (*ante*, Vol. III. p. 534.)

⁶ 3 Stair, 2, § 2; Young, Jan. 16, 1844, (*ante*, Vol. VI. p. 370;) 1 Craig, 16, § 31, and 2, 1, § 6, and 2, 19, § 8; Dirleton, p. 106, and Stewart, p. 177; Gibson-Craig, *ut sup.*

* "NOTE.—The very clear and satisfactory exposition and discussion of the pursuer's title to the superiority libelled on, contained in each of these papers, in

The defender reclaimed.

No. 12.

LORD MACKENZIE.—I am for adhering to the interlocutor. If a party acquires a good title as vassal, by obtaining an entry from the only person claiming to be
 Nov. 20, 1844.
 Innes v.
 Gordon.

a great measure supersedes any explanation on the part of the Lord Ordinary as to the grounds of the preceding judgment. It is sufficient to mention, that six objections to the superior's title are stated by the defender, and that all of them appear to be satisfactorily obviated by the answers in the case for the pursuer. The Lord Ordinary, therefore, shall state his views in a few sentences.

"1. The defender confessedly is the vassal in the lands of Barra. It is not alleged that he has any right himself to a holding under the Crown. On the contrary, it is admitted that the father of the defender's predecessor, Colonel McNeill, took an entry from Lord Macdonald in 1818.

"2. As the defender derives right from Colonel McNeill, he cannot maintain any plea against Lord Macdonald's title to the superiority which Mr McNeill would have been barred from urging. In particular, the defender could not question Lord Macdonald's right to the superiority, which McNeill had recognized. But truly there is no objection to Lord Macdonald's right. The ancient infeftment of his Lordship's predecessor, as well as the more recent title, expedes to 'a feu-duty of £40 Scots yearly, payable to the late Sir Donald Macdonald, out of certain lands belonging in property to — McNeill of Barra, with the right of superiority of the said lands, out of which the said feu-duty is payable,' is a title to the *dominium directum* of these lands, which, upon the authorities quoted in the pursuer's case, is altogether incontestable.

"3. The transmission by Lord Macdonald to Colonel McNeill is equally valid and well established. It is true the disposition went amissing; but as the noble grantor's successor concurred with Colonel McNeill and his trustee in giving a new disposition to the pursuer, the mere want of the first disposition was thus obviated.

"4. The objections urged to the title thus granted by Lord Macdonald to Colonel McNeill on the Entail Act of 20 Geo. II., are quite untenable. It is said that the sale to Colonel McNeill was contrary to the said Act, entitling superiors of entailed lands to sell to vassals, in consequence of the liferent of one-half of the superiority in question being conveyed to the Honourable Alexander Macdonald, who was not the vassal. But, (1.) That would not invalidate the conveyance of the fee to Colonel McNeill, who was the indisputable vassal in the lands. (2.) The power given in this entail to make partial alienations for specific purposes, (quoted in the pursuer's case,) is of itself a sufficient answer to the objection. (3.) The objection is *jus tertii* to a third party like the defender, the vassal, so long as the alienation remains, as it does, unchallenged by a competent party.

"It is notorious to all lawyers, that there is not a law in our statute-book more easily and constantly evaded, than the Act authorizing the sale of entailed superiorities to vassals; and the present certainly is not a case in which the series of conveyances, founded on by the pursuer, can be objected to by way of exception.

"5. The objection to the pursuer's feudal title, as proceeding on the resignation of Mr Horne, at one time ineptly infeft, is now entirely obviated. Mr Horne unquestionably purchased the superiority from Colonel McNeill's trustee for an onerous cause. At first Mr Horne, the pursuer's immediate author, got a conveyance from the trustee with consent of Lord Macdonald and Colonel McNeill, but with a wrong recital of Lord Macdonald's retour. Without taking infeftment on that conveyance, Mr Horne granted a procuratory of resignation in his own favour, and expedes a Crown charter thereon. He then conveyed to the pursuer, assigning the open precept in the Crown charter, and on it the pursuer's sasine proceeded. Had his title remained in this state, it would obviously have been liable to a double

No. 12.
 Nov. 20, 1844.
 Innes v.
 Gordon.

superior, though it afterwards turn out that he had not a valid right, it seems *jus tertii* for the vassal to object to the superior's title. Is a vassal entitled in every case of non-entry, to rip up the whole question of the superior's title? If so, the superior is placed in an extremely unfortunate position; for if he gains, he gets no judgment except as to the one vassal; it is not effectual to him against any one else. I think the view of the Lord Ordinary is correct throughout. As to the entail, if the decisions are right which hold that it is *jus tertii* for a party, not an heir of entail, to plead the entail to the effect of excluding a vote, they must apply *a fortiori* to a party stating such a plea as an objection to a declarator of non-entry. As to the disposition of 1828, I could not hold proof of its tenor competent without a process of proving of the tenor; but the title here stands good on other grounds, and so it is not necessary to enter into that question. I concur in the views of the Lord Ordinary.

LORD PRESIDENT.—I think the interlocutor well founded. The plea of *jus tertii* is quite settled, and as to it I don't entertain the slightest doubt. As to the disposition of 1828, we cannot hold that there is an equivalent to a proving of the tenor, but a proving of the tenor is not necessary. As to the entail, there is no allegation that there were no debts at the date of the sale. Colonel M'Neill, to whom the superiority was sold, was the vassal in the lands, though not infeft.

LORD JEFFREY.—I hold the same views. The passages from Stair are conclusive—that a vassal is not entitled, when an entry is required or offered, to object to the title of the superior, unless it is so recent that there has been no exercise by him of the right of superiority. The case of Gibson-Craig is the strongest of all cases, and was affirmed in the House of Lords. That case shows that the vassal has no interest to object, because if he take an entry from the

objection; first, from the misrecital of Lord Macdonald's retour in the conveyance to Mr Horne, and from the resignation in the charter being inept, as proceeding from a party uninfest. But these objections were effectually removed by Mr Horne getting a new and unexceptionable conveyance from Lord Macdonald, on which he was infeft in September 1841.—(See Nos. 8 and 11 of process.) Mr Horne's new title accresced to the pursuer's title, and rendered the right of that party complete. In what case can accretion take place, if it does not receive effect in the present case? The foundation of the doctrine is well explained by Professor Bell, sec. 881. When a party having a personal and equitable right to land, disposes it before infeftment, and the disponee takes sasine, it is at first null as flowing *a non habente potestatem*; but if the granter is afterwards infeft, that sasine draws back, and removes the nullity. The present is a case in point. There is no doubt Mr Horne had a personal and onerous right to the superiority. When, therefore, he got a correct disposition and sasine, his title accresced and validated the previous right flowing from him.

"The case of Young and Leith, (16th January 1844,) is referred to by the defender, as an example of a case in which a resignation by a vassal uninfest was held to invalidate a title. That general doctrine is now supposed to be incontestable. But if General Gordon had at any time of his life been infeft a second time, on a title as unexceptionable as Mr Horne's, his settlements would probably have been unchallengeable.

"Finally, the defender has pleaded that the second sasine of Mr Horne is not mentioned in the summons. But there was no occasion to specify it. The summons libels generally, that the pursuer is superior of the lands, conform to his charter. He neither specifies the first or second infeftment of Mr Horne, but founded on it afterwards on record, to obviate an objection urged by the defender, and it is thought he was not bound to do more."

apparent superior in the exercise of the right, though his title may be afterwards reduced, the vassal's title is good. The vassal has therefore no interest to challenge the superior's title. As to the objection founded on the entail, it is clearly *jus tertii* for any party not an heir of entail; for just as a deed on deathbed is good except against the heir, so a deed of contravention of an entail is good against all the world till challenged by an heir of entail. It is *jus tertii* for any other party to challenge it.

LORD FULLERTON.—I am of the same opinion. Colonel M'Neill, though not infert, was the vassal in the lands, and the superior, though he held under an entail, was entitled to sell the superiority to him.

THE COURT adhered.

JAMES and ROBERTSON, W.S.—JOHN HUNTER, W.S.—Agents.

JAMES CLELLAND, (Walker's Assignee,) Pursuer.—*Maitland*.
ALEXANDER BRODIE and OTHERS, (Bell's Trustees,) Defenders.—*Horn*.

No. 13.

Trust—Powers of Trustees.—1. Where trustees had powers to sell heritable subjects either publicly or privately, and at such prices as they thought fit, but no special power to transact or compromise;—Held, in an action of count and reckoning, at the instance of a legatee under the trust, that the sale of a heritable debt below its nominal value was unchallengeable, the trustees having acted *bona fide* and beneficially for the trust-estate; and their actings being approved of by all concerned, except the pursuer, who had a very subordinate interest in the trust. 2 Question, Whether the power of trustees to enter into a transaction, can be tried in an action of count and reckoning at the instance of a beneficiary, or whether a reduction of the transaction is necessary.

THIS was an action of count and reckoning and payment against testamentary trustees, at the instance of the assignee of a legatee, who refused to accept of the dividend, with which the other legatees were content. The ground of action was, that the trustees had unwarrantably, and *ultra vires*, sold an heritable debt for £1000, due to the estate by one of their own number and another, and collusively transferred the security for the sum of £700, which was alleged to be so much less than the value.

By the trust, power was given to the trustees "to sell and dispose of the heritable subjects, as well generally as specially conveyed to them as aforesaid, and that either by private bargain or public roup, and at such

Nov. 20, 1844.
1st DIVISION.
Ld. Robertson.
N.

No. 13. prices as they shall think proper." The trustees were declared protected from liability, except each for his own actual intromissions only.

Nov. 20, 1844.
Clelland v.
Brodie.

The trustees having consigned the dividend effeiring to the legacy in question, defended themselves upon the ground that they had acted by advice of counsel; that their conduct was that most beneficial to the estate in the circumstances, and had been approved of by all the beneficiaries except the pursuer, who had interest only, as in right of legacies, to the amount of £400 out of the £2200 which had been left.

The Court, altering the interlocutor of the Lord Ordinary, (Cockburn,) which had remitted to a writer to the signet, remitted to the superintendent of the Leith Docks, where the subject of the security for the debt was situated, to report as to its value. From his report, which was approved of by the Court, it appeared that the subject was not worth more than the public burdens affecting it, and was therefore totally worthless as a security.

The debtors were both insolvent, and no proof was offered that more could have been made of the debt, which, however, the purchaser offered to the legatees at the price he paid for it. There could be no doubt, therefore, that the trustees had acted prudently in the matter. There was no proof of collusion, and further probation being renounced, the only question was, whether, assuming that the trustees had acted *bona fide* and beneficially for the estate, they had *power* under the trust-deed, which gave them authority to sell heritage, but said nothing about transaction or compromise, to sell the debt for less than its full nominal value.

The Lord Ordinary (Robertson) to whom the case had been remitted, found that the trustees had acted prudently in the circumstances, and within their power, and were not liable beyond the amount they had recovered for the debt, and therefore assolizied them, with expenses. His Lordship's note, which is subjoined, narrates fully the facts and procedure in the case.*

* "NOTE.—By the settlements of the late Mr and Mrs Bell, various legacies were left, to the amount of £2200, including one legacy to Miss Jean Walker of £100, and another to Mrs Janet Walker or Shirreff in liferent, and her children in fee, of £300. The testatrix nominated trustees, who were empowered to sell the heritable property, 'either by private bargain or public roup, and at such prices as they shall think fit.' Mrs Bell died on the 31st of May 1839, and the defenders and the late Mr Allister acted as trustees under the settlement.

"Amongst the debts due to the testatrix, there was a sum of £1000 secured by bond over certain heritable property in Leith, belonging to Messrs Brodie and Brougham, of which company Mr Brodie, one of the trustees, had been a partner. The company was dissolved—Mr Brougham having become bankrupt. Mr Brodie, as is admitted, became insolvent, and executed a trust deed in the year 1832. The trustees of Mr and Mrs Bell, after having raised diligence to the extent of giving Mr Brodie a charge of horning on the 25th of May 1841, ultimately disposed of their right to the bond, by transference to Mr Mercer, for himself, and

The pursuer reclaimed.

No. 13.

LORD PRESIDENT.—I entirely concur in the view taken by the Lord Ordinary. Nov. 20, 1844.
Clelland v.
Brodie.

on behalf of the other creditors of Mr Brodie, at the price of £650—Mr Brodie, at the same time, discharging a legacy of £50 left to him under the settlement of Mrs Bell. This arrangement was made by the trustees acting under the advice of counsel, and with the approbation of all the beneficiaries under the trust, excepting Mrs Shirreff and Miss Walker, who, through Mr Charles Shirreff acting on their behalf, insisted that no arrangement of the debt should be made in the manner proposed.

“The present pursuer acquired right by assignation to the legacies due to Mrs Shirreff and Miss Walker, and this action is rested on an assignation to the legacy of £100, dated 18th August 1841. The action concludes against the trustees for a count and reckoning, and for payment of such sum as may be the just proportion of the estate of the deceased effecting to the legacy, with interest, or failing thereof, of the sum of £150. The ground of action as laid in the summons (p. 3) is rested on an alleged illegal or unwarrantable discharge by the trustees, of a large debt due to the estate by one of their own number, for a sum greatly less than its true amount. On the record this is explained to refer to the bond due by Mr Brodie, and in article 21st, it is stated, that, at the time of the compromise, Mr Brodie was in good circumstances, which fact, however, is denied in the answers—it being stated, on the contrary, that he was entirely insolvent. It is also alleged by the pursuer, that the transfer of the heritable bond was collusively made, and, under article 25th, that the sum accepted was much less than the value of the property. The case having come before Lord Cockburn, his Lordship remitted to Mr Lindsay, W.S., to enquire into this last averment, and into the value of any other subject or fund from which payment might be obtained. The Court, however, on the 18th of January 1844, remitted to the superintendent at Leith to report as to the value of the property at the period of the transaction, and that gentleman reported, that ‘neither in May 1841, nor a few months before or after, would this property have sold for any thing beyond the feu-rent, and even at this moment, when such property may be considered somewhat better, he does not believe that any purchaser could be found for it.’ Upon this report, the Court, on the 28th of February 1844, ‘In respect the value of the property in question has been satisfactorily obtained, by the report of the superintendent of the docks of Leith, No. 136 of process,’ remitted to the Lord Ordinary.

“The case having come to be heard, the Lord Ordinary appointed the parties to state whether they admitted the correspondence in process to be genuine, and renounced further probation. This has accordingly been done; and in the admitted state of the case, with all further probation renounced, it cannot possibly be maintained, that it was not a prudent and beneficial transaction for the parties interested in the settlement, to recover £700 out of a bond for a £1000, where the heritable security was worth nothing—one debtor being bankrupt, and the other insolvent. The case of the pursuers, therefore, comes to be reduced to a question of mere power on the part of the trustees, and so it was accordingly argued. It is true that the trust-deed gives no express power of transacting, and that the legatees, in whose right the present pursuer is, insisted on the utmost rigour of the law being had recourse to, manifestly, as the truth now appears, and according to evidence tendered at the time, to the disadvantage of themselves and the other beneficiaries; but as these parties were only legatees to the extent of £400 out of £2200, the Lord Ordinary does not think that the trustees were bound at their suggestion, and to the injury of others having an overwhelming interest in the common fund, to do extreme diligence, by which it is plain great expense and ultimate loss would have been incurred to all concerned. The trustees were, therefore, well advised by counsel on 7th June 1841, to desist from

No. 13.

Nov. 20, 1844.
Clelland v.
Brodie.

I think, looking at the whole correspondence and documents before us, there cannot be a doubt that these trustees acted not only *bona fide*, but for the benefit of the trust estate, in the transaction regarding the disposal of Mr Brodie's bond, (the only point now insisted in,) for the sum of £650 paid down, and the discharge of his legacy of £50, more especially considering that Mr Shirreff, acting on behalf of his mother Mrs Shirreff, and his aunt Miss Walker, the pursuer's authors, were the only recusants, the whole other parties interested being anxious that the offer should be accepted. Independently of this, I think the offer of the bond to the Shirreffs, on the terms proposed by Mr Mercer, conclusive. When the case was formerly before us, I took this view of it; but with reference to the pursuer's averment, that the heritable security of the subjects in Leith would have realized the full amount of the bond, we thought that more enquiry might be proper. And differing so far from Lord Cockburn as to the party best qualified to judge of the market value of the subjects in question, we remitted to the superintendent of the docks, where the property is situated, instead of to a man of business—a writer to the signet—to report as to their value. That gentleman reported the subjects as altogether unsaleable now, and at the date of the transaction in 1841, which, in a question of this kind, in which an act of administration of a body of testamentary trustees is called in question, we held conclusive as to the estimate formed by them, in so far as the heritable security was concerned. We then remitted to the Lord Ordinary to dispose of the case *quoad ultra*; and the parties having now renounced further probation, I think there cannot be a doubt of the soundness of the judgment at which his Lordship has arrived. The only circumstance in the case which made any impression of difficulty in my mind, was Mr Brodie's being himself a trustee. But the correspondence and other evidence before us, I think, completely removes the possibility of suspecting any approach to collusion, or undue leniency or favour towards him on the part of his co-trustees.

LORD MACKENZIE.—I concur. As the case is now put to us, the pursuer rests entirely upon the abstract question of power. It is put to us on the same footing as if the case had been sent to a jury on the question of *bona fides* and beneficial administration of the trustees, and the pursuer had still come back to us, after getting a verdict against him, asking a judgment on the mere legal question, whether the trustees had power to carry through the transaction without a formal autho-

detrimental diligence, and, as the bond was unconditionally offered to, and rejected by, the residuary legatees, at the price for which it was sold, to their benefit and that of the other parties having right therein as a common fund, it seems plain that this action, which is rested on an allegation of corrupt dealing, and loss by negligence to do exact diligence, cannot be supported; and also, that the legatees who stood out were not entitled, at their own loss, and merely for the sake of enforcing the diligence of the law, to endanger and injure the common interest of the other beneficiaries by useless expenditure; and that the trustees acted prudently, and *bona fide* in the whole matter. It is not unimportant to observe also, that this assignee—the value paid for whose assignation is not specified—took right to the debt apparently in the knowledge of the whole circumstances, and that the recovery of the whole sum in the bond would have made a difference on the dividend on this legacy so utterly insignificant, that it was really not worth while to have instituted such proceedings as the present, and which, at any rate, are rested on allegations now disproved.”

nity to transact and compromise having been given by the settlement. Now, even were there any thing in the pursuer's plea upon this point, I do not see that it can be competently raised under his summons, which does not embrace a reduction of the transaction as being *ultra vires* of the trustees, but is limited to conclusions of account and reckoning against them for their administration and management of the trust estate, on the same footing as if it had been directed against any ordinary factor or administrator. Against such an action I hold the defence to be conclusive, that you have failed to prove that, by any other course than that adopted, the trustees could have made more of the estate.

LORD JEFFREY.—On the mere question of power, which is the only point now argued to us, it is important to observe that the settlement gives a power of sale of heritable subjects, which was the form in which Mr Brodie's bond was disposed of to Mr Mercer. But independently of this, I am disposed to hold that trustees acting *bona fide*, and with sound discretion, have always a power of disposal and settlement, where such is necessary, for extricating the trust and duly administering their office. The only limitation of such a power I hold to be where certain specific forms are prescribed by the settlement in the exercise of the power, which must, of course, be strictly complied with. In the absence of such prescribed forms, I hold the duties of trustees to be, as has been observed by Lord Mackenzie, the same as those of factors, and that they sufficiently exonerate themselves by showing that they have made the most of the estate, or rather that they are entitled to exoneration when the party challenging their acts of administration fails to prove that more could have been made of it. I hold this view even in the case of trustees being called upon by one of the parties interested, at the time of the transaction, to proceed in a certain course with a view to the realizing of a trust-subject, contrary to their own opinion, and contrary to that of the other beneficiaries interested under the settlement. I think the situation of trustees, in such a case, somewhat analogous to that of a pursuer coming into Court with an action calling certain individuals out of a number jointly and severally liable to him. If the objection be taken by the defenders that the other parties liable ought also to be called, the pursuer is entitled to say, I have not called them because they are utterly insolvent, and it would be a mere needless waste of money to do so; but if you insist on my doing so, I shall call them, but under certification that it is done on your requisition, and that you shall be liable for the expense of so useless a proceeding. In the present case, there was a difference of opinion among the beneficiaries, and the trustees, concurring with the majority, thought the course which Mr Shirreff called upon them to follow would have been not only a useless waste of the trust-funds, but would have caused a positive loss to the estate. In such circumstances, I think it sufficient that it has been made out, to the satisfaction of the Court, that the trustees and the majority of the beneficiaries were right, and Mr Shirreff wrong. But, at all events, I think Mr Shirreff had no right to insist upon that course being followed which he individually thought the best, without at least offering to guarantee the trustees against loss. Even had he made such a proposal, I think the offer of the trustees to hand him over the bond, on the terms proposed by Mr Mercer, was enough, and was conclusive in regard to their exoneration. Such an offer was more than equivalent to an offer to adopt Mr Shirreff's course of proceeding, on being guaranteed against loss. On these

No. 13.

Nov. 20, 1844.
Clelland v.

No. 13. grounds, and generally upon those stated by the Lord Ordinary, in which I fully concur, I think his Lordship's judgment ought to be adhered to.
 Nov. 20, 1844. LORD FULLERTON concurred.
 Railton v. Mathews.

THE COURT adhered.

WOTHERSPOON and MACK, W.S.—D. ALLISTER, W.S.—Agents.

No. 14. EDWARD RAILTON, Pursuer.—*Rutherford—Buchanan*.
 MATHEWS and LEONARD, Defenders.—*G. G. Bell*.

Process—Jury Trial—A. S. 16th February 1841.—In interpreting the Act of Sederunt 16th February 1841, § 13—Held that the term “days” is to be construed as meaning sederunt days, not natural days.

Nov. 20, 1844. The Act of Sederunt 16th February 1841, provides, § 13, “that when a party gives notice that the cause is to be tried in Edinburgh, or on the circuit, the opposite party, if he wishes to have the place of trial changed, must, within four days from the receipt of such notice, make a motion in the Division to which the cause belongs for that purpose.”
 2D DIVISION.
 Jury Cause.

On Thursday November 14th, the pursuer Railton gave notice of trial for the sittings at the Glasgow spring circuit. Upon the Tuesday following, (the 19th,) the defenders Mathews and Leonard, having sent notice on the Saturday to the agent of the pursuer, moved the Court to change the place of trial to Edinburgh at the Christmas sittings.

Rutherford, for Railton, then objected that the motion was incompetent, as it was required by the Act of Sederunt that a motion to change the place of trial should be *made in Court* within four days after receipt of the notice of trial.

G. Bell, for Mathews and Leonard, answered, that the notice of trial having only been received on Thursday night, the motion could not have been made sooner. The meaning of the Act of Sederunt was, that the motion must be made within four sederunt days after notice was given.

LORD JUSTICE-CLERK.—There have not been four sederunt days yet, since the notice. In these Acts of Sederunt, days are always interpreted as sederunt days.

Lords Moncreiff and Cockburn having expressed some doubts as to whether the Act of Sederunt was to be construed as meaning *natural days* or *sederunt days*, the case was delayed for the purpose of consulting the other Judges.

Of this date,

No. 14.

LORD JUSTICE-CLERK.—We have now consulted with our brethren of the other Division, and we are of opinion that this motion must be entertained.

Nov. 21, 1844.
Railton v.
Mathews.

JOHN CULLEN, W.S.—SIMON CAMPBELL, S.S.C.—Agents.

Lawson v.
Drysdale.

EDWARD RAILTON, Pursuer.—*Rutherford—Buchanan.*
MATHEWS and LEONARD, Defenders.—*G. G. Bell.*

No. 15.

SEE preceding report.

Process—Jury Trial.—In this case, the pursuer Railton gave notice of trial for Glasgow spring circuit. The defenders Mathews and Leonard then moved that the case should be tried in Edinburgh. Railton had formerly been resident in Glasgow, but had ceased to live there, and gone to England. Mathews and Leonard resided in Bristol. The witnesses were chiefly professional men living in Edinburgh. The Court fixed the trial to take place in Edinburgh at the Christmas sittings, partly on the ground that there was no sufficient reason why it should be tried in Glasgow, and partly on the ground of the delay that, in that event, would necessarily ensue.

Nov. 21, 1844.
2D DIVISION.
Jury Cause.

JOHN CULLEN, W.S.—SIMON CAMPBELL, S.S.C.—Agents.

WILLIAM LAWSON, Pursuer.—*Macfarlane.*
JAMES DRYSDALE, Defender.—*Rutherford—Handyside.*
Et e contra.

No. 16.

Compensation—Reparation—Process.—Where a party had obtained a verdict for damages, and the verdict had been applied,—Circumstances in which the Court refused, on a motion by the party against whom the damages had been awarded, to supersede extract till the result of an action of count and reckoning at his instance, then in dependence, so as to enable him to constitute certain counter claims, and compensate them with the damages.

JAMES DRYSDALE and William Lawson formed a partnership for carrying on the business of nurserymen and seedsmen in Glasgow. After the partnership had subsisted for about four years, Drysdale, without the consent of his copartner Lawson, issued notices of its dissolution. Lawson, upon this, raised an action for having it declared that there was a subsisting agreement or contract of copartnery between the parties for the period of nineteen years, and further concluding for damages against

Nov. 22, 1844.
2D DIVISION.
Jury Cause.

No. 16. Drysdale for having issued the notice of dissolution, and refusing to act along with him as a partner under the contract. Drysdale also raised an action of declarator to have it found that the agreement between the partners was not for any specified number of years, but was terminable at the pleasure of either.

Nov. 22, 1844,
Lawson v.
Drysdale.

Prior to the institution of the action of declarator, Drysdale had raised a process of count and reckoning before the Sheriff of Lanarkshire against Lawson for his intromissions as a partner. This action had been advocated ob contingentiam of the processes of declarator, and stood sisted hoc statu.

Issues having been adjusted in the actions of declarator, a jury trial took place, in which a verdict was returned in favour of Lawson, finding that there had been an agreement of partnership between the parties for nineteen years, and also finding him entitled to £250 of damages on account of its dissolution by Drysdale. This verdict was subsequently applied by interlocutor of the Court decerning for the amount of the damages.

Thereafter, a motion was made for Drysdale, to supersede extract of this decree till the result of the action of count and reckoning. He contended, that the count and reckoning, which had been brought on the assumption that the notice of dissolution had brought the company to a close, (which had been denied by Lawson,) necessarily stood sisted while that question was sub judice; that it appeared from the evidence at the trial that during the subsistence of the partnership, Lawson, who had not contributed any of the funds, had drawn considerable sums from the business, and he (Drysdale) was entitled to have extract superseded, so as to enable him to constitute his claims, that he might state them in compensation of the damages to which Lawson had been found entitled.¹

Lawson answered;—That there had been no plea of compensation stated on the record. It was impossible to tell what the result of an accounting between the parties might be; and Drysdale was not entitled to have the operation of a decree for damages suspended, upon the mere hypothetical assumption that a balance was due to him.

LORD JUSTICE-CLERK.—The jury have here found that a wrong has been done to Lawson by the dissolution of the company, and have awarded damages. This verdict has been applied, and the damages have been decerned for. No plea of compensation has been stated by Drysdale on record; and this motion is made to supersede extract till he shall be able to constitute counter claims in the count and reckoning. In Seton's case, the plea of compensation was stated in the action. It seems hard, when this man has suffered a wrong, that his decree for damages should be suspended till the issue of a count and reckoning which has not yet been brought into any shape. (His Lordship then referred to the evidence which had been

¹ Ersk. 8, 4, 16, and cases there cited; Seton, Nov. 22, 1833, (Mor. voce Compensation, p. 2566.)

led before him at the trial, and which he did not consider as establishing, as contended by Drysdale, a probability that a balance would be due to the defender on an accounting as to the company funds.)

LORD MEDWYN.—I have nearly the same view, principally because this application is to supersede extract, the verdict having been already applied.

LORD MONCREIFF.—It may turn out that refusing this motion may be a hardship to the mover. But here is a clear decree for damages, and this is a motion to supersede extract, without any offer of security for the damages, till the issue of a count and reckoning which is not before us. Suppose this decree had been allowed to go out, would the statement of a claim that may arise in this process of count and reckoning be a relevant ground of suspension?

Rutherford, for Drysdale;—We are willing to find caution for the damages, or to pay, on the other party finding security for repetition.

LORD MONCREIFF.—That takes away the hardship to some extent; but still here is a liquid decree for damages, which is sought to be compensated with claims which have not yet been constituted in any shape.

LORD COCKBURN.—I am of the same opinion. I think the question is solved by the application of the old principle, that you cannot compensate liquid with illiquid claims. Here the damage is a clear settled thing by itself; you can't stop the decree by a vague general statement of claims that may be substantiated in another process.

Their Lordships accordingly refused the motion.

LOCKHART, HUNTER, and WHITEHEAD, W.S.—ANDREW DUN, W.S.—Agents.

JOHN MURDOCH, Advocate and Defender.—*Dundas*.
CHRISTIAN MUNRO, Respondent and Pursuer.—*Pattison*.

No. 17.

Process—Advocation—Bastard—Proof—Oath in Supplement—Stat. 50 Geo. III. c. 112, § 36, 37.—It is incompetent to advocate from an interlocutory judgment of the Sheriff, finding that the pursuer of an action of filiation and aliment had established a semiplena probatio, and allowing her oath in supplement, such advocacy not coming within the meaning of § 36 of 50 Geo. III. c. 112, allowing advocacy from interlocutory judgments, on the ground of "legal objection with respect to the mode of proof."

CHRISTIAN or Chirsty Munro having raised an action of filiation and aliment before the Sheriff of Ross and Cromarty, against John Murdoch, the Sheriff, after a proof, found that a semiplena probatio had been established of the defender being the father of the pursuer's child, and found her entitled to the benefit of her oath in supplement, and ordained her to appear to be examined.

Nov. 26, 1844.
2d DIVISION.
Lord Cuning-
hame.
Bill-Chamber.

No. 17.

Nov. 26, 1844.
Murdoch v.
Munro.

Before the pursuer's oath had been taken, Murdoch presented a note of advocacy, with the leave of the Sheriff.

An objection was stated by the respondent Munro to the advocacy,—that it was incompetent and ought to be dismissed, in respect the interlocutors brought under advocacy were interlocutory judgments, and did not fall under any of the classes of cases which might be advocated, before final judgment, with leave of the inferior Judge, under 50 Geo. III. c. 112, § 36. The advocacy was not founded on “legal objection with respect to the mode of proof,” but was founded on an objection in point of fact, that the Sheriff had gone wrong in his inference from the proof, when he had allowed the pursuer her oath in supplement.

It was answered for Murdoch,—that advocacy of an interlocutor allowing the oath in supplement, was competent under the act, it being an advocacy on the ground of objection to the mode of proof. The general practice in similar cases, was to advocate before the oath was taken.¹

The Lord Ordinary on the bills reported the case to the Court.*

LORD JUSTICE-CLERK.—I have very deliberately considered this case, and have gone carefully over all the cases respecting the competency or incompetency of the advocacy under § 36 of 50 Geo. III. c. 112. The objection to the competency of the advocacy, though raised on record, has not been noticed by the Lord Ordinary. The exception within which it is proposed to bring this advocacy is thus expressed—“legal objection to the mode of proof.” Now I apprehend that, according to all the definitions and expositions in the great authorities of the law of Scotland, the *mode of proof* refers to those rules in the common or statute law of Scotland by which, in certain classes or character of cases, matters alleged can be proved either by a proof at large or only by writing, or only by writ or oath of the opposite party. These distinctions as to the mode of proof are of very deep foundation in our law—and if in the one class of cases a proof at large is allowed when a correct application of the law restricts the party to either of the more limited modes of proof, or if he is restricted to the latter in the inferior Court, where he is entitled to a proof *pro ut de jure*, then there is a plain reason for an advocacy, with leave, on the legal

¹ Milne v. Blacklaws, March 11, 1842, ante, IV. p. 1149; M'Laren v. M'Colloch, June 12, 1844, ante, p. 1183.

* “NOTE.—The Lord Ordinary reports this case in order that it may receive the determination of the Court in the speediest and least expensive form possible. It belongs to a class of cases in which the parties generally are little able to bear the expense of a protracted litigation; being an advocacy against an interlocutory judgment of the Sheriff, allowing the mother of a natural child her oath in supplement, in support of her claim for aliment. If the Lord Ordinary had either passed or refused the note, his judgment, by the express terms of the Judicature Act of 1825, (§ 45,) would not have been reviewable in the present stage of the proceedings. Although the incompetency of a reclaiming petition, in a similar case, seems to have been lately overlooked by the parties and the Court, (see the case of Kirkpatrick v. Donaldson, in 1843, 5th Bell's Reports, N.S. p. 1104,) yet, as the enactment of the statute is express and unequivocal, it is necessary to follow the regular course of procedure now adopted, as to which there can be no objection.” (His Lordship then referred to the proof in the case.)

objection to the mode of proof, although the judgment is only interlocutory—for the whole subsequent proceeding in the inferior Court may come to be useless waste of time and expense, if the interlocutor as to the mode of proof is wrong.

No. 17.

Nov. 26, 1844.
Murdoch v.
Munro.

It has been found, going upon this distinction, that an advocacy is incompetent against an order for a judicial examination of the party; for although in that way material aid may be obtained for the extrication of truth, yet it is not a separate mode of proof in the sense of the statute.¹ So also an advocacy was refused as incompetent against an interlocutory judgment on the effect of a certain document, alleged to be invalid under the registry acts.² So also, in other cases where the objection was to an article or piece of evidence, but not to the mode of proof. And on this plain ground, in *Wright v. Watson*, June 29, 1826, Lord Medwyn found expressly that an advocacy on the same ground as the present was incompetent. And the Court, holding that to be clear, found a reclaiming note incompetent under the 45th section of the Judicature Act. But if Lord Medwyn was wrong, then his interlocutor, refusing to entertain the advocacy, was incompetent, and beyond his power, and would have been subject to review on *that* ground. Hence the opinion of the Court necessarily assumed as its basis the point of incompetency.

Then the statute further says—*legal objection* to the mode of proof. I think this advocacy cannot be brought within that expression—legal objection. A proof here was allowed to the pursuer. As a part of that proof at large, in this particular class of cases, the party herself is a competent witness when the Judge thinks there is a *semiplena probatio* without her testimony, and when the case made by the witnesses is consistent with her record. The only question which can then be raised is one on the evidence, whether the proof adduced does amount to a *semiplena probatio*. *Legal objection* to the oath in supplement there can be none, and accordingly none is stated in this case; for the whole pleas in law are only comments on the amount or sufficiency of the proof to lead to this result.

I can well understand that in various cases this objection may not have been stated. In *Kirkpatrick v. Donaldson*, it was not. But the error there was not with the Court, as the Lord Ordinary supposes, but with his Lordship in entertaining that advocacy at all on the *merits*, as he has done this. He should have refused it as incompetent; or passed it at once as a matter of course, if competent in his opinion. But if there is no objection to the competency of the advocacy, and if an interlocutor is pronounced on the merits, then I apprehend (and it is very important that we should not be thought to agree with the Lord Ordinary on that very serious question) that the clause in the Judicature Act does not exclude review—that that clause only applies when the Ordinary refuses or passes the note as competent or incompetent, under the clause in the statute 50 Geo. III. But it would be a most alarming and novel view to take, that the judgment of the Ordinary in the Bill-Chamber on the *merits* was *final*, when the merits can be raised in the Bill-Chamber. Such has never been my understanding, and I never before heard that explanation of the clause in question. It was intended simply to leave to the Ordinary the question of the competency or incompetency of the note; and if competent, then the note is *passed at once*; and this was the error of the Lord Ordinary in *Kirkpatrick v. Donaldson*; for if the note there was

¹ *Turner v. Gibb and McDonald*, Feb. 11, 1826.

² *Berry v. Lawson*, Dec. 16, 1815; Lord Glenlee.

No. 17. competent, then it ought to have been passed as a matter of course ; for discussion on the *merits*, when the advocacy is competent, can only take place, in the general case, in the Court, after the note is passed, not in the Bill-Chamber.

Nov. 26, 1844.
Murdoch v.
Munro.

In most cases the oath has been taken, and the discussion arises, whether it was right to have been allowed when the whole cause is brought up. And there is no difficulty in deciding that preliminary question, for we have only not to read the oath until it is disposed of. In some few cases the objection may not have been stated. But the interpretation of the statute is clear ; and the reason of the rule is also most cogent—viz. to avoid the delay in those cases in which the objection is not to the *mode of proof*, and to prevent two advocations.

LORD MEDWYN.—I always held the point to be quite plain, and acted upon it in several cases as Junior Ordinary in the Bill-Chamber. In the case of *Wright v. Watson*, 29th June 1826, (4 S. & D. 774,) I refused a similar advocacy as incompetent. I should be sorry to see the practice changed. Your Lordship has gone over the cases on the point, and I have nothing more to add.

LORD MONCREIFF.—I concur. I consider the case of *Wright* as a judgment in point, and the case of *Berry* completely confirms this view. I cannot recollect if any cases came before me during the long time I sat as Junior Ordinary in the Bill-Chamber. If the point was not stated, it might be that I did not notice it. I think it is incompetent to advocate in the present circumstances, and a very expedient rule it is. It might occur, that after the oath in supplement had been appointed to be taken, a long litigation might ensue, during which the mother might die. I consider the oath in supplement merely as an addition to the proof, to be allowed, provided the Judge forms a certain opinion upon the evidence ;—it is not a new mode of proof.

LORD COCKBURN.—At first I felt some doubts whether this was not a legal objection to the mode of proof. I have now come to concur with your Lordships. My ground is, that this pursuer is merely a witness in the cause, and you could not allow an advocacy with regard to the objection to her oath being taken, without allowing an advocacy whenever an objection is taken to a witness.

THE COURT accordingly remitted to the Lord Ordinary to refuse the note of advocacy as incompetent, with expenses.

JOHN HUNTER, W.S.—ROBERT LAIDLAW, S.S.C.—Agents.

No. 18.

JAMES MANSON, Pursuer.—*Ld.-Adv. M'Neill—A. M'Neill.*THE NATIONAL BANK OF SCOTLAND, Defenders.—*Marshall—Brown.*

Nov. 27, 1844.

Manson v.
National Bank
of Scotland.

Bankruptcy—Cessio Bonorum.—Where there is good reason to suspect that a party applying for cessio is fraudulently concealing funds or effects from his creditors, the proper course is to refuse his application for cessio *hoc statu*.

JAMES MANSON, a debtor in Perth jail, applied to the Sheriff for the benefit of cessio. This was opposed by his creditors, the National Bank, on the ground of fraudulent concealment of funds. Manson was subjected to a judicial examination, and, in addition, a proof was taken. On considering these, the Sheriff-substitute found that concealment of funds was not proved, but that the circumstances disclosed, showed "great recklessness of conduct and improper management of business;" and therefore, while he found the insolvent entitled to the benefit of cessio, he superseded extract till a specified day, "so that the opposing creditors may detain him in prison in all for the period of six months."

The Sheriff altered this judgment, and simply "refused the insolvent the benefit of the process of cessio *in hoc statu*," explaining, in a note, that he thought it a case where it was "in the power of the insolvent to make further disclosures, as to his circumstances and affairs, than he has yet done."

Manson reclaimed to the Lord Ordinary, who affirmed the judgment of the Sheriff.*

Manson reclaimed.

THE COURT adhered.

L. MACKINTOSH, S.S.C.—A. W. GOLDIE, W.S.—Agents.

* "NOTE.—The Lord Ordinary prefers the course adopted by the Sheriff-principal to that pointed out by the Sheriff-substitute. The latter Judge thought the pursuer should be found entitled to the cessio, and liberated at the end of six months from the date of incarceration. But it is thought that that course is rather adapted to the case of a bankrupt who has been guilty of some fault or offence (such as extravagance of living, or illicit trade, or the like) short of a contumacious and continued concealment of funds, which the Lord Ordinary thinks is strongly presumable in the present case. The application, therefore, was properly dismissed *in hoc statu* by the Sheriff, leaving it to the petitioner at a certain interval, and when he can explain the application of his funds more satisfactorily, or when he can fortify his statement as to the application of his different funds with some sort of evidence, to apply of new for the benefit of the cessio."

No. 19.

Nov. 28, 1844.

Mason v.
Wilson.HECTOR MASON, Pursuer.—*Rutherford—Deas.*ADAM WILSON, Defender.—*G. Bell—Patton.*

Contract—Pactum Illicitum.—Held, 1. That an agreement between a depute and assistant clerk of Session, whereby the latter was, for a certain consideration to perform the whole duties of the office to which they were both attached, was *pactum illicitum*. 2. That, if legal, it came to an end on the resignation of the depute, without the necessity of notice, notwithstanding a stipulation that the party putting an end to it should give six months' notice to the other.

Nov. 28, 1844.

1st Division.
Lord Cuning-
hame.
W.

ADAM WILSON being, from age and infirmity, unable to discharge his duties as one of the depute-clerks of Session, entered into an agreement with Hector Mason, assistant-clerk in the same office, to take the sole charge of the office, acting as if he (Wilson) were present. The agreement was effected by an interchange of letters. Under it, Wilson bound himself to pay Mason at the rate of £100 a-year, payable quarterly during its continuance; and it was stipulated that the party putting an end to the agreement should give six months' previous notice to the other.

Wilson, without any previous notice to Mason, resigned his office in the middle of a quarter, and offered him the proportion of salary for the period he had served since the last quarterly payment. Mason refused this, and raised action for his salary from the last quarter to the day on which the resignation was intimated, and for six months thereafter.

In defence, Wilson pleaded, 1st, The agreement was illegal. 2d, That, not, it came to an end on his (Wilson's) resignation, just as it would have done upon his death, without the necessity of notice, the stipulation for which had reference solely to the event of his continuing to hold office.

The Lord Ordinary pronounced the following interlocutor:—"In respect the defender has stated that he is ready and willing to pay the pursuer £16 : 13 : 4, as the sum due to him for extra labour on the defender's account, up to the period of the intimation of his resignation. Sustains the defences, and assoilzies the defender from this action: Finds expenses due to neither party, and decerns." *

* "NOTE.—The Lord Ordinary regrets that this case has not been settled on the merits of Court, as he recommended. Although he thinks the pursuer has a strong claim in equity, and between man and man, to a certain allowance from the defender, he has been unable to satisfy himself that it is such a claim as can be enforced at a court of law.

"1. He is inclined to hold that the transaction was not legal. The pursuer was the assistant clerk in the same office with the defender as depute-clerk, and the arrangement agreed upon was, that the pursuer should do the defender's duties so as to exempt the defender from attendance at the office. It is thought that

The pursuer reclaimed on the merits, and the defender as to expenses. No. 19.

LORD PRESIDENT.—I am of opinion with the Lord Ordinary, that this arrangement cannot be sustained in a court of law. The Court ought to have been applied to, to sanction any temporary arrangement which was thought necessary. I am equally clear, that if the agreement had been legal, it came to an end on the defender's resignation, without the necessity of notice. I think the Lord Ordinary right as to expenses also.

Nov. 28, 1844.
Mason v.
Wilson.

LORD MACKENZIE.—I am of the same opinion on both points. I think the agreement illegal. The public must be presumed to suffer when they get the services of only one person, when they are entitled to those of two. As to the other point: in ordinary service, where notice is to be given, even death does not prevent the contract from continuing to the end of the term; but that rule is founded on the hardship of turning off servants in the middle of a term, when they cannot get another situation, and they are bound to serve the heir if he chooses to take them. That will not apply to so peculiar an arrangement as the present. I think the reasonable interpretation is, that the requirement of notice was intended to prevent the agreement being put an end to while Wilson was in office, not after he resigned or died.

LORD FULLERTON.—I concur. I think it clearly an illegal contract. If legal, it was limited to the period Wilson held office.

LORD JEFFREY.—I concur in the view of all your Lordships on both points. What settles the illegality of the contract is, that the surrogated person is a public officer. If a private person had been appointed, it would have been different. The sting of the thing is consolidating two offices, which the public are entitled to have separately, with the services of two officers. The *presumptio juris et de jure* is, that the service of two officers is necessary for the proper discharge of the duties. It is the same as if one of two clergymen of a parish became sick and infirm, and agreed with the other to be his assistant.

THE COURT accordingly adhered.

J. W. ARNOTT, W.S.—GRAHAM and WEBSTER, W.S.—Agents.

this was contrary to the principle and rule on which the present establishment of clerks was provided by statute. It was meant that there should be two clerks in each deputy-clerk's office, the one probably to form a check on the other; but by the arrangement libelled on, the defender devolved his whole duty on the subordinate clerk, and the latter undertook to relieve him from attendance for £100 a-year. Could a Principal Clerk of Session make a similar arrangement with the assistant in his office, and devolve his whole duty on an assistant for a fourth part of the salary, retaining the other three-fourths? The Lord Ordinary cannot persuade himself that this would be a legal paction which the Court could sustain.

"2. Even if it were legal, it is thought that the arrangement between the pursuer and defender was made under the implied (though not expressed) condition, that the defender actually continued in office himself for a period longer than a year. The pursuer was to receive six months' notice before the defender made any other arrangement with another person to do his duty. But that condition was inapplicable if the defender ceased to hold his office by death, or by such incapacity as might induce the public authorities to force him to resign. The resignation here was most excusable and necessary, and in fact the very argument libelled on shows that it should have taken place at an earlier period."

and not in the event of opposition only. 3d, The defender was compelled to claim, to instruct the deductions which had been admitted. No. 20.

The chargers answered, 1st, Ranking in a sequestration did not bar an action of constitution.¹ 2d, Admitted that such action must be at the pursuer's own expense, that the general conclusion for expenses in this case was therefore wrong, and that the suspender would have had a good case had he confined his defence to it; but he defended chiefly on the ground that the action was incompetent, which occasioned the greater part of the expense. 3d, Deduction of the dividend drawn, had at once been consented to, and also of the alleged overcharge, though *ex gratia* and to avoid litigation only.

Nov. 28, 1844.
Rutherford v.
Dawson.

The Lord Ordinary repelled the reasons of suspension, and found the charge orderly proceeded, with expenses.*

¹ Walker, May 14, 1835, (13 S. 759.)

* "NOTE.—The suspender was sequestered on the 17th of November 1841, and the respondents were ranked upon his estate for the sum of £89:13:9. On this sum a first and final dividend at the rate of 4d. per pound was received by the respondents on the 1st of December 1842. On the 1st of February 1843, the respondents raised an action concluding for the sum of £85:11:11, being apparently for the same debt for which they stood ranked, but under deduction always of whatever sums the said defender may be able to instruct he has paid to account of said principal sum. There was no notice in the summons of the bankruptcy of the suspender, or special deduction given for the dividend. Defences were lodged on the 14th February 1843, in which the suspender maintained, both as a preliminary plea and on the merits, that the action should be dismissed in respect that the dividend had been paid. This was not a valid objection in law to the constitution, and the proper course for the suspender to have taken was either to have allowed the decree to go out, or to have consented to the constitution, subject to the definite deduction of the dividend, which was very trifling. He also claimed deduction of a sum of £1:14:1, as overcharged in the account. To this deduction, as well as to the amount of the dividend, £1:8:7, being together £3:2:8, the respondent, in replies lodged on the 17th of February, consented, thus leaving a net balance of the sum libelled, £82:9:3.

"While these proceedings were pending, the suspender was in course of obtaining his discharge from the Court, having already procured the necessary concurrence of his creditors. On the 28th of February 1843 he was discharged. The record was closed on the 1st of March, and on the 8th decree was pronounced for the admitted balance of £82:9:3, and for expenses. These expenses were afterwards taxed at the sum of £4:18:10, and the propriety of that award of expenses forms the whole subject of the present suspension.

"It is not correct, as stated on the part of the suspender under reason 7, and also in answer to statement 5, that decree was taken without deduction of the dividend or extra charge. On the contrary, deduction has been given for both, and therefore this ground of complaint is unfounded. As the suspender's agent was present at a meeting before the Sheriff on the 1st of March, and did not state judicially that a discharge had been obtained, or consent to decree of constitution, but closed the record under reservation of the dilatory pleas that the pursuers were not entitled to constitution, the Sheriff was right in repelling that preliminary plea, and the decree so pronounced did not go by default.

"On the 14th of March 1843, the advocator's agent intimated that the discharge had been obtained, and stated that he hoped a reclaiming petition would be unnecessary. The matter seems to have lain over till the 14th June 1843.

No. 20. The suspender reclaimed.

Nov. 28, 1814.
Rutherford v.
Dawson.

LORD JEFFREY.—I cannot concur in the interlocutor. I don't give any judgment that it is actually incompetent for a party, who has ranked in a sequestration, to raise an action of constitution against the bankrupt. It would be perilous to establish such a rule. Though a claim has been ranked, and the first dividend paid, yet an objection to it for future dividends or otherwise may be anticipated, on the ground of want of a decree of constitution; and it would be hard to prevent an action of constitution from being brought. But though the action may be competent, it is fairly to be dealt with as nimious and oppressive, unless the party make it appear that he had some intelligible and reasonable cause for raising it, especially where he concludes generally for expenses. I cannot take it off his hands to say that he contemplated the possibility of getting a larger dividend. He might be entitled to obtain and extract a decree at his own expense, but certainly not at the expense of the bankrupt. The conclusion is very common for expenses in the event of ineffectual opposition, and such a conclusion would have been unexceptionable here; but as it was for expenses generally, I think the bankrupt was justified in defending. It is said that a great part of the expense was incurred in opposing the objection to the competency of the action, but I cannot divide; the decree of the Sheriff has not done so.

I must hold that a litigant does not abandon pleas unless they are untenable, and I cannot listen when he says that he did so *ex gratia*. I therefore so view the conduct of the charger as to the alleged *pluris petitio*.

The question then is, Whether the suspender's comparance in such an action, which concluded against him generally for expenses, and contained a *pluris petitio*, was so wrong as to subject him in expenses? I think not, and am, therefore, for altering the interlocutor, and suspending the letters.

LORD MACKENZIE.—I concur. I cannot say that, when a party has made a claim in a sequestration, he is absolutely barred from bringing an action of constitution. I see, from the Bankrupt Act, that claiming in a sequestration stops

when decree was taken for the amount of the expenses charged for. It is clear, that notwithstanding the receipt of the dividend, the respondents were entitled to decree of constitution, although it is not very obvious, as the claim was ranked, and as the discharge was not objected to, what objects the respondents had in taking such decree; still there might have been property which they wished to attach, and the bankrupt should not have objected to the competency of the constitution. If such constitution be insisted in, perhaps it is somewhat harsh to do so at the expense of the bankrupt. The portion of the account of expenses which would have been incurred had no defences been lodged, seems to amount to £1 : 8 : 8 only, and the present proceedings in the supreme Court have not been instituted for the purpose of getting quit of the decerniture to that amount, but to be freed of the whole expense, the great proportion of which was occasioned by unnecessary litigation on the part of the suspender. He was wrong in resisting the decree of constitution, and his dilatory defence was justly repelled. He was also to blame in not stating on the record that he had obtained his discharge; and he was still further to blame for stating on the record in this Court that no deduction had been given in the decree for the dividend and overcharge. Under these circumstances, the Lord Ordinary does not feel inclined on this matter of expenses to interfere with the judgment of the Sheriff."

No. 20.

Nov. 20, 1844.
Rutherford v.
Dawson.

prescription; but I do not see that a claim, being sustained in a sequestration, is equivalent to the decree of a court. It would, therefore, be unsafe to lay down, that a party who has claimed in a sequestration is not entitled to bring an action of constitution. If the debt were founded on a bond, or other writ registrable for execution, it would be a different matter; but here it is founded on an open account for whisky, and it would be strong to say that, because the trustee is satisfied, the creditor is barred from constituting—for another party might challenge his claim.

But when a party is sequestrated, and can do nothing, it is a great hardship to bring an action against him. The action here does not appear to be an action of constitution. It is in the ordinary form, and concludes for payment, and for expenses generally; and the pursuer takes decree for the whole expenses, and not for those only caused by the defender's appearance. I cannot hold that correct in my respect. The question is not whether expenses should have been given the other way, but whether they should have been given to the pursuer. I don't think it was a case for expenses at all. The pursuer was entitled to a decree of constitution; yet his action was so framed as to warrant the appearance of the defender, who could not safely let decree pass in absence. Then the pursuer cannot tell us intelligibly what he is to do with the decree. He can have no other party liable for the debt, or that would have appeared in his oath in the sequestration.

LORD FULLERTON.—I am of the same opinion. I agree in thinking that the interlocutor of the Sheriff, finding the action competent, ought not to be disturbed. None of us have any doubt about that. But supposing it quite competent, and that, if improperly resisted, the defender may be made liable in expenses; yet to support an award of expenses in his favour, the pursuer must show that it was an action in which the defender was in safety to allow decree to pass in absence. Now, that is not the case here; for the conclusion is for payment of a particular sum, under deduction of whatever sums the defender might instruct he had paid to account, with, superadded, a general personal conclusion for expenses. The conclusion for expenses entitled the defender to appear; but the conclusion for payment, under deduction of such sums as he could instruct he had paid to account, forced him to appear. When he did appear, he no doubt stated an untenable defence against the competency of the action, but his other defences were good. I think it was not a case for expenses at all.

LORD PRESIDENT.—I am of the same opinion.

THE COURT accordingly altered the interlocutor of the Lord Ordinary, and suspended the charge, with expenses.

SHIELDS and FORREST, S.S.C.—MAURICE LOTHIAN, S.S.C.—Agents.

No. 21.

ROBERT NAPIER, Pursuer.—*Rutherford—Neaves.*

Nov. 29, 1844.

CHARLES WOOD, Defender.—*H. J. Robertson—Macfarlane.*Napier v.
Wood.

Arbitration.—An arbiter, to whom disputes as to a contract for building a ship had been submitted, having gone out of the contract, and decreed for more than the contract price,—Held that the decret-arbitral was *ultra vires* and reducible, in respect that the contract, which had been disregarded, was the basis of the submission.

Nov. 29, 1844.

1st Division.
Lord Ivory.

By missive and acceptance, dated 3d May 1839, Charles Wood, ship-builder, contracted with Robert Napier to build a steamer, according to a specification, for the sum of £13,500, to be launched by 3d January and finished by 3d March 1840. Thereafter, Napier promised a premium of £500 if the vessel were finished within the stipulated time ; but this was not done. In the course of building and finishing the vessel, a good deal of extra work was done ; and, in the mean time, Napier made payments, amounting to upwards of £17,000. Subsequent to the missive and acceptance, an alteration as to size, favourable to the builder, was agreed to, but it was not stipulated that this should affect the price.

Disputes arose as to the state of accounts between the parties, and they executed a deed of submission, by which, on the narrative, “ that the said Charles Wood having, on or about the third day of May 1839, contracted with the said Robert Napier to build a steam-ship or vessel, called the ‘ Caledonia,’ and that in terms of the specification and contract or agreement executed between the parties, which ship or vessel was accordingly built ; and that whereas disputes and differences having arisen between the parties in regard to the said ship or vessel, the said parties have submitted and referred, and do hereby submit and refer to the amicable decision, final sentence, and decret-arbitral of Robert Thomson, shipbuilder in Greenock, all claims, questions, differences, and demands any way subsisting between them, of every kind or nature, arising out of, or in any way connected with, the building and finishing of the said vessel, with power to the arbiter to receive the claims of the said Charles Wood, and the answers and objections of the said Robert Napier thereto, as well as the claims of the said Robert Napier, and answers and objections of the said Charles Wood.”

In his claim given in to the arbiter, Wood stated the amount of his extra account at £3231 : 16 : 8½, which, added to the contract price, would have amounted to £16,731 : 16 : 8½. But the arbiter issued a deliverance, stating it to be his opinion, “ that, for the payment of £17,200 sterling, subject of course to the deduction of all partial payments, or goods furnished by Mr Napier, Mr Wood should discharge Mr Napier in full of all demands—each party paying their own agents’

expenses, and each party paying one-half of the fees of the clerk to the submission." No. 21.

The amount thus allowed considerably exceeded the sum of the contract price, and of the extra account. In a representation, Mr Napier pointed this out to the arbiter, and contended that the result could only have been arrived at from a disregard of the original contract, in which the price was fixed at £13,500. But the arbiter adhered to his first view, and found Napier liable in the sum of £206 : 6 : 6, besides £30 of expenses.

Nov. 29, 1844.
Napier v.
Wood.

A charge upon the decret-arbitral having been given, Napier raised actions of suspension and reduction, which were conjoined.

He pleaded, that the decret-arbitral was *ultra vires*, or *ultra fines compromissi*, in so far as it disregarded the written contract between the parties, the existence of which was the basis of the submission. Further, it reared up, without evidence, claims inconsistent with the original written contract; and the pursuer had not been fully and fairly heard before the arbiter, particularly with regard to the state of accounts.

The defender pleaded, that the decret-arbitral being *ex facie* regular and unobjectionable, and there being no relevant allegation of bribery, corruption, or falsehood, on the part of the arbiter, it was incompetent to enquire into, or review the procedure which took place before him.¹ It was a mistake to suppose that the contract stood upon the missive of May 1839 alone. There were subsequent agreements, by which contingently the price was increased, and the size of the vessel was altered. At any rate, even though the arbiter had made an error in calculation, that might be competently rectified without setting aside the decret-arbitral to any other effect.

The Lord Ordinary pronounced the following interlocutor:—" Finds that, under the deed of submission libelled, whereby upon the express recital, 1st, of a previous specific contract having been entered into between the parties for the building and finishing of the steam-ship or vessel in dispute; 2d, of the said ship or vessel having been accordingly built; and, 3d, of certain disputes and differences having arisen between the parties in regard thereto, the said parties submitted and referred to the amicable decision, final sentence, and decret-arbitral of Robert Thomson, shipbuilder in Greenock, 'all claims, questions, and demands anyways subsisting between them, of every kind or nature, arising out of, or in any way connected with, the building and finishing of the said vessel'—it was *ultra fines compromissi*, and *ultra vires* of the said arbiter, to pronounce any decree which should not assume and proceed upon the said contract, as being to all intents a concluded and binding contract between the parties: Finds that the only questions by

¹ 3 Ersk. 3, 32; Ferguson v. King, June 20, 1826, (F. C.)

No. 21. said deed of submission submitted and referred to the arbiter, and within his competency to dispose of, were questions arising out of, or connected with the building and finishing of the vessel, as, for example, whether the said vessel had or had not been built and finished in terms of said contract, and in so far as such building and finishing comprehended any extra work or furnishings not covered by the contract, what the same consisted of, and what additional sum was due and fell to be paid in respect thereof: Finds that the contract referred to in the deed of submission, was the contract entered into between the parties by the mutual missives of 3d May 1839, being No. 15 of Process, and that there was never any other contract entered into between the said parties, to which the reference contained in the submission did, or could possibly apply: Finds that, by the express terms and stipulations of said contract, the price of the vessel, apart from extra work and furnishings, was settled and fixed at £13,500: Finds that the very *maximum* amount of every demand and charge made by Mr Wood, in the submission for extra work and furnishings, was not more than £3231: 16: 8½: Finds that, while these two sums, thus constituting between them the very utmost extent of claim competent to be set up or given effect to, under the submission, amount together only to £16,731: 16: 8½, the arbiter has, by his decret-arbital, under challenge, decerned in favour of Mr Wood (interest included) for no less a sum than £17,200: Finds that, in so doing, the said arbiter has exceeded the powers conferred upon him under the deed of submission, and that his decret-arbital is inept and void: Therefore sustain this reason of suspension and reduction: Finds it unnecessary to enter into the matter set forth and pleaded in the other reasons; and in respect hereof, in the process of reduction, reduces, decerns, and declares in terms of the libel; and in the suspension, suspends the letters and charge *simpliciter*: Finds expenses due in both processes.” *

* “NOTE.—The Lord Ordinary is by no means satisfied that the arbiter performed his duty properly in regard to hearing parties upon the question of accounting, and altogether, nothing, it is thought, could be so unsatisfactory as the slumping manner, without explanation or detail of any kind, in which he appears to have arrived at his conclusions. At this moment, what he has sustained as price, and what as extras, is utterly inextricable. He seems to have thought he had only to pronounce what (independently of any contract of parties) might present itself to his own mind as ‘a fair price’ on the whole matter; and so, without distinction of extras, or any thing else, just to have pitched at once upon the random and arbitrary amount of £17,200.

“It is not necessary, however, to go into this. The deed of submission is express—that the arbitration had reference to the contract of parties—and it was necessarily in reference to that contract, and not otherwise, that the arbiter was bound to perform the duties of his office. What the contract so referred to was, cannot be brought into question. Mr Wood’s own pleadings before the arbiter are, as regards that matter, conclusive; for he there admits, in the most explicit terms, nay, anxiously and strenuously pleads upon it, that there was no contract ever concluded but the one in process. His argument is, not that there was a

The defender reclaimed.

No. 21.

LORD PRESIDENT.—I should be unwilling to depart from the general principle, that proceedings in submissions must receive a fair and liberal construction. But if an objection appear on the face of the decret-arbitral itself, it must receive effect. That is the case here. It is clear that the parties proceeded upon the basis of a complete contract for building the vessel. Now that contract stipulated a particular price; and the subsequent offer of a *douceur* for dispatch did not change the contract. Neither did the alteration in the size of the vessel, which was all in favour of the builder. The arbiter was therefore not entitled to go beyond the contract price, which it is clear he must have done from the sum he has given decree for.

Nov. 29, 1844.
Napier v.
Wood.

LORD MACKENZIE.—I am of the same opinion. If the contract had been changed to the effect of providing that £500 extra was to be added to the price as a certain condition, it might have been argued that the arbiter was entitled to find that sum due under the submission, and that his judgment upon that point could not be disturbed, even though wrong. But there was no such change on the contract; the £500 promised was a mere conditional gratuity to induce dispatch, and it was never earned. The arbiter had therefore as little right to go back upon the gratuity, as to set aside the contract in another way. But I do not

second contract, the existence of which might perhaps have satisfied the reference in the deed of submission, but that the contract there referred to, being the only one that ever existed, was abandoned and departed from, and that as to any 'new agreement' he denies it *in toto*. That in this way 'the only question that now remains to be determined is, what sum can be deemed a fair and reasonable price for a vessel of the build and tonnage' of the one in question—and accordingly, that 'in the absence of any fixed price, it is obvious that the arbiter must now determine what is a fair price.' (See statement for C. Wood, No. 21 of process, p. 16, and repr. No. 25, p. 4, *et passim*.) And as such 'fair price' he carries his argument even to the extravagant point of demanding 'at least £19,000.' But the express terms of the deed of submission and the contract therein referred to, cannot be so got over. There is, besides, Mr Wood's letter of 2d August 1839, (No. 17 of process,) in which he distinctly refers to the contract as still unquestionably subsisting, and proposes of himself to make certain improvements in the structure of the vessel still 'at the contract price.'

* Some confusion is attempted to be raised, in regard to a sum of £500 which Mr Napier had conditionally volunteered to pay, over and above the contract price, provided the vessel should be finished within a certain period—a condition which was not purified. But even this, Mr Wood does not pretend to found on as constituting a contract in the sense necessary to satisfy the reference contained in the deed of submission. And so the matter necessarily falls back to the original contract.

* As to the statement insinuated in the record, and more strongly insisted in at the debate, that Mr Napier conducted the case before the arbiter on the footing that the latter's powers to set at nought the contract of parties were distinctly recognised and acquiesced in, it is contradicted in the clearest manner by the whole tenor of the pleadings in the submission. Mr Napier, on the contrary, both before and after the arbiter had issued his first notes in the case, most strenuously contended that this was a matter wholly beyond the arbiter's powers, and that 'the contract price, be it high or low, is a matter with which neither a court of law, nor an arbiter, has any concern whatever.'—(Answers, No. 22 of process, p. 16.)"

No. 21. believe that he proceeded on that ground. It is demonstrable, however, that he went beyond the contract price, or he could not have given so much.

Nov. 30, 1844.
Telfer v.
Barrow.

LORD FULLERTON.—I concur. The clear meaning of the submission was, that the arbiter should proceed on the contract, not that he himself should fix the price. He was to consider the sum the defender was entitled to for extra work. But he has allowed a sum greater than the amount of extra work claimed, added to the contract price. It is therefore plain that he must have gone out of the contract, which it was *ultra vires* in him to do.

LORD JEFFREY.—I concur. The contract referred to in the submission, was the contract “executed between the parties.” That is referred to as fixing the price. Any innovation on it was favourable to the builder by reducing the sum, but all the specifications were to be adhered to. The arbiter was in a mistake in supposing that he could fix the price irrespective of the contract. The consequence is, that his decree is truly *ultra petita*.

THE COURT adhered, and found additional expenses due.

W. A. G. and R. ELLIS, W.S.—C. FISHER, S.S.C.—Agents.

No. 22.

HENRY TELFER, Suspender.—*Mackenzie*.
BARROW and COOPER, Respondents.—*Pyper*.

Process—Reduction—Notary.—Held that an objection to a notarial protest on the ground that it bore to have been served at a certain house as the debtor dwelling-place, which, in point of fact, was not so, could not be pleaded *ope exceptionis*, but requires a reduction.

Nov. 30, 1844.

1st Division.
Ld. Robertson.

THE notarial protest of a promissory-note granted by Telfer to Barrow and Cooper, bore that it “was at the residence of Henry Telfer, farmer at Auchintibert, the granter thereof, duly presented and protested by me, notary public, subscribing, because, after due enquiry, I could not find the said Henry Telfer personally.” Diligence having been used, Telfer suspended on the ground that the promissory-note was not duly protested in respect of his not having been resident at Auchintibert at the time, but in the island of Islay, where he was the manager of a farm.

The respondents pleaded, that the protest could not be challenged except in a reduction.¹

The suspender contended, that the notarial protest could not be held conclusive upon the fact of where the debtor resided, in respect that

¹ E. of Winton, (Dict. 2713;) E. of Galloway v. Gordon, (Dict. 2714;) Ramsay v. Pettigrew, Dec. 13, 1828, (7 S. & D. 193;) Elder v. Smith, May 20, 1829, (7 S. & D. 656;) M'Queen v. Clyne's Trustees, May 20, 1834, (12 S. & D. 610.)

was a fact which the notary could only ascertain by enquiry. It was a different case from personal service, where the notary himself knew the fact which he reported. There was no necessity, therefore, to set aside the protest in a reduction.¹

No. 22.

Nov. 30, 1844.

Telfer v.
Barrow.

The Lord Ordinary pronounced the following interlocutor:—"Finds that the acceptance by Henry Telfer charged on, in which the said Henry Telfer is not designed, is dated at Mansfield the 25th of September 1842, and is payable twelve months after date, but the same bears no place of payment: Finds that the said acceptance appears from the instrument of protest to have been protested on the 28th of September 1843 at Auchintibert, which is described as the residence of the complainer, Henry Telfer, farmer at Auchintibert: Finds the said instrument of protest is not impugned on the ground that the acceptance was not truly protested at Auchintibert; but finds it alleged that, at the date of the protest, the complainer was not domiciled or resident at that place, but was domiciled in the Island of Islay: Finds that this allegation is denied on the part of the charger, who states that the complainer's domicile was at Auchintibert aforesaid; and finds it competent in this suspension, without a reduction of the instrument of protest, to enquire into the actual domicile of the complainer at the date of the said protest, and remits to the issue-clerks to prepare an issue for the trial of that question."

The respondents reclaimed.

LORD PRESIDENT.—I have looked at the decisions cited by the respondent, and I should hesitate to interfere with the principle established in them. The distinction attempted between service at the dwelling-house and personal service is a very narrow one. I think the protest must be reduced, but a reduction can be repeated.

LORD MACKENZIE.—I am of the same opinion; but I cannot say that I know the principle on which the law requires a reduction. It is said by some that the party is entitled to insist that the instrument shall be set aside *in toto*, which can only be done in a reduction. But I do not know as to that. Requiring a reduction is no great hardship, as it can be repeated.

LORD FULLERTON.—I am of the same opinion. This is a mere question of form, as the party, if allowed to repeat a reduction, gets the whole benefit of his objection. In all judicial proceedings these documents are held complete proof of what they contain, and therefore their accuracy must be challenged in a separate action. It is not easy to make a distinction between service personally and at the dwelling-house. The notary must be presumed to have done his duty.

LORD JEFFREY.—I am inclined to take a different opinion. I am aware that the distinction is a thin one, still there is a distinction. The seal of the officer is a proof of the verity of some things, such as of the fact of personal service. But

¹ 4 Ersk. 2, 2; Gordon v. Campbell, (Fount. 1702.)

No. 22. —
Dec. 3, 1844.
Pollock v.
King. that is a different case from the present, where all that the officer does is to certify that he left the copy at Auchintibert, which he was informed was the debtor's dwelling-house. Not finding the debtor personally, he left it there; but it is not part of his own certificate that that was the dwelling-house. I do not, therefore, see the necessity for a reduction.

THE COURT recalled the Lord Ordinary's interlocutor, but allowed a reduction to be repeated.

W. MEIKLE, S.S.C.—GRACIE and MACKENZIE, W.S.—Agents.

No. 23. JAMES POLLOCK and OTHERS, Appellants.—*Rutherford—Munro.*
MATHEW KING and WILLIAM KING'S TRUSTEE, Respondents.—
H. J. Robertson—T. Mackenzie.

Bankruptcy—Process—Judicial Examination.—1. Special circumstances in which the Court, on the application of certain of the creditors on a sequestrated estate, ordered another creditor to produce, and to be examined with regard to, a "pass-book" between him and the bankrupt, (which it was alleged would throw light upon the bankrupt's affairs,) although the pass-book also related to the creditor's own claim. 2. Question whether, under sections 68 and 69 of the existing Bankrupt Act, a creditor can competently be examined on matters relating to his own claim?

Dec. 3, 1844.
2d Division.
R. IN section 68 of the existing Bankrupt Act, it is enacted, "That the Sheriff may, at any time, on the application of the trustee, order an examination of the bankrupt's wife and family, clerks, servants, factors, law-agents, and others, who can give information relative to his estate, either by declaration or on oath, as to the Sheriff shall seem fit, and issue his warrant requiring such persons to appear; and if they refuse or neglect to appear, when duly summoned, the Sheriff may issue another warrant to apprehend the person so failing to appear." In section 69, it is enacted, "That the bankrupt and the said persons shall answer all lawful questions relating to the affairs of the bankrupt; and the Sheriff may order such persons to produce for inspection any books of accounts, papers, deeds, writings, or other documents in their custody relative to the bankrupt's affairs, and cause the same, or copies thereof, to be delivered to the trustee."

The estates of William King, victualler, Tradeston, Glasgow, having been sequestrated, Robert Robertson was appointed trustee. The greater part of the supplies of goods received by the bankrupt for carrying on his trade had been derived from his brother, Mathew King, who was also a victualler in Glasgow. Mathew King had claimed on the estate as a creditor, in virtue of a bill for £187, dated 24th January 1844, and an open account, extending from 13th January to 17th May of the same

year, amounting to £64 more. In reference to his dealings with his brother, the bankrupt at his statutory examination declared,—that there were no statements of accounts made out between his brother and him at the time the bill was granted—that there never had been any final settlement of accounts between him and his brother—that the last payment of cash he had made to his brother was £20, which he thought had been paid since January 1844—that he could not tell what sums he had paid his brother prior to that £20, as he just paid him different sums as he could spare them, and never kept any note of the sums so paid, nor entered them in any book, having all along trusted to his brother keeping a correct note of the monies paid him—that he could not tell how much goods he had got from his brother since January last—that he had never got any invoices of goods from his brother previous to the sequestration.

No. 23.
Dec. 3, 1844.
Pollock v.
King.

Mathew King, the brother, was subsequently (in consequence of a recommendation of a meeting of the creditors) examined upon oath before the Sheriff, in reference to the affairs of the bankrupt. The trustee on the sequestrated estate, and the law-agent in the sequestration, were present at this meeting, but the examination was conducted by the agent for James Pollock and several other creditors of the bankrupt. He deposed that he seldom had sent the bankrupt an account or invoice of the goods he bought—that he had no books which could show his dealings with the bankrupt, but that to the best of his belief he thought these might have averaged £15 or £16 a-week—"that the deponent has a pass-book in which he entered some of the goods sold to his brother."

The deponent having been then called upon by the agent for Pollock and the other creditors to produce this pass-book, it was objected by him and the agent in the sequestration, that the call was incompetent, in respect the deponent had lodged a claim on the estate, and the line of interrogation was obviously intended to cut down or investigate into that claim.

It was answered by the agent for Pollock and others, that the object of the examination was to ascertain the extent of the bona fide dealings between the bankrupt and his brother, the witness. Large quantities of goods had been received by the bankrupt from his brother; and, in return, cash payments to a considerable amount had been made by the bankrupt, some of them shortly before the sequestration; and further, there had been no state of accounts ever made up between them. The witness admitted that he had entered some of the goods sold to his brother in the pass-book, and the object of the examination and call for that document was to ascertain the dealings between them.

The Sheriff, in respect the requisition was made by one set of creditors calling upon another creditor to answer questions and produce books, which might affect or cut down his claim upon the estate; and in respect it did not appear that either common law or the bankrupt statute conferred power upon a creditor to interrogate another creditor

No. 23.

Dec. 3, 1844.
Pollock v.
King.

upon oath, or compel him, under the penalty of imprisonment, to produce books that might affect his claim, without raising an action, and getting a diligence therein, or making a reference to his oath—found the requisition incompetent, and sustained the objection.

Pollock and the others then presented a note of appeal, praying the Court to recal the above deliverance, to remit to the Sheriff to repel the objection to production of the pass-book, and to direct the trustee to take the necessary steps to have the examination of Mathew King continued.

They pleaded;—

The ground on which production of the pass-book was demanded was that it was the joint property of the bankrupt as well as of Mathew King, and was therefore one of the books connected with the sequestrated estate, which the creditors were entitled to see, for obtaining information with regard to the bankrupt's affairs. There were circumstances of suspicion in the case, which rendered investigation the more important. The greater part of the bankrupt's goods had been received from Mathew King, of which there were no invoices or accounts. The bankrupt had produced no books, but had relied on his brother keeping a correct statement of the sums he had paid him. The pass-book was therefore of importance, as showing what goods he had received, and whether he had given a true account of his cash. Under the 69th section of the existing Bankrupt Act, the appellants were entitled to have the book produced. Being one of the bankrupt's books, it was no ground for refusal that it might incidentally bear upon the claim of the creditor producing it. The recovery of a document was very different from the examination of a creditor by questions with regard to his claim. But even with regard to this, the existing Bankrupt Act, in § 68, gave more extensive powers than the former Act, (§ 32,) which limited the persons to be examined to those "connected with his (the bankrupt's) business."

Mathew King, and the trustee on the sequestrated estate, who had appeared as respondents in the appeal, answered;—

The ground of demand in the court below had been now abandoned. It had been decided, in reference to the former Bankrupt Act, that a creditor could not be examined with reference to his claim upon the estate.¹ In so far as the pass-book threw light upon the bankrupt's affairs, the appellant might be entitled to exhibition of it, but not in so far as it related to Mathew King's claim.

¹ *M'Leay v. M'Lehose*, Dec. 4, 1792, (*Bell's 8vo Cases*, pp. 75—80, an Supp. ;) *Bell's Com.* Vol. II. 394—399 ; *Nisbet v. M'Clelland*, Jan. 28, 1837 (15 S. & D. p. 439.)

No. 23.

Dec. 3, 1844.
Pollock v.
King.

LORD JUSTICE-CLERK.—I feel no doubt at all upon the point, after it has been explained to us. It is not necessary to go beyond the precise case before us, and I should be sorry to do so. A great change has certainly been made by the substitution of the words, those “who can give information relative to the bankrupt’s estate,” in the 68th section of the existing Act, from those used in the former statute—“connected with his business.” But I give no opinion how far these words may carry other cases. It is probable that there may be persons who may be able to give information with regard to the bankrupt’s affairs, whom it may not be competent to examine upon oath; they may have books in their possession which the trustee may have an interest to see. Now, what are the facts of this case? I may remark, that it is singular that, when a general meeting of the creditors recommended that Mathew King should be examined, the examination is not conducted by the trustee, although he is present, but by the agent for the creditors. Now, this bankrupt has carried on business for six years, and he has produced no books at all. There is a large claim on the estate made by his brother, who also produces a bill dated not long before the sequestration. The bankrupt says that no statement of accounts had ever taken place between his brother and him; that he had not kept any note of the sums he had paid to his brother, but that he had trusted to his brother to keep a correct note. Under these circumstances, it was certainly competent to call upon the brother to know if he had kept any such note. When the brother is examined as to whether he has any record of these transactions, he says that he has a “pass-book”—this is the description the witness himself gives of it—between the bankrupt and him. Now, assuming this book to be the joint property of the bankrupt and Mathew King, can it be maintained that the latter is not bound to produce it, because he says that he is a creditor on the estate? Put the case of a regular bank pass-book—could a bank refuse to produce because they were creditors on the estate? This seems an extravagant proposition. I am of opinion that the book must be given up. If it contains other entries unconnected with the bankrupt’s affairs, we might guard the interlocutor so as to protect them; but to guard it, so as to exclude from examination all the entries bearing on Mathew King’s claim, would just be to defeat the object for which it is sought. Without giving any opinion as to how far the examination of a creditor might be carried under the above sections of the Act, I think that here we have a party who can give information with regard to the bankrupt’s affairs, he having admitted that he has a pass-book between himself and the bankrupt, and that he must be examined with regard to it.

LORD MEDWYN.—I have some difficulty in concurring with your Lordship. I think that the question is not so much whether this pass-book is to be produced, or whether it is to be forced out of the witness’s hands, under this examination, and under the sanction of his oath. The question seems to me to depend upon the alteration which has been made in the new Bankrupt Act, from the enactment in the former statute. Is this alteration to be held to sanction the examination of a creditor in reference to his own claim, because he has books in his possession which may throw light upon the bankrupt’s affairs? It must be observed, that the appellants have shifted from the ground they took in the Sheriff Court. There, the whole examination referred to Mathew King’s claim. The pass-book is now pressed for, on the ground that it is a book connected with the sequestered estate. There may certainly be a sort of joint property in this book

No. 23.

Dec. 3, 1844.
Pollock v.
King.

between the bankrupt and Mathew King; but I should wish to be satisfied as to what the creditors' object is in seeking for production.

Upon the whole, I cannot hold that the new Act differs from the former one, in giving to a creditor power to examine another creditor with the view of investigating into his claim.

LORD MONCREIFF.—I concur with the Lord Justice-Clerk. If we were now called upon to decide that the trustee or the creditors are entitled generally, at this stage of the proceedings in a sequestration, to examine persons claiming as creditors on the bankrupt estate, relative to their own claims of debt, I should have very great hesitation in sanctioning such a demand. The statute has not directly given such authority; and considering the previous state of the law, as decided in the case of *M'Leay v. M'Lehose*, Dec. 4, 1792,¹ and laid down by Professor Bell, Commentaries, 2, 394, I think that if it had been intended by the late statute to vest such a power, it would have been so said in express words. Without such an express enactment, I must attach great importance to what was said by President Campbell in that case of *M'Leay*:—"It is not a formal explanation that is here demanded, but the creditor is called off the street, and all the procurators in the country let loose upon him; he makes a slip when examined in this way without vouchers, or time for recollection, and may be then indicted for perjury. I should be very sorry were this the law; and were it so, I should undoubtedly say that it ought to be altered. But our law does not, and I hope never will, allow of a previous and unnecessary investigation of the kind."

(Bell's first Report, pp. 78—80, must be inaccurate as to the state of the opinions at the first advising; for it is clear by the last that the President, Justice-Clerk, and Eskgrove, were all agreed on the point.)

But the present case is different. Even under the statutes, it was competent to require other persons than the bankrupt to produce books or papers which might throw light on the bankrupt's affairs, even though sworn to be inseparably connected with the affairs of the party examined himself.—Bell, 2, 399, and case of *Dundas v. Belch*, there quoted. There was a difficulty under the statute then in force, it being necessary first to show that the party under examination was connected with the bankrupt's business. But, while the Court held it not to be competent to use such an examination in order to prove a man to be a partner with the bankrupt, (against which doubt has since been thrown,) the difficulty was not thought insuperable as to the production, or at least exhibition, of books. But the late statute has removed even that difficulty, by changing the words, and providing that any one may be examined "who can give information relative to the bankrupt's affairs." Looking at this enactment, though I still am not prepared to hold that it is thereby made competent at this stage to interrogate a creditor and require an answer on oath, under the pains of perjury, relative to his own claim of debt; yet, as his being a creditor is no reason why he should not be examined, he can give information concerning the bankrupt's affairs, (Justice-Clerk's opinion in *M'Leay*,) and as it is impossible to deny that, if he is in possession of a book which though it may be said to relate to his own affairs and his own claim, clearly means to relate to the affairs of the bankrupt, he is a person who, by means of that book, can give

¹ Bell's 8vo Cases, Sup. p. 80.

information relative to those affairs. If, therefore, it appears by his own answers, under examination, that he is in possession of a pass-book, which, by its name and nature, is as much the property of the bankrupt as it is his, I do not see why such a document can be withheld, merely because it may be stated to relate only to the dealings between the bankrupt and himself. It is still the record of a part of the bankrupt's affairs, which he, before his bankruptcy, had a right to see, and of which therefore his trustee or his creditors, after it, are equally entitled to inspection. The bankrupt has sworn that he all along "trusted to his brother keeping a correct note of the money paid to him." If, indeed, the respondent had said that he had no note or account other than an account entered in his own private books in an ordinary way, I should think it very doubtful whether he could be required, at this stage of the proceedings, and in this summary form, to produce such books, though I am not clear that he might not; and though, in the end, before his claim could be sustained, he must have been bound to produce or exhibit them. But here he says himself that the book which contains the entries of those dealings is a pass-book, which, by its nature, must be held to have been kept as much for the bankrupt as for himself. It is, in reality, one of the books of the bankrupt's trade, though kept by the respondent; and therefore he is bound to make it forthcoming to the creditor. In reality, in so far as it may contain acknowledgments of money paid to the respondent, it belongs properly to the bankrupt; and, though the respondent may have possession of it, in respect of the counterpart in the goods delivered, it is still a mutual record between them, which the one is not entitled to withhold from the sight of the other.

Requiring this book to be produced is evidently a very different thing from allowing, in this summary way, an examination of a creditor on oath, concerning the merits of his own claim in the sequestration. And I beg to be understood as giving no opinion that that is competent in our law as it stands.

LORD COCKBURN.—It is plain to me that questions may arise as to these classes of the statute, and I do not know how soon; but no such questions are before us, and I give no opinion by anticipation. The demand made here is for a pass-book, which is not the exclusive property of the creditor at all, but is as much the bankrupt's property as his. He is as much bound to produce this as any other book of the bankrupt's; nor is he entitled to keep it up, because it may happen to throw some light upon his own claim. I consider that we are here clear of all difficulties that may arise hereafter in a totally different question.

THEIR LORDSHIPS accordingly pronounced this interlocutor:—"In the special circumstances of the case, and in respect that the book called for is described by the respondent, Mathew King, in his examination, as a pass-book between him and the bankrupt, Sustain the appeal—alter the judgment of the Sheriff—ordain the respondent to produce the book—and remit to the Sheriff to proceed accordingly in the examination of the respondent: Find the appellants entitled to the expenses incurred by them in this Court."

DAVIDSONS and SYME, W.S.—CHARLES FISHER, S.S.C.—Agents.

No. 24.

ROBERT GLASGOW and OTHERS, Petitioners.—*Cowan.*Dec. 5, 1844.
1ST DIVISION.
W.

Glasgow.

Strachan v.
Monro.

Trust—Nobile Officium.—THE whole trustees named in a disposition for behoof of married parties and their children, which contained a power of sale, having died, the Court, on the application, or with consent, of all the parties beneficially interested, appointed trustees under the disposition, “with the whole powers thereby conferred on the original trustee now deceased, they always finding caution before extract, in terms of the A. S. anent factors.”¹

J. C. REDDIE, W.S.—Agent.

No. 25.

JOHN STRACHAN, Jun., Pursuer.—*Maitland—Forman.*
GEORGE MONRO, Defender.—*Monro—E. S. Gordon.*

Reparation—Process—Summons.—In an action of damages for “illegal, unwarrantable, oppressive, and injurious” conduct, in causing the pursuer to be apprehended and tried in a police-court on a false charge of creating a disturbance, an objection to the relevancy of the summons, that it did not allege malice and want of probable cause, was repelled.

Dec. 5, 1844.

1ST DIVISION.
Lord Murray.
N.

STRACHAN raised an action of damages against Monro, in which it was alleged that Monro had caused him to be seized in an insurance office by a police-officer, and taken through the public streets at mid-day, and lodged in the police-office, on the false charge of his having created a disturbance; that the pursuer had been tried in the police-office on the charge, but had been acquitted. The summons further stated, “that the whole of the foresaid conduct of the said George Monro was most illegal, unwarrantable, and oppressive, and was injurious, if not ruinous, to the character, credit, and reputation of the said pursuer, hurtful to his feelings and degrading to him in the eyes of society.”

It was pleaded as a preliminary defence, that the summons was irrelevant, inasmuch as it did not set forth that the alleged proceedings complained of were taken by the defender maliciously, and without probable cause.

The Lord Ordinary repelled the preliminary defence.*

¹ M’Aslan, July 17, 1841, (ante, Vol. III. p. 1263.)

* “NOTE.—It does not appear to the Lord Ordinary that the additional preliminary defence that ‘the summons is irrelevant, inasmuch as it does not set forth

The defender reclaimed.

No. 25.

THE COURT, holding that there was no necessity for technical words, and that the averments sufficiently supported the relevancy of the summons, adhered, with additional expenses.

Dec. 5. 1844.
M'Lelland v.
Redfearn.

M. LOTNAN, S.S.C.—GEORGE MONRO, S.S.C.—Agents.

GEORGE M'LELLAND, W.S. and ALEXANDER'S TRUSTEES, Pursuers.—

No. 26.

Rutherford—Cowan.

Mrs JULIA STEELE or REDFEARN, Defender.—*Ld.-Adv. M'Neill—Whigham.*

Interest—Agent and Client—Expenses.—Circumstances in which simple interest at 4 per cent was allowed on an agent's business account, from the last article in each account till citation in the action, and thereafter 5 per cent till payment.

ALEXANDER PEARSON, W.S., acted for Mrs Julia Steele or Redfearn and another party in a joint purchase of a landed estate. But by mistake certain of his business accounts in the joint purchase were rendered to and paid by that other party exclusively. When the mistake was discovered, which was at the distance of some years, the present action of relief was raised against Mrs Redfearn, and the Lord Ordinary decided against her.

Dec. 6, 1844.
1st DIVISION.
Lord Cuninghame.

that the alleged proceedings complained of were taken by the defender maliciously, and without probable cause," is well founded. The summons states that the conduct of the defender was most 'illegal, unwarrantable, and oppressive, and was injurious, if not ruinous, to the character, credit, and reputation of the pursuer, and to his feelings, and degrading to him in the eyes of society.' The case of Attkle against Taylor was different. That was a criminal prosecution, and the law relative to such cases is admirably stated by Lord Eldon. Malice and want of probable cause referred to the legal proceedings in that case. Here a party is said to have put another under custody of a constable. If he did so legally, and upon sufficient grounds, that meets the charge; but if he did so, as the summons charges, illegally and unwarrantably, there is a case for trial, though no malice or want of probable cause is charged against him. If this was merely a prosecution which every person has a right to raise, then it might be necessary for the pursuer to charge in his summons malice and want of probable cause. The defender suggests, that in all events he is entitled to have the same issue as the Court gave in the case of Swayne, 27th June 1835, (Shaw, 13, 1003,) viz. 'Whether the defender acted wrongfully, injuriously, and oppressively, to the loss, injury, and damage of the pursuer.'

"The Lord Ordinary reports the issue as prepared for the consideration of the Court."

No. 26.

Dec. 7, 1844.
 Seaforth
 Trustees v.
 Macaulay.

She reclaimed, and the only objection ultimately insisted in was that to the rate of interest. Mr Pearson had charged interest at 5 per cent, and accumulated it annually, without any periodical rendering of accounts, and repayment, with similar interest, was claimed from the defender.

LORD MACKENZIE.—No writer's account, not rendered, can bear one farthing of compound interest.

LORD JEFFREY.—I think that interest, but not compound interest, should be allowed.

LORD PRESIDENT.—It would be a serious matter, after the lapse of years, to allow the charge of both simple and compound interest. I cannot accede to that. It is sufficient that the pursuers get simple interest at the common rate.

LORD MACKENZIE.—Say four per cent.

THE COURT found the defender liable in simple interest on the account libelled, or from the date of the last article in each of those accounts respectively, at the rate of four per cent *per annum*, to the date of citation in the action; and at the rate of five per cent thereafter till paid.

HUNTER BLAIR and COWAN, W.S.—A. SMITH, W.S.—Agents.

No. 27.

SEAFORTH TRUSTEES, Petitioners.—*Ld.-Adv. M'Neill—Sandford.*
 DONALD MACAULAY, Respondent.—*Rutherford—E. S. Gordon.*

Inhibition—Lease—Reparation—Consignation.—Where a party had raised an action for implement of an agreement to grant him a lease of certain farms, and alternatively for damages, and to secure his claim for implement had used inhibition on the dependence;—Held that the defender was not entitled to have the inhibition recalled, merely on consignation of the sum claimed as damages.

Dec. 7, 1844.

2d DIVISION.
 R.

IN 1838, an agreement was concluded between the trustees of Mr and Mrs Stewart Mackenzie of Seaforth, and Dr Donald Macaulay, by which the trustees agreed to let to Macaulay, for a period of nineteen years, certain farms in the island of Lewis on advantageous terms, Macaulay on the other hand, discharging the trustees of certain claims of damages which he had against Mr and Mrs Mackenzie. Macaulay, accordingly, obtained possession of a part of the farms, which it had been agreed should be let to him; but the trustees having failed to put him in possession of the farms of Valtos, Kneep, and Reef, being the larger part of the lands included in the agreement, he raised against them, in November 1839, an action for implement and damages.

The conclusions of the summons were, 1. For £500, as the damages.

No. 27.

Dec. 7, 1844.
Seaforth
Trustees v.
Macaulay.

the pursuer had sustained at the date of the summons, by the failure of the trustees to implement the missives of agreement. 2. For implement of the missives on the part of the trustees, in regard to the set of the lands and farms, in so far as they had not been fulfilled by them; and that they should be decerned to give him possession of part of the lands of Balnicol, which had been withheld from him, and of the lands of Valtos, Kneep, and Reef, that he might occupy and possess the same. 3. Alternatively for £200 yearly, as the loss the pursuer would sustain, in the event of the trustees failing to fulfil the agreement as to the set of the farms. The summons further contained conclusions for decree, ordaining the trustees to erect a dwelling-house and offices on the farm, with a claim for deduction from the rent till this was done; and there was a further conclusion for £500 of damages, on account of an alleged wrongous sequestration. Upon this summons, Dr Macaulay raised letters of inhibition against the trustees.

While this action was in dependence, the Seaforth trustees had entered into a minute of sale of the whole island of Lewis to Mr Matheson of Achany, at the price of £190,000; but in consequence of the inhibition used by Dr Macaulay, the purchaser refused to receive the disposition, or to pay a large portion of the price.

The trustees then presented a petition, in which they offered to consign, to await the issue of the action, the sum of £3500, as being the full sum concluded for by Dr Macaulay in his summons; and praying the Court, upon their doing so, to recal the inhibition.

To this Dr Macaulay answered;—That his summons concluded against the trustees for implement of their agreement, by giving him a lease of the farms in question; that it was implement that he desired; and to secure this he was entitled to resist the recal of the inhibition. The consignation of the damages, which he claimed alternatively, was no ground for its recal.

Lord Justice-Clerk.—We cannot grant a recal of this inhibition. Dr Macaulay's action sets forth, that an agreement was entered into by the trustees to put him in possession of the right of lease, and that this they had failed to do. There is a distinct conclusion for implement of this agreement, and that the pursuer should be put in possession of the lands. On this action inhibition has been well, for the purpose of preventing a lease being granted to any other party. I cannot see how Dr Macaulay is to be prevented from claiming implement. It is new to me to say that a pursuer claiming implement, and alternatively damages, is not to be entitled to say—I prefer implement. It is true, one has a desire that a great transaction such as this should not be unnecessarily stopped, but still Dr Macaulay has a legal right. His right of tack is as good in law as the right of the proprietor. He is perfectly entitled to say, I do not choose to take the damages—I prefer to insist for implement. I think the inhibition cannot be recalled.

No. 27. **LORD MEDWYN.**—That is quite my opinion too. I cannot understand that a party, when he asks for implement, and also insists in a claim for damages, is to have nothing but the damages given to him.

Dec. 7, 1844.
Grant.

LORD MONCREIFF.—I am satisfied that at present it is impossible to recal this inhibition, because that would be just determining the question whether the pursuer is entitled to specific implement or not.

LORD COCKBURN concurred; and

THEIR LORDSHIPS accordingly refused the petition.

WILLIAM MACKENZIE, W.S.—ROY and MARTIN, W.S.—Agents.

No. 28.

JOSEPH GRANT, Petitioner.—R. Robertson.

Dec. 7, 1844.

2d Division.

Curator bonis—Superior and Vassal—Cautioner—Cash-Credit—Process.
—Mr James Lawson, and his brother Charles Lawson (of the firm of Peter Lawson and Son,) had granted an heritable bond over subjects held by them, as pro indiviso proprietors, to certain parties, in relief of a cautionary obligation undertaken by them to the British Linen Company's Bank for a cash-credit to Peter Lawson and Son, on which bond the cautioners were infest. The bond for the cash-credit having been retired by Peter Lawson and Son, the principal obligants, it became necessary that the security in relief should be discharged by the cautioners. For effecting this, it was requisite that the heir of one of the cautioners who was dead should be entered by Messrs James and Charles Lawson, the superior of the subjects over which the security was granted. The present application was made by Joseph Grant, W.S., who had been appointed curator bonis to James Lawson, and inter alia craved power from the Court, in conjunction with Charles Lawson, to enter the heir of the cautioner.

THEIR LORDSHIPS having ordered intimation to Charles Lawson and to the cautioners, and the cautioners having given their consent, the prayer of the petition was granted.

JOSEPH GRANT, W.S.—Agent.

HER MAJESTY'S ADVOCATE, Pursuer.—*Ld.-Adv. McNeill—Penney—Baillie.*

No. 29.

WILLIAM GRAHAM, and TRUSTEES OF GEORGE LEWIS, Defenders.—*Sol.-Gen. Anderson—Rutherford—Dundas.*

Dec. 10, 1844.
Her Majesty's
Advocate v.
Graham.

Prescription—Stat. 1617, c. 12—Church—Patronage—Stat. of Annexation 1587—Crown.—The right to a patronage, which had been possessed by a party and his authors upon personal titles for more than the prescriptive period, having been challenged by the Crown on the grounds, 1. That the patronage had formed part of the annexed property of the Crown, and had never been separated from it by any act of dissolution or conveyance; and, 2. That the patronage having been feudalized in the person of the Crown, (its right being equivalent to one completed by seisin,) no prescriptive possession could follow on an adverse personal title;—Held, that prescription having run in favour of the possessors of the patronage, upon a title *ex facie* sufficient, these grounds of challenge, and all enquiry into his older titles and the origin of his rights, was excluded; and that the positive prescription operates against the annexed property of the Crown;—Observed, that a patronage does not necessarily become feudalized by being vested in the Crown; and that the rule, that when a patronage has once been feudalized, its subsequent transmissions ought to be in feudal form, has only reference to a competition between parties deriving right from the same author, in which, as in the case of other heritable rights, a right completed by seisin is preferable to a personal title.

THE Abbacy of Eccles, in Berwickshire, including under it the benefices of Eccles and Bothkennar, fell to the Crown at the Reformation, in the same way as other religious establishments of the same nature, and it was included in the general Act of Annexation of 1587.

Dec. 10, 1844.
2D DIVISION.
Ld. Cockburn.

Of date, 17th December 1624, and 6th February 1625, an assignation was executed by Sir George Home of Eccles, in favour of James, Earl of Home, in reference to the advocation, donation, and right of patronage of the parish and kirk of Eccles. This deed narrated in gremio an Act of Parliament said to have been passed in the year 1609, by which all lands, baronies, &c., of the temporality of the abbacy of Eccles, had been dissolved from the Act of Annexation, together with the parish kirks of Eccles and Bothkennar, belonging to the abbacy of Eccles, as part of the patrimony thereof, to the effect that his Majesty might grant and dispose the lands pertaining to the temporality of the abbacy, and the patronages of the kirks of Eccles and Bothkennar, to the said Sir George Home; and it assigned the Earl of Home in and to the Act of Parliament, in so far as concerned the patronage of the parish of Eccles.*

* This Act of Parliament, as it is narrated in the assignation, is in the following terms:—"Forseameikle as be speciall Act of Parliament holden in the month of June the year of God 1609, Our Sovereane Lord and three Estates of Parliament, for the causes specified in the said Act, hes dissolvit all and sundry Lands, Baronies, castles, towers, fortalices, manor places, milns, woods, fishings, teunents,

No. 29. It did not appear, however, that the Crown had ever exercised the power conferred upon it by this Act, by executing, in favour of Sir George Home, any charter or other grant of the abbacy and the two kirks, conveying them to him; and no such deed was referred to in the assignation. No copy of the Act of Parliament, referred to in the assignation, was to be found in any record, but its title was mentioned in a list of the Acts of the reign of James VI.

D.c. 10, 1844.
Her Majesty's
Advocate v.
Graham.

From the year 1609 down to 1690, when patronage was abolished, the patronage of the parish of Bothkennar was (it was alleged) exercised by the Crown, by repeated acts of presentation during that period.

Of date 3d March 1732, William Earl of Home, on the narrative of his having the undoubted right of the temporality of the abbacy of Eccles,

tennandries, service of free Tennents, annexis, connexis, parts, pendicles, pertinents, fewmaills, kains, customs, casualties, profitis, and duties quhatsoever of the temporality of the Abbacy or Priory of Eccles fra the Act of annexation made in his highness Parliament holden at Edinr the 29 day of July the yeir of God 1587, annexand the temporality of all Benefices within this realm to his Maty's Crown, together with the Parish Kirk of Eccles, alias called Ladykirk, and Chaplainries called St. Johns Chaple, St. Cuthberts Chaple, and St. Magdalenes Chaple, quhilk are parts and pendicles of the said Paroch kirk of Eccles, lyand within the Shireffdome of Berwick; And als the Paroch kirk of Bothkenner, lyand within the Shireffdome of Stirling, pertaining to the said Pryory or Abbacy of Eccles, as an part of the Patrimony yrof; Together with the personage and viccarage of the saids Kirks and Kirklands yrof, Barn and Teind Barnyardis of the samen, and All and Sundry Teind-sheaves and other Teinds, as well great as small, fruits, rents, emoluments, and duties pertaining and belonging yro fra the said Abbacy & Pryory of Eccles and Benefice yrof whereunto the samen pertainit as a part of the spirituality yrof to the effect his Maty might give, grant, and dispoone to me the said George Home of Eccles, my heirs und Assignees q'tsoever heritably, All and Sundry the said Lands, Baronyis, Castles, towers, fortalices, manorplaces, houses, biggings, yards, orchards, milns, and others above specifiet, pertaining to the temporality of the said Abbacy or Pryory of Eccles. Together with the advocacion, donation, and right of Patronage of the said Kirk of Eccles, alias called Ladykirk, and the Chaplainries above specifiet, qlk are parts and pendicles of the said Paroch Kirk of Bothkenner, and als of the said Paroch Kirk of Bothkenner, pertaining to the said Abbacy or Priory of Eccles. Together with the Parsonage and vicarage of the said Kirks and Kirklands yrof, and all and sundry the Teynd-shaves and other Teinds, great and small fruits, rents, emoluments, and duties pertaining yro, and all ryt, title, interest, claim of right qlk his Maty, his predecessors or successors had, has, or any ways may claim or have yro; and als to the effect that his Maty may erect the said Paroch Kirk of Eccles, alias called the Ladykirk, and the said Kirk of Bothkenner, personages and vicarages yrof, in severall and distinct Rectories, or personages and vicarages, and may make and constitute me and my foresaids heretabill Patrons of the same Paroch Kirks, personages, and vicarages yrof, and dispoone to us the advocacion, donation, and right of Patronage yrof. And sicklike to the effect that his Majesty may erect, unite, creat, and incorporat all and sundry the forsaid Lands, Baronyis, and others above written, pertaining to the temporality of the said Abbacy; Together with the advocacion, donation, and right of Patronage of the Paroch Kirks foresaids, personages and vicarages of the samen, with all and sundry Teind-shaves and other Teinds great and small pertaining yairto, In ane hail and free Barony, to be called the Barony of Eccles, to be holden of our Sovereine Lord and his hienes successors in free blench."

and of the parish kirks of Eccles and Bothkennar, for certain important services done and conferred to him by Mr James Graham of Airth, gave, granted, and disponed to him, his heirs, &c., the advocation, donation, and right of patronage, of the parish kirk of Bothkennar. The clause of assignation to writs and evidents assigned to Mr Graham the Act of Parliament of 1609, above-mentioned, and the assignation by Sir George Home of 1624-5. The deed contained procuratory of resignation in common form. The warrandice was from fact and deed only.

No. 29.
Dec. 10, 1844.
Her Majesty's
Advocate v.
Graham.

After this date, the patronage of Bothkennar was transmitted in the family of Graham of Airth, upon personal titles, to the late Mr Thomas Graham Stirling, who succeeded to this property in 1816. In the progress of titles transmitting the patronage, there was first a disposition and settlement by the above-mentioned James Graham in favour of William Graham, his second son, of date 1st February 1746. This deed was in form of a procuratory of resignation. The next deed was a contract of marriage between William Graham of Airth and Mrs Ann Stirling, whereby, in implement of an agreement entered into previous to marriage, he bound himself to infest his spouse in a certain annuity out of certain lands, and, inter alia, the right of patronage of Bothkennar. The deed also disponed the patronage in favour of the persons therein named, with procuratory of resignation and precept of sasine. The next deed was a disposition, of date 14th September 1765, by Mr Graham, conveying the patronage to Captain George Middleton of Lethem Dolls, with obligation to infest a me vel de me, procuratory of resignation and precept of sasine. The patronage was subsequently reconveyed by Captain Middleton. In January 1783, Mr Graham executed another disposition of the patronage in favour of Mr David Erskine, C.S., in liferent.

The first vacancy that occurred in the kirk of Bothkennar subsequent to 1732, the date of the Earl of Home's disposition of the patronage to Mr Graham of Airth, was in 1743, when a Mr Penman was settled as minister of the parish by the presbytery, upon a call by the heritors, elders, and heads of families. Upon this occasion, Mr James Graham did not seem to have asserted any right to the patronage, but appeared and voted as an heritor for an unsuccessful candidate.

The next vacancy occurred in 1765, when Captain Middleton of Lethem Dolls, who was Mr William Graham's disponee in the patronage, presented in favour of Mr William Nimmo. It was alleged that this presentation was issued by Captain Middleton for behoof of Mr Graham, who was then disqualified from presenting, in consequence of not having taken the oaths to Government. On two subsequent occasions also, the Grahams presented to the benefice, first in 1783, when Mr David Erskine, to whom William Graham had disponed the patronage in liferent, presented in favour of Mr David Dickson; and again in 1796, when Mr James Graham's trustees granted a presentation to Mr John Caw, the last incumbent in the parish. At the time of the presentation by Mr

No. 29. *Erskine, William Graham*, it was alleged, still laboured under the disqualification of not having taken the necessary oaths to *Her Majesty's* ment.
 Dec. 10, 1844.
Advocate v. Graham.

It further appeared that the right of the *Grahams* to the patronage in question had been recognised in the proceedings in two processes of locality in 1774 and 1810.

In the year 1830, the late *Thomas Graham Stirling* exposed the patronage of *Bothkennar* to sale, when it was bought by the late *Mr George Lewis*, at the price of £2420. Some questions having arisen after the sale, as to the form of the title to be granted to the purchaser, a reference was entered into to the late *Mr Thomas Cranstoun, W.S.*, who gave it as his award, that the seller, before executing a conveyance, was bound to complete a feudal title in his own person, by resignation, upon the procuratory in *Lord Home's* disposition of 1732. *Mr Graham Stirling* having died pending this submission, *Mr William Graham*, his eldest son, completed a title in the manner prescribed, by obtaining a Crown charter of resignation, upon which he was infeft in February 1837. He then executed a disposition in favour of *Mr Lewis*, which was dated 26th April 1838.

In January 1842, an action was brought at the instance of the Crown against *Mr Lewis*, (in which his trustees were, on his death, subsequently sisted as defenders,) concluding for reduction of the assignation by *Sir George Home* of 1624-5—the disposition by the *Earl of Home* of 1733—the charter of resignation and infeftment of *William Graham* of 1837, and of the disposition to *Mr Lewis*; and also concluding for declaration that the patronage of *Bothkennar* was vested in, and belonged to the Crown.

Mr William Graham, who was liable in warrandice to *Mr Lewis*, sisted himself as a defender in the action.

The case was argued in the Outer-House on cases. Additional cases were ordered in the Inner-House—and there was also argument at the bar.

It was pleaded for the Crown ;—

The patronage of *Bothkennar* had been vested in the Crown, as a portion of the Abbey of *Eccles*, and was held by the Crown as a part of the annexed property, and as a proper feudal subject, which could only pass from it by grant, in the form of charter and seisin.¹ There had been no such conveyance made by the Crown in favour of any of the defenders' authors—the assignation in favour of *James Earl of Home* was merely of the alleged Act of Parliament of 1609, and that only in so far

¹ *Stair*, 2, 8, 85; *Earl of Haddington v. Officers of State*, June 30, 1778, (*M.* 9940;) *Dunlop's Par. Law*, 2d Edit. p. 196; *Craig*, *Lib. I. Dieg.* 16; *Ersk.* 2, 3, 44; *Great-Seal Record-Book*, 31, No. 537, May 11, 1567; *Forbes on Tithes*, p. 68; *Ersk. (Ivory)*, p. 102, Note 113; *Hope's Minor Practicks*, 2, 92, §§ 8, 9.

as concerned the patronage of the parish of Eccles; the disposition of 1732 to James Graham, by William Earl of Home, and the other titles of the defenders, therefore flowed a non habente potestatem. The proper patrimony and annexed property of the Crown was, by repeated Acts of Parliament, declared to be unalienable;¹ and all dispositions and alienations made after the annexation, and without lawful dissolution in Parliament, and compliance with the statutory requisites, were declared to be null, either by way of action or exception.² Such being the case, the defects in the defenders' titles to the patronage were not capable of being validated by prescription. The Act 1617, establishing the positive prescription, although it declared that prescription should run against the Crown, was not of universal application,³ and could not be held to overrule the effect of the statutes of annexation, which it did not either repeal or alter.⁴ By force of these statutes, the title of the defenders' author was null, by way of action or exception, and therefore could never form a valid warrant for prescriptive possession.⁵

No. 29.

Dec. 10, 1844.
H. R. Majesty's
Advocate v.
Graham.

The title of the Crown was further preferable to that of the defenders. The patronage in question was a feudalized subject; it had been dealt with in the defenders' titles as such, and the right of the Crown to it was of a feudal character, and equivalent to one completed by seisin. In these circumstances no mere personal right could form a valid adverse title to the ipso jure seisin of the Crown, and no title not completed by infestment could be the foundation of prescriptive possession—the Crown being vested as under an infestment, could only be divested in the ordinary form applicable to feudal subjects.⁶

It was further argued for the Crown, that the alleged acts of possession by the defenders' authors were insufficient, both in their character and continuance, to sustain the plea of prescriptive possession; and more especially, that the acts of presentation of 1765 and 1783, were not valid

¹ Craig, B. I. Dieg. 15, §§ 15, 5, 1, 4; Vide Thomson's Acts of Parliament, Vol. II., Act 1455, p. 42; Act 1503, *ibid.* p. 253; Act 1540, *ibid.* p. 360; Act 1587, Vol. III. p. 431; Act 1594, Vol. IV. p. 64, No. 13, and No. 14, p. 65; Act 1597, Vol. IV. p. 131, Nos. 4, 5, 6; Act 1639, Vol. V. p. 27; and Acts 1633, caps. 11, 14; *ibid.* p. 32; Craig, I. 16, 4, and II. 3, 35.

² Stat. 1597, c. 7; Thomson's Acts, Vol. IV. p. 131.

³ Stair, 2, 12, 10; Ersk. 3, 7, 14.

⁴ Stewart's Ans. to Dirliton's Doubts, pp. 225–6; Earl of Galloway v. Feuars of Whithorn, (Elchies, Vol. II. p. 338, No. 18, voce Prescription, Jan. 17, 1739;) Lord Advocate v. Earl of Morton, Feb. 25, 1669, (M. 7875;) Magistrates of Pabla, Nov. 25, 1800, (Hume, p. 457.)

⁵ Bankton, 2, 12, 11; Stair, 2, 12, 7; Craig, Dieg. 1, 16, § 1, and 2, 1, § 8.

⁶ Urquhart v. Officers of State, June 27, 1752, (M. 9915;) 1 Ersk. 3, 15, and 2, 19; Earl of Fife v. Earl of Seafield, Jan. 21, 1831; Shaw's Teind Cases, 1834; Dunlop's Par. Law, 2d ed. p. 193; Bell's Prin. 9836; Ersk. 2, 3, 44; Urquhart v. Officers of State, (M. 9913;) Dick v. Carmichael, July 29, 1752; Earl of Home v. Officers of State, (M. 10777.)

No. 29.

Dec. 10, 1844.
Her Majesty's
Advocate v.
Graham.

acts of possession, in respect they were truly made by or for behoof of a party who was legally disqualified from presenting.

The defender, Mr Graham, pleaded;—The defenders and their predecessors had a good and habile title to the patronage of Bothkennar, standing in their persons for upwards of a century together; upon which uninterrupted possession of the patronage had followed for greatly more than the prescriptive period, without any interference on the part of the Crown. The disposition by the Earl of Home to James Graham in 1732, contained a clear grant of the patronage, and was in every respect an effectual foundation for a prescriptive right. It was true that the titles by which the right thus acquired by James Graham was transmitted to his successors were personal titles merely; but sasine was not requisite to found prescription to a right of patronage, a personal title being sufficient, even in a question with the Crown.¹ The objection that a patronage had been at one period feudalized in the person of the Crown, and consequently that a personal title could not compete with it, was one which was struck at by the law of prescription, equally with any other defect of title; the presumption of law, after the period of prescriptive possession had run upon the personal title, being, that the patronage had never been feudalized.² But even were it the case, that a patronage once feudalized in the person of a subject, and held under a feudal title, could not be carried off by prescription on an adverse personal title, still it did not follow that the same effect was to be given to the constructive seisin ascribed to the Crown; the reason of the rule was, that when a patronage had been feudalized, seisin became necessary for the transmission of the right; but this had no application in the case of the Crown, which, it was indisputable, could be divested, and its donee invested in a patronage by disposition alone without seisin.³

The foundation of the defender's right was the disposition 1732, which was a formal and regular deed, and free from any intrinsic nullity. His defence was prescription; and this plea was a sufficient answer to all objections to his title, whether they regarded the validity of the right as in the Earl of Home or his authors, or the subject-matter of the grant as being the annexed property of the Crown,⁴ even on the supposition that

¹ 3 Ersk. 7, 3, and i. 5, 15; *Urquhart v. Officers of State*, Jan. 27, 1752, (M. 9915;) *Stair*, 2, 12, 23; 2 *Bankton*, 8, 91; *Dunlop's Par. Cases*, ed. 1841, p. 205.

² *Farquarson v. E. of Aboyne*, Dec. 2, 1679, (M. 10879.)

³ *Stewart v. Officers of State; Patronage of Torryburn*, 1810, unreported; *Gordon v. Kennedy*, July 11, 1758, (M. 10825;) *Solicitor of Teinds v. Budge*, May 7, 1797, (Hume, p. 455.)

⁴ *Duke of Buccleuch v. Cuninghame*, Nov. 30, 1826, (F. C. and S. 80;) *Forbes v. Livingstone*, Nov. 29, 1827; *Scott v. Bruce Stewart*, July 1, 1779, (M. 13519;) *Munro v. Munro*, May 19, 1812, (F. C.)

these objections were well founded in point of fact. The provisions of the statute 1617 were most comprehensive in their terms, and while they expressly subjected the Crown to its operation, made no exception of the annexed property.

No. 29.
Dec. 10, 1844.
Her Majesty's
Advocate v.
Graham.

Should it be thought that the disposition of 1732 stood exposed to any of the objections of the Crown, in consequence of the recital made in that deed of the manner in which the patronage had been acquired by the Earl of Home, the defender was entitled to found his title upon the disposition and settlement by James Graham in 1746 and subsequent titles, on which sufficient prescriptive possession had run, and which did not make any allusion to the patronage having at one period been in the hands of the Crown.

It was further contended, that the acts of possession by the defender's authors were valid and effectual.¹

The Lord Ordinary reported the case.

The case was advised of this date.

Lord Justice-Clerk.—I have arrived at a clear opinion that judgment must be given in favour of the defender.

The last argument addressed to us was of great importance. Because, in the outset of the well-considered speech of the Lord Advocate, he distinctly stated that he did not dispute,

1. That the positive prescription in heritable rights takes effect against the Crown, and that admission was made without qualification.

2. That the positive prescription can be pleaded to secure a right of patronage, although not mentioned in the statute; and,

3. That prescription is available to protect a party in possession of a right of patronage, although he or his authors may not have been at any time infeft in the right, and although the title is wholly a personal right.

He contended—most correctly—that there must, however, be at least a title sufficient for the possession, and maintained that the title founded on in this case was not a sufficient title for prescriptive possession.

But, in the close of his argument, it appeared that the first proposition was not really admitted to the extent which the terms implied, and that he did in reality (so I understood and noted the argument) contend that the Act 1617 did not operate against the Crown to the extent to which it operates against a subject; that it was competent for the Crown to look to the *origin* of the title; that the Act 1617 did not overrule the effect of the acts of annexation, and in particular of the Act 1597, declaring alienations made to the contrary thereof to be null of the law; and that if no act of dissolution could be produced in support of the subject's title to any of the annexed property of the Crown, then this was a statutory

¹ Additional authorities referred to by defender:—Bankton, 2, 3, 18; Dunlop's *Pr. Cases*, p. 21, § 45, ed. 1841; 3 Ersk. 7, 8; *Glengarry v. Duke of Gordon*, Feb. 26, 1828; Bell's *Princ.* § 2006, last ed.; *Erskine v. Presbytery of Paisley*, Aug. 10, 1770, (second branch of case, M. 9970;) *Presbytery of Inverness v. Fraser*, June 10, 1823, (S. & D.;) 2 Stair, 12, §§ 6, 11, 19; 3 Ersk. 7, § 15.

No. 29. nullity pleadable against the operation of the positive prescription, as much as a nullity in essentialibus of the deeds constituting the alleged title. Hence the operation of the prescription pleaded under the statute 1617 is, in this case, *substantially denied*. And if this view of the statute is well founded, then of course the same ground of challenge, as a reply to the defence of prescription, must obtain in regard equally to all titles to lands constituted even by charter from the Crown and possession on infeftments for centuries, if no act of dissolution has enabled the Crown validly to make a grant of the lands in question. Practically, therefore, the plea maintained does resolve into this, that unless an act of dissolution has fortified and legalized the grant, the titles to all property which may appear to be included within the acts of annexation are null, or voidable on a challenge by the Crown. This proposition has the wider effect, because it will be remembered that the Act of Annexation 1587 only applied to Church property, and that various other Acts, particularly 1455, c. 41, made a general annexation to the Crown of great tracts of lands and extensive old lordships, under a similar statutory declaration that all alienations of the same "shall be of none avail." The plea on the part of the Lord Advocate is therefore substantially and in effect this—viz. that when prescription is pleaded against the Crown, there are distinctions and exceptions to be attended to, and enquiries into the origin of the title founded on, and objections thereto, such as defect of right, competent by the Crown in reply to the defence of prescription, which could not be competent to a subject instituting a similar challenge. The import and operation of the statute against the Crown is, in truth, in this way directly contested.

I think we must, therefore, consider the effect in law of the defence of the prescription under the Act 1617 against the Crown, in order to decide the pleas raised in this case, and that such decision is forced on us by the objections stated to, and the discussion as to the origin and character of the title of the defender. It has not been maintained that this discussion, and the objections said to arise out of it, would be competent in a challenge by a subject, and the reverse is a point perfectly fixed. What, then, is the effect of the statute 1617, c. 12, as to the annexed property of the Crown?

The terms of the statute itself are express and unqualified, making the effect of the statutory prescription apply to the Crown as much as any of the lieges. After the well-known and important declaration of the object of the enactment—"That his Majesty, according to his fatherly care which his Majesty hath to ease and remove the griefs of his subjects, being willing to cut off all occasion of pleas and to put them in certainty of their heritage in all time coming"—the statute goes on to make the provision in favour of parties possessing for forty years on certain titles, and then declares and enacts, "that such persons, their heirs and successors shall never be troubled, pursued, or inquieted in the heritable right and property of their said lands and heritages aforesaid, by his Majesty or others," and so forth whether by virtue of prior infeftments; "nor upon no other ground, reason, or argument competent of law, except falsehood."

The enactment applies to the Crown by the same terms by which it takes effect against subjects. There is no distinction as to one species of property more than any other belonging to the Crown, nor to one ground of challenge more than another. It is directed against *any* challenge at the instance of the Crown, on *any* ground competent of law, in the most absolute terms. On the face of the statute then, I must hold, unless otherwise settled by a train of early decisions, that what

our has been held to be the effect of the positive prescription in excluding enquiry into the origin of, and all allegations as to defects in the title, as originally insufficient in cases in which the challenge is at the instance of a subject, must obtain equally when the challenge is proposed by the Crown.

No. 29.

Dec. 10, 1844.
Her Majesty's
Advocate v.
Graham.

The property of the Crown was either annexed or unannexed. The latter was comparatively of small value, and chiefly acquired as pertinents or adjuncts of the annexed property. Then the annexed property was not merely of Church property, but also of the ancient and great possessions of the Crown enumerated in 1455, c. 41. Further, the Estates of Parliament as well as the Crown, in the latter part of the reign of James VI., had become fully alive to the consequences of the improvident and lavish grants made even of the annexed property, which, by diminishing the revenues of the Crown, added to the necessity of additional taxes. It seems to be quite inconceivable that, in regard to so important a public measure as that of a general prescription in favour of heritable rights, when it was resolved to make the same exclude challenges at the instance of the Crown, the state of the greater proportion of the property claimed by the Crown—viz. of being under the acts of annexation—could have been lost sight of, or that any exception of grounds of challenge founded upon these public statutes could have been overlooked, if such exception had been within the intendment of the Crown and Estates of Parliament. I think the very suggestion of such an omission raises a conclusive difficulty against the interpretation of the Act 1617, which rests upon it.

But the statute 1633 seems to be conclusive upon this subject. The Lord Advocate, Sir Thomas Hope, in 1630 raised a general interruption within the thirteen years allowed by the Act 1617, to give effect to the general challenge by Charles I. of alienations of the property of the Crown, as well annexed as unannexed, and obtained authority for a kind of general execution or proclamation of this general interruption. The warrant of the Court expressly applies to all alienations made contrary to the Acts of Parliament applicable to the annexed property. I cannot view the admission that the prescription introduced by the Act 1617 would operate to secure rights, followed by possession of portions of the annexed property of the Crown, if the possession was not tempestivé interrupted, as a matter to be viewed as an unmeaning or over-anxious precaution. Sir Thomas Hope was at the very height of his practice when the Act 1617 passed, and must have understood the object of the statute, as well as its author, President Haddington; and, as Lord Advocate, he had too difficult a part to play between his position as the head of the Presbyterian party, and the adviser of the Crown, to give additional offence by unnecessary admissions, unfavourable to the rights of the Crown, of a character so very important as that which the application to the Court contained. Besides, he was dealing with a matter of direct and pending litigation with parties, on which he must have had ample occasion to consider all the grounds upon which the defence of prescription could be obviated. 1st, The King had executed a variety of express revocations, and instituted challenges against individuals of a very extensive character, founded upon the acts of annexation. 2d, There were actions at that moment in dependence, in which it is clear that, without this interruption, he was aware that the challenge would be excluded. Accordingly, there was in dependence at the time an action against the laird of Pencaitland, a case not noticed by the parties, but the value of which cannot, I think, be estimated too highly. I think the decision is one distinctly in

No. 29. point.—The King's Advocate against the Laird of Pencaitland, July 14, 1630, Morison, 11290. (Reads.)

Dec. 10, 1844.
Her Majesty's
Advocate v.
Graham.

It is quite plain that this was a challenge of a right to part of the annexed property of the Crown, and sustained solely in respect of the interruption. It was not only Church property, but there was a college at Pencaitland (the name of which, indeed, yet exists in the village) to which the lands had belonged, and which fell under the Act of Annexation 1587. I look on this decision as conclusive on the point. But so little was the general interruption an ill-considered or hasty proceeding, that it was thought, on the occasion of the first Parliament of Charles I., held by himself when he came down to Scotland in 1633, important to give statutory effect to this general interruption. And then, instead of any new measure, the application of Sir Thomas Hope, in the letter from the King to the Court, is recited verbatim in the statute; and there is not the slightest trace of any attempt on the part of the Crown to dispute that the defence of prescription applied to the annexed property, when the possession had not been interrupted within the thirteen years allowed by the statute. And this is the more remarkable, in consequence of a certain limited statutory reduction of alienations of certain rights of superiority made at once by another statute, c. 14, of the same year, but which there was no attempt to direct against the alienations of, or titles to other portions of the annexed property on which prescription might be pleaded. In these Acts of Parliament 1633, it is nowhere said that the prescription under the Act 1617 had not been intended to apply to the annexed property of the Crown. Yet, surely, if such had been the view of Parliament, that was the time to make the declaration, when the sufficiency of an interruption under that statute was brought so prominently before them. I consider, therefore, the proceeding in 1630, the decision in the case of Pencaitland, and the statute 1633, to be a conclusive contemporaneous exposition of the effect of the statute 1617, as extending to the annexed property of the Crown.

When Mackenzie comes to explain the statutes, he states in his observations in general terms, that the statute applies to the Crown as much as to any other party. It is true, in his Institutes, p. 323, there is a sentence which was not quoted to us, to the effect that prescription runs against the King, "except as to Majesty's annexed property or his unannexed, whereof the farms, duties, or farms have been counted for in Exchequer since August 1455;" and then refers for his authority to the Act of Parliament 1633, c. 12, ratifying the general interruption within thirteen years of the date of the Act 1617, above mentioned. It is quite plain from this reference, and from his using the express words of Thomas Hope, "general interruption," that either this sentence has been incomplete, or that, from some haste, Sir George Mackenzie had forgot the import of the Act 1633. The reference to that Act, as containing the above proposition, would imply that he thought that the effect of the positive prescription had been restricted by that statute, so far as applicable to the Crown; whereas the statute only ratified an interruption of the possession of parties founded on the very opposite view. Hence it is clear that this sentence in the Institutes has either been left incomplete, or that it had been an accidental mistake at the time on the part of Sir George Mackenzie.

Then there is the authority of Lord Stair, in various passages, direct upon the point followed by Nisbet.

Now all these great lawyers had been directly concerned in many important

reductions at the instance of the Crown—Nisbet and Mackenzie both, as Lords Advocate; and their opinions seem to me to be of the highest authority—conclusive, even, if the terms of the statute were doubtful—as they prove the universal understanding from the date of the statute.

No. 29.

Dec. 10, 1844.
Her Majesty's
Advocate v.
Graham.

Then the question received a direct decision in a case reported by Elchies, who reports it, as he says, expressly because it decided this general point. This is the case of the Earl of Galloway, (*Elchies, voce Prescription, 1739.*) The point had occurred in a direct and general form, and had not been the subject of difference of opinion. The remark in the case for the Crown, that the title in this case was granted between the act of annexation and the *declaration* of nullity in the statute, 1597, is of no importance. For the effect of a statutory annexation was really to render null all grants, if a prescription had not been introduced.

Following these authorities is the direct and clear opinion of Erskine, in a passage in which he states the principle of the statute, and explains that, as it is applicable equally in favour of those intended to be protected, whether the challenge was by the Crown or a subject, therefore the statutory protection was directed against the Crown as well as against all others. Surely, on the same reason, even if the words as to the Crown in the statute had not been express and unqualified, the benefit must be pleadable against all grounds of challenge by the Crown, to the same extent as against all grounds of challenge by subjects. Erskine not only draws no distinction or exception as to the annexed property of the Crown, but the view he gives, and correctly gives, of the principle of the statute, shows that, without an express revocation in the statute, we could not be warranted in adopting a view which would be inconsistent with the leading object of the enactment.

Against these authorities we have only a doubt started by Stewart and Bankton. These doubts do not affect my mind at all. Indeed the passage in Bankton seems, by the distinction he takes in favour of an onerous acquirer, to cover and protect this case.

I hold it, then, to be clear law, that against a reduction and claim by the Crown, instituted to vindicate heritable property or rights on the ground that the same formed part of the annexed property of the Crown, had never been dissolved, and had never, in point of fact, been disposed by the Crown, or not disposed cum effectu, owing to the absence of an act of dissolution, it is a relevant and sufficient defence to propone prescription under the Act 1617, c. 12—prescription, on a title to the right, fair and colourable—labouring under no nullities in essentialibus, and followed by the possession which is the great basis of prescription; and that when a case is raised sufficient to exclude challenge on other grounds, it cannot be obviated by the reply that the Crown can show, whether by reference to the title or otherwise, that it had been part of the annexed property of the Crown, and that no act of dissolution had passed.

Some intermediate points, however, must now be noticed. I apprehend that there is no doubt whatever that the positive prescription can be pleaded not only in support of a right of patronage generally, but also (which seemed to be questioned at one time) when the possession of the party has been founded only on a personal title; that is, when the patronage has not become the subject of possession by feudal forms. And here it is material to add, that the importance of the enquiry whether the patronage has been feudalized or not, only applies when both

No. 29.

Dec. 10, 1844.
Her Majesty's
Advocate v.
Graham

parties are deriving right from a common author. Then if the patronage has been once feudalized in his person, it must continue to be so, and a personal right derived from him will not avail against the renewal of the feudal title in others. The fact that the patronage had been feudalized in the person of the common author, in truth brings the case within the ordinary rules applicable to all feudal property, and then the transmissions of it, to be effectual, must be fortified by feudal titles. So Erskine, 1, 5, 18, expressly states the rule. But if the parties do not claim from a common author; if one has a right of patronage, the origin of which cannot be traced, or which was never feudalized in the person of any of his authors, the personal title is not the less a title for prescription, because another party has a title flowing from a different source which has been feudalized. The use made in this argument of the rule, that if a patronage has once been feudalized, the transmissions thereof must be regulated by the ordinary principles applicable to other feudal subjects, is a perversion of that rule to a case to which it is not applicable. A right of patronage does not require in law to be feudalized. The title is complete without infeftment, and it is a title to prescription although it has never been feudalized. When there are two titles, not flowing from one another, the title which has never been feudalized is as good a title for prescription as the one which has, if the possession has been clear and continuous. And a party possessing on such a title, to the full extent of the possession which is necessary in the case of patronage, does not lose the benefit of the statute, because at some remote period another party, on a different and competing title not flowing from the same author, or if so, when that author was not infeft, took infeftment, but never had possession.

In the view I take, however, of this case, I do not think that this question, however largely discussed and earnestly pressed upon us, can arise at all. For, 1. I think the enquiry into the origin of the title, and the grounds of challenge by the Crown are excluded by prescription; and 2. It is a mistake to hold that all patronages of the Crown are necessarily feudalized whenever they were acquired by the Crown. The Crown has *jure coronæ* all the benefits of an infeftment, *whenever* an infeftment would be necessary for a subject to perfect and complete his title and protect his right. But it does not follow, and is no part of the rule, that all incorporeal rights which do not require by the law of Scotland to be feudalized in order to be enjoyed and protected, become at once feudalized in the person of the Crown, merely because they are capable of being feudalized. I never saw the rule so explained and I never heard of any such deduction from it. The statute 1711, 10 Queen Anne, c. 12, § 4, restoring patronages, enacted that all patronages of archbishops, bishops, and dignified clergy prior to 1689, when Episcopacy and patronages were both abolished, should belong to the Crown. But it would be a singular doctrine to admit that all such became thereby feudalized, so as to alter and affect the rights of parties who might have been possessing before 1689, on titles derived from these clerical personages, without being aware of any necessity for infeftment. Before the Crown got right to the Abbey of Eccles, most assuredly the patronage was not feudalized, and the transference to the Crown did not render it feudalized subject.

Even if this point shall be thought to arise competently in this case, I must add that I attach no importance in the enquiry, whether this patronage ever was feudalized, to the fact that the disposition by Lord Home contains a procurator of resignation. That is no proof that the patronage was acknowledged to have

No. 29.

Dec. 10, 1844.
Her Majesty's
Advocate v.
Graham.

been feudalized. There is only a precuratory, no precept, as if infestment could be given without resignation to the Crown, who receive all resignations, although of allodial subjects. Inserting a procuratory is very common, in order to enable a party to go to the Crown by resignation, if he wishes to feudalize the right. Indeed if a patronage never was feudalized, it is the proper, perhaps the only very regular, way of doing it, though, I daresay, infestment has often been taken for the first time in patronages along with lands holding under a subject-superior.

Further, the possession in this case more than satisfies all that can be required under any of the cases for prescriptive possession of a right of patronage.

Thus then, we have, 1. A title, *ex facie* a regular disposition to an onerous acquirer, to a patronage which has never been feudalized previously in the person of any author of the disposer. 2. We have that title acted upon in all the ways in which the right could be asserted, by presentations,—in localities; and I dare say, although not mentioned, by open possession of a seat allotted to Mr Graham as patron. 3. That title was produced and founded upon in legal questions connected with the parish, in which the Crown was called for its interest. 4. That title has been followed by possession, in character, continuance, and practical results, greatly broader and for a longer period than is necessary for prescription.

Then on what grounds is effect to be denied to this prescriptive title? First, it is said that the patronage was part of the annexed property of the Crown; and I have no doubt it did fall under the general terms of the act of annexation, and therefore it said it could not be alienated. But, 1. That is just one ground of challenge competent to the Crown, and prescription is declared to take effect generally against the Crown, without any distinction as to one ground of challenge or species of title in the Crown, more than as to another. To my mind, that answer is of itself complete. 2. This ground of challenge is only reached by *enquiries into the*

origin of the title of the party conveying the patronage in 1732, in order to show that the disposition flowed a non habente potestatem. It is a fixed principle of law that such enquiries are excluded by the effect of prescription, and there is no distinction admitted by any of the authorities to render such enquiries competent against the party pleading prescription, when the challenge is by the Crown. To show that enquiries of any kind into the origin of the title, in order to prove that it flows from a person non habente potestatem disponendi, even when such enquiries are founded upon or proved by statements in the title itself as to its own origin, are not competent, it is unnecessary to do more than to refer to two well-known cases—

1. The Duke of Buccleuch v. Cuninghame, November 30, 1826. The opinions of the Court are only given in Shaw, 2d edit. p. 55. The defender pleaded prescription, and contended, that although it were true that he derived his titles a non habente potestatem, yet the possession for forty years excluded enquiry into its origin. The reply to that defence was, that the title from the Crown in favour of the defender referred to the origin and source of the Crown's right—viz. the act of annexation—that under that act the Crown had confessedly no right, as public patronages, of which this was one, were excepted; hence, that as the title must be clear in itself, the enquiry into its origin was opened up by the title, and it proved that it flowed a non habente potestatem. This was a very strong case indeed; for it was not the case, as here, of a party onerously acquiring from a former holder, but of a party beginning and making his prescriptive title, by going, as it was said, to a wrong superior, the Crown, and taking a charter from that superior. Yet the Court sustained the prescriptive title as a title to exclude.

No. 29.

Dec. 10, 1844.
Her Majesty's
Advocate v.
Graham.

This is a decision directly in point as to the competency of such enquiries into the origin of the title, and such objections to the validity of the grantor's right, as are proposed by the Crown in this case. To sustain such enquiries and objections when stated by the Crown as the party challenging, necessarily amounts to an exception in favour of the Crown, from the most important effect of the prescription introduced by the Act 1617; and as I hold that prescription applies to the Crown equally in all respects as to subjects, I must find that there can be no such reply competent to the Crown, when excluded at the instance of a subject. 2. Then this case was followed by *Forbes v. Livingstone*, November 29, 1827, which related directly to the validity of an alleged grant by the Crown, as contrary to the Clan Act, and appears to me to be a very direct authority upon the same question as that before us. I cannot see that it can distinguish that case from the present in principle, that the objection to the title as invalid, in respect of the provisions of the Clan Act, and flowing a non habente potestatem, was there stated by a subject claiming the property. It was surely as good a plea to him as to the Crown, if relevant at all against prescription, which must be rested on a sufficient title, to say—the title flows a non domino, since the Crown could not grant it, and so it cannot found proper prescriptive possession. By whomsoever stated, it is the same identical plea. But as prescription under the statute 1617 is not a punishment for neglect, but a protection for the party in possession, the defence good against one party to exclude enquiry into the original validity of the title, must necessarily be equally good against any other party. (His Lordship read a sentence from the opinion of the majority of the Court in the case of *Forbes v. Livingstone*, Nov. 29, 1827, (p. 175, Shaw,) to the effect, that the positive prescription excludes all enquiry beyond forty years into the previous titles, so that it cannot be legally known what were the original titles, and their previous history is excluded.)

But then it is said that the fact that the patronage was part of the annexed property is an essential nullity in the title, and that in order to make a title sufficient for prescription, it must not labour under essential nullities. But this is not an essential nullity. 1. It is not established or proved in the way in which essential nullities are proved, but by an examination and enquiry into the validity of the grantor's right. Hence this is only another way of stating the point, already adverted to. 2. No definition of essential nullities in the law of Scotland includes want of title in the grantor of the deed on which prescription follows, and every explanation, on the other hand, limits the import of the exception to the ordinary meaning of the terms—nullities, *ex facie*, which deprive the title of the character of a formal, complete, and valid instrument. Want of power in the grantor is not a *vitium reale*, pleadable against the prescriptive possession of the disponent, else the statute truly effected nothing of value for the certainty of heritages. 3. The same alleged nullity did occur in the *Duke of Buccleuch v. Cuninghame*; but in the words of Erskine, “time was held to stand in place of all requisites,” and the defect of power was held to be no ground of challenge. Further, if the enquiry is competent at all, there are other answers on the fact. It is said alienation of the annexed property without an act of dissolution is void. But here it is not proved by the references in the deed that there was any alienation by the Crown. On the contrary, I do not read the disposition of 1732 as a title in which the party acknowledges that he derives right from the Crown. It may stand perfectly well as a separate independent competing title, although with a reference to the mean

of getting such a grant from the Crown as might exclude the pretension that the patronage had fallen under the Act of Annexation, the explanation of which, being general in its terms, might often create difficulties without some such fortification. This is, I think, the just view to be taken in this question of prescription of the disposition by Lord Home, and even of the early grant to Lord Home by Sir George Home, a century before. I think we must hold that the right was claimed separately, although it was hoped that the Crown might put an end to challenge by a grant under some act of dissolution. Hence I do not think that any alienation by the Crown has been proved at all. On the other hand, if the enquiry entered into by the Crown were admissible, I could not hold that the existence of an Act of Parliament for the dissolution of the property and its tenor was proved either by the contents of the party's own writs, or by any printed list of Acts of Parliament. That would be a very hazardous ground to take in a court of law; and therefore I consider Mr Dundas has very judiciously, in his last argument, laid aside the notion of an act of dissolution, and treated the case independently of any such slender support. However, in the view I take of the case, the enquiry into the origin of the title is altogether excluded, as the reasons of challenge of that title resolve into objections of the same character as those which have been often repelled, *e.g.* want of power in the grantor—defects in the progress of early titles, and an offer to prove that the true title in law was originally in another, from whom there is no conveyance. To exclude such objections, and in order to prevent the uncertainty as to rights of heritages, which the Act 1617 so emphatically describes as a great grief, was the very object of the statute; and being, as Erskine says, for the benefit of the parties to be protected, and not founded on the notion of any neglect on the part of others, it would be on that ground declared to operate against the Crown as much as against any other party challenging rights fortified by the possession required.

It may be right, in conclusion, to advert at least to two of the cases relied on by the Crown. The Magistrates of Peebles, Nov. 25, 1800, (Baron Hume, 457,) was a case in which the grant of annexed property had never been followed by any possession, while the Crown had complete possession—its title, *jus coronæ*, being sufficient for possession. Hence this case, in which prescription could not be pleaded for the grant, but was complete against it, is utterly inapplicable to the present. The case of Lockhart of Lee depended on this—1. That the alleged title had been evacuated by a later, in favour of the same party, which excluded the patronage; 2. That there was an essential nullity in the absence of the requisite for a *novodamus*; and 3. There was no possession even alleged against the Crown. It was, therefore, an enquiry into the sufficiency of the titles (see inter-lucator) in a proper competition of titles. These are the only two cases which appear to require notice.

I would therefore propose to your Lordships to sustain the second plea in law stated for the defender on record, and assolvie the defender from the whole conclusions of the action.

I must add, in conclusion, that if it had been so pleaded, I think the defender had a good title to exclude.

LORD MEDWYN.—In this process the Lord Advocate, on behalf of the Crown, challenged the right which Mr Graham has given to Mr Lewis of the patronage of Bothkennar, calling for production of the titles on which the defence is founded, which commence with a disposition granted to his predecessor in 1732 by the

No. 29. Earl of Home, and followed by possession under it, but on which no seisin was taken till the year 1837. The respective pleas of the parties are very distinctly stated at page 8, in the revised case for the Crown.

Dec. 10, 1844.
Her Majesty's
Advocate v.
Graham.

The defender did not attempt to found on his title as exclusive of this challenge of the Crown. This, indeed, he could not do; for he had to make out, that as his possession had been all along on personal titles without infeftment, this patronage had never been feudalized; and it was more especially incumbent on him to show this, as the first title founded on had annexed to it a procuratory for completing the right as a feudal subject; and this was still further the case in the next conveyance of the right in 1746, which was by a procuratory alone without any disposition. I am aware, that whenever there is a habile title for prescription with the requisite possession following on it, this excludes all enquiry into the prior titles or prior history of the subject; but when the subject is such, that in one state of it a personal right will carry it, while in another the title for prescription must be a seisin and its warrant; then when a party pleads in defence a personal title only, he must show that the subject is of that character to which a personal right is a habile title for prescription, by prior titles, or history of the right prior to the title commencing the prescriptive period. A right of patronage is an apt illustration of this rule. If a patronage has never been feudalized, but has always been held and transmitted as a *jus incorporale*, a personal title will be sufficient for its conveyance, and a personal title with possession will be good under the Act 1617 to secure the right in the dispositive; but, on the other hand, if it has at any time been feudalized, a personal title which does not connect with the feudal title, will not be a habile title for prescription; for I do not understand, that if once it has been conveyed as a feudal subject, a patronage can regain its personal character by a prescriptive possession on a personal title. If once feudalized, it loses its character of a *jus incorporale*, and it can only be acquired afterwards by a title habile for conveying a feudal subject. I have no idea that the Crown has any privilege to defend against the Act 1617, beyond what a subject has.

The history, then, of this patronage must be enquired into, and the defender must show that it never was feudalized; and I cannot hold that prescription excludes this enquiry. Prescription can only apply after it is shown that the nature of the right is such, that possession on a title without seisin will operate as a prescriptive title.

The priory of Eccles had right as part of its patrimony to the churches of Eccles and Bothkennar. They were served by a vicar appointed by the conventual body. On the Reformation this religious establishment fell into the hands of the Crown. As a liferent of the benefice was given to Alexander Home as commendator in 1607, the Crown had not at that time disposed away this benefice; but, in 1609, it would appear that there had been an intention on the part of the Crown to grant the benefice, with the churches of Eccles and Bothkennar, to Sir George Home. But as the temporality of the benefice had been annexed to the Crown by the Act 1587, it was necessary first to dissolve this annexation. I think there is sufficient evidence, that in 1609 an Act in favour of Sir George Home was passed, although it cannot be produced, and it has not been preserved among the proceedings of Parliament, as has happened to many other private Acts of the same kind; and I am not disinclined to take the account given of its nature from the narrative of it in the assignation 1624, when it was clearly lying before the writer of that deed at the time, more especially as this is so much in the ord-

any style of such a grant. It bears, then, that in the Parliament held in the month of June 1609, our sovereign and three estates of Parliament dissolved all and sundry lands, &c., of the temporality of the abbacy or priory of Eccles, fra the Act of Annexation 1587, annexing the temporality of all benefices within this realm to his Majesty's Crown, together with the parish kirk of Eccles, and also the parish kirk of Bothkennar, as a part of the patrimony, together with the parsonage and vicarage of the said kirks, kirk lands, with teind-sheaves and other teinds, as a part of the spirituality, to the effect his Majesty might dispone to Sir George Home all lands pertaining to the temporality, together with the advocacy of the two kirks, with the teind-sheaves and teinds; and to the effect his Majesty may vest the said kirks into several and distinct rectories, or parsonages and vicarages, and make and constitute him heritable patron of the same parish kirks.

Now I am inclined to hold, that the terms of the Act of Parliament 1609, thus sustained from the assignation, disposes of some important points in this cause. In the first place, it shows that it was not then held that the church of Bothkennar was included in the Act of Annexation, and became part of the annexed property of the Crown. It bears that the lands, &c., of the abbacy were the temporality and annexed, and that the two churches were only part of the patrimony, and indeed the spirituality of the benefice, which had fallen to the Crown at the Reformation. This accords with the Annexation Act, which does not include patronages among the subjects of annexation; and I think it is consistent with law. Although the point seems to have been argued in some earlier cases, it was not decided till 1783;¹ and then it was held that church patronages did not fall under the act of annexation.

That this judgment was well founded as the enunciation of an historical fact, is, I think, very clearly shown, if we look at the first great erection of church lands into a temporal lordship, which took place after the Act of Annexation—the lordship of Spynie in 1592. The parties who framed the Act 1587 were the same who advised this grant; and the Parliament 1592 must be the best interpreter of an Act passed by its immediate predecessor. The King had granted a charter to Alexander Lindsay, his vice-chamberlain, with the advice of his secret council, of the lordship and barony of Spynie, and a vast variety of other lands in the counties of Elgin, Forres, and Banff, which formerly belonged to the Bishop of Murray, and which are declared to be part of the temporal patrimony of the same, and are now in the King's hands in virtue of the Act 1587, and by the death of George Douglas, last bishop. The charter then goes on to state, that certain churches which are enumerated, with the teinds, belonged to the bishopric as part of its patrimony; therefore the King, with consent of his council, disunited and dissolved the said churches from the bishopric, and erected them into rectories, with the teinds belonging to each, for the support of the minister, granting the patronage of these churches to Lindsay, and uniting them all with the barony. The churches are said to be part of the patrimony only, not of the temporality of the bishopric, and as not annexed the King disunites them from the benefice, erects them into rectories, and so bestows them on the donee. The tenendas is of the barony, with the patronages united, to be held of the Crown, feudalizing, of course, for the first time the patronage of these churches. This charter is ratified in Parliament.

No. 29.

Dec. 10, 1844.
Her Majesty's
Advocate v.
Graham.

¹ *Murdoch v. Gordon*, Feb. 22, 1783.

No. 29.

Dec. 10, 1844.
Her Majesty's
Advocate v.
Graham.

Whenever a patronage was conveyed along with lands to a subject, I know of no instance in which it was conveyed as a *ius incorporale*, and to be held and pass by a personal title. Had the grant, contemplated in the Act 1609, to Sir George Home, and the assignation 1624, taken place, it would have been by such a title as that of Lord Spyney, and a subsequent personal title would not have carried right to it, which did not connect with that charter. But sometimes the operation, which we saw in the above charter, of raising a church into a rectory, took place without the benefice being attached to a barony, being bestowed upon the minister serving the cure. In such a case we do not hear of any annexation to the Crown by Act 1587, or consequently any dissolution by Parliament. There is no doubt a dissolution of the church from the ecclesiastical benefice, of which it was part of its patrimony, but this is done by the Crown charter alone, as the counterpart of the right of union inherent in the Crown. Of this, I may mention the dissolution of Kirkliston from the patrimony of the archbishopric of St Andrews, and its erection into a separate benefice. It had been a mensal church of the archbishop, and Parliament ratified what had been done. Had it been annexed to the Crown as part of the temporality, the procedure would have been different. I may also refer to the erection of the lordship of Halirudhouse, where the distinction is also clearly shown. Many other instances might be given; but I hold it not questionable that a benefice, including the right of patronage, was not comprehended within the temporality of the great ecclesiastical benefice.

On this point I may remind your Lordships of the case of the Earl of Mansfield, 18th May 1830, as a specimen of another form of a grant of a patronage. There was an erection of the lordship of Scone under a dissolution in the same year, 1606, which conveyed certain churches and their teinds along with the lands erected, which alone are declared to be the temporality of the abbacy, but declaring that the right of presenting the ministers was to be in the Crown. Accordingly, it was found that there was no sufficient title in the donee to prescribe a right of presentation, although the churches had been conveyed to him. But of this enough.

2. I think it appears that the church of Bothkennar was part of the patrimony of the priory of Eccles, and, prior to the Reformation, was not a separate patronage, but patrimonial, as the Act of Parliament, after dissolving the lands, &c., of the temporality of Eccles, from the Act of Annexation, further dissolves the two kirks of Eccles and Bothkennar from the abbacy of Eccles, to the effect that the King may dispoise the lands, &c., to Sir George Home, together with the right of patronage of the said kirks; and also to the effect, that the King may erect them into several and distinct rectories. They were to be erected into a separate benefice, carrying the right to the teinds to the beneficiary, giving the donee merely the right of presentation. Had this intention been followed out, there can be no doubt that this would have feudalized the right of patronage.

3. It is quite clear that circumstances prevented the Act 1609 being followed out in favour of Sir George Home. Had it been, the assignation 1624 would have said so, and would have been a disposition of the patronage of the church of Eccles, and not merely an assignation to the Act of Parliament in so far as regards the church of Eccles, instead of merely giving the Earl of Home power to obtain from the Crown right to this patronage. Accordingly, it is not disputed that the Crown is still in right of this patronage of Eccles, never having parted with it. It contains no notice of the church of Bothkennar; and it appears that

the church also remained with the Crown, and that the Crown presented to the church of Bothkennar, on occasion of the vacancies, in the years 1622, 1661, and 1676.

No. 29.

Dec. 10, 1844.

Her Majesty's

Advocate v.

Graham.

4. I remark further, that I do not concur in the observation that there is here no competition of titles. If by this is meant that the discussion is not between two disponents, the observation is correct; but when the plea is not simply *jure coronæ*, that the Crown is entitled to the property of every patronage to which a subject cannot show a good right, but when the Crown shows a good title, with possession, as is done here, the title which is pleaded against this title, and seeks to put the better of it in virtue of the positive prescription, places the parties, I think, in the position of pleading on competing titles.

If, then, I am right in holding that this patronage did not fall under the Act of Association, I am relieved from the discussion as to whether the positive prescription applies to the case of the annexed property, where no dissolution of it in Parliament can be shown. If it were necessary to dispose of the point, I rather incline to hold that there is sufficient evidence, considering all the circumstances, especially the notoriety of the practice, that the Act 1609 did pass, to the effect of dissolving the temporality of Eccles from the Crown.

It appears, then, that from the period of the Reformation down at least to 1676, this patronage was in the Crown, undisposed to any grantee. Now what was its condition, with regard to its holding, at this time? It is pleaded by the pursuer—

“that the priory of Eccles was a proper feudal subject held of the Crown before, and, as such, by the Crown itself, after the Reformation, must therefore be presumed, unless the contrary be shown.” I think it is a mistake to say that the priory was a feudal subject held of the Crown. This was not the condition of these ecclesiastical establishments; nor did they hold their property by a feudal tenure. We have not the foundation charter of this priory, and do not know whether the church of Bothkennar was a part of its original patrimony, or a separate grant to it by the patron at a subsequent date; but in either case the conveyance would be, like all such grants, in *puram eleemosinam pro salute animæ*, and it might be confirmed by the King or the Pope, but not as by the superior of a feudal subject. The Conventual body was not vassal to a superior. The reference made to the charter of confirmation in 1567, of a grant by the prioress, might be the constitution of a feudal right in favour of a vassal to the priory, but this will not show that the Conventual body held it as a feudal subject under the Crown. The Conventual body fened out their lands to vassals; it was the only mode in which such a conveyance could be made, as it could not be disposed of and become the property of a layman in any other form. But what the priory retained was not a feudal subject.

When the priory fell to the Crown, did it become feudal? I think it did not. This benefice just fell to the Crown as part of the patrimony of the priory, but its character was not changed. It is quite true that the right of the Crown in lands falling to it by forfeiture, “is constituted *jure coronæ* without seisin. His Majesty King completes his right as fully as a seisin does the rights of subjects.”¹ But although the right to lands is completed without seisin, this does not mean,

¹ Ersk. II., 3, § 44.

No. 29. that when a subject falls to the Crown, the same consequences will follow as if seisin had been necessary to complete the right, when it was not required to complete the right in the person in whose place the King now stands. It will not, in short, feudalize a right which was not feudal before, and which was complete without seisin in the predecessor. In short, I hold that in the case of a church as a part of a benefice, it passes to the Crown, and is held by it in the same condition as before, the only difference being, that whatever is superstitious in the terms under which it was held, is swept away by the abolition of the Pope's jurisdiction, and the reformation of religion.

There is no doubt, that if the Crown resolved to give away the church, with the right of patronage, to a subject, it would have been by a disposition with a feudal holding, and this whether it was attached to lands or not. This title could only be completed by resigning on the procuratory; and then, but not till then, it would be feudalized, and incapable afterwards of being transmitted by a personal title as a *jus incorporale*, which it no longer was, unless the assignee in the personal right could connect himself with the seisin of the Crown donee. But it does not appear that the Crown ever disposed this patronage or feudalized it. The plea of the Crown is, that it is still a part of the annexed property, against which prescription will not apply; and the defender founds his right on the disposition 1732, by which the Earl of Home, stating himself as having the undoubted right of the temporality of Eccles, and of the kirks of Eccles and Bothkennar, disposes to Mr Graham of Airth the patronage of the latter, and inserts a procuratory of resignation, to enable him to complete his right. The warrandice is from fact and deed only; and the assignation to writs and evidents specifies only the Act of Parliament 1609, and the assignation 1624. This obviously was not a progress which could convey the subject, but it was all, no doubt, that existed; and therefore we need not wonder that no attempt was made to complete the title by resigning in the hands of the Crown. It was seen that it might be the commencement for a prescriptive title, but was not to be acted upon immediately. He did not act as patron in 1743, on the settlement of Mr Pentman, but as an heritor only; and as the Crown had not presented on this occasion, Mr Graham, at the next vacancy in 1765, presented by means of a trustee. The family did so again in 1783 and 1796. All these acts of possession took place while the title was yet personal and latent. It may be remarked, however, that so inveterate is the notion that the right could only be completed by resignation under the Crown, that the next transmission which took place after the disposition by Lord Home, is by a procuratory merely, in 1746, by James Graham of Airth to William Graham, his second son, by which he, as a feudal proprietor, grants a procuratory for resigning the patronage of Bothkennar, "purchased and acquired by me from William Earl of Home, conform to the right and disposition granted in my favour, of date 8d day of March 1732," in the hands of the immediate lawful superiors. The other subjects contained in this procuratory were resigned, and the titles completed on it. Neither Mr Graham nor his son, however, ventured to resign the patronage and complete a title to it, which could only be done by resigning in the hands of the Crown. The defender, in his additional case, seems now desirous to commence his personal title, as for an unfeudalized subject, with this deed. I doubt whether he could validly do so, as it is calculated only for conveying a feudal subject. It has no clause, as, in the disposition 1732, which

Dec. 10, 1844.
Her Majesty's
Advocate v.
Graham.

No. 29.

Dec. 10, 1844.
Her Majesty's
Advocate v.
Graham.

would transfer the subject under any other form but by resignation, indicating that the subject was feudal; and, therefore, if the defender could not fall back on the disposition 1732, I could not hold that the procuratory 1746 was a *habile* title to commence prescription by possession, as of a personal right. As he has taken up the right to the procuratory in that disposition by service, I presume he is the heir of the grantee, although it appears by the deed 1746, that his predecessor was the second son of the grantee. The title in 1765, with the possession, however, would, I think, be sufficient as a prescriptive title of this *jus incorporale*, now that it is shown that no grant was ever made by the Crown so as to feudalize it. It has been very cleverly acquired by the Airth family, and wrested from the Crown by this series of latent titles, and the assertion of a right to present in the absence of the exercise of this right by the Crown.

LORD MONCREIFF.—I am of opinion that the claim of the Crown to the patronage of this parish of Bothkennar, and all the grounds on which it is maintained, are excluded by a valid prescriptive title fully established in the defenders.

We must attend particularly to the nature and conclusions of the summons; for, in the last paragraph of the additional case for the Lord Advocate, the question is stated as if it depended wholly on the reductive conclusion applicable to the procuratory of resignation in Lord Home's disposition, and the titles made up under it. But I apprehend that the substantial question does not depend on that, for there is a further broad conclusion, absolutely necessary to sustain the action, in these words:—That "it ought and should be found, decreed, and declared, by decree, &c., that the said right of patronage of the parish kirk of Bothkennar remained, notwithstanding the said Act of Parliament, in our royal predecessors, and now belongs to, and is vested in us exclusively, as undoubted patrons thereof, and that we and our royal successors have the sole and undoubted right of presenting ministers thereto." There are some assumptions in the first part of this conclusion, which render it not altogether well adapted for the trial of the propriety between the parties on its fair basis. They are incidental matters of discussion; and the real case of the defenders does not, as I understand it, depend on their making out a certain effect of the Act of Parliament here referred to, but on much broader grounds quite independent of it. However this may be, it is evident, that unless the last part of the conclusion can be sustained on solid legal grounds, the pursuers can have no legal interest to maintain the action to any effect whatever.

The material question, therefore, is on that conclusion; and it is, whether, on the grounds of fact and law maintained, the pursuers are entitled to a decree, declaring that the exclusive right to the patronage of this parish is now vested in the Crown?

The defenders meet this demand by a plea of prescription under the statute 1671, c. 12, founded on titles and possession, stated to be sufficient in their own nature to sustain that defence, and to exclude all enquiry as to the merits of the original titles themselves, or into the merits of any other title which may be set up by any other party.

It is, therefore, fundamental in the case, that this is a question of prescription. Whatever may be said about the original rights of the Crown on the effect of the Act of Annexation, in reference to other questions, they can have no effect here, unless they can be applied to a question of statutory prescription, when correctly pleaded by an adverse party.

No. 29.

Dec. 10, 1844.
 Her Majesty's
 Advocate v.
 Graham.

As it appears to me that the general scope of the argument of the pursuers, and much of the detail of it, runs counter to the fundamental principle of the law of prescription, I think it very necessary to have directly in our view the terms of the preamble of the Act 1617, and of its leading enactment. The preamble runs thus:—"Considering the great prejudice which his Majesties lieges sustains in their lands and heritages, not only by the abstracting, corrupting, and concealing of their true evidents, in their minority and lesse age, and by the omission thereof by the injury of time, through war, plague, fire, or suchlike occasions; but also by the counterfeiting and forging of false evidents and writs, and concealing of the same to such a time, that all means of improving thereof is taken away; whereb his Majesties lieges are constitute in a great uncertainty of their heritable rights, and divers pleas and actions are moved against them, after the expiring of thirti or forty years, which nevertheless, by the civil law, and by the lawes of a nations, are declared void and ineffectual. And his Majesty, according to his fatherly care, which his Majesty hath, to ease and remove the griefs of his subjects, being willing to cut off all occasion of pleas, and to put them in certainty of their heritage in all time coming," &c.

On this preamble, which it is impossible to misunderstand or explain away, the Act "statutes, finds, and declares, That whosoever his Majesty's lieges, their predecessors and authors, have brooked heretofore, or shall happen to brook in time coming, by themselves, their tenants, and others having rights; their lands, baronies, annualrents, and other heritages, by virtue of their heritable infeftments, &c., "for forty years, continually and together, and that peaceably, without any lawful interruption, shall never be troubled, pursued, nor unquieted in the rights and property of their lands and heritages foresaid by his Majesty, or others the superiours and authors, their heirs and successors; nor by any other person, by virtue of prior infeftments, public or private; nor upon no other ground, reason or argument, competent of law, except for falsehood;" and it declares all such rights to be good, valid, and sufficient rights for brooking of the heritable rights of the same lands and others foresaid.

Though this statute speaks of rights held by seisin, and makes provisions on that supposition, it has been long settled law that it applies to all heritable rights, and specially to rights of patronage held and transmitted by personal titles only.—See the authorities, as quoted in defender's case, pp. 10, 11. If personal titles sufficient for prescription, are produced, I have no idea that it is incumbent on him, after one hundred years' possession, to prove the negative—that it never was feudalized in other parties at any earlier date.

The statute contains no exception in favour of the Crown, but expressly the reverse, providing that the parties entitled to the benefit of it shall not be troubled &c., "by his Majesty or others," &c.

Under the statute thus explained and applied, Mr Graham defends his right to the patronage of Bothkennar against the claim of the Crown, upon the titles enumerated on pp. 4 and 5 of the defender's case, originating in a disposition by the Earl of Home in 1732, and comprehending a disposition by James Graham, the dispositive, in 1746, and a settlement by onerous marriage-contract in 1760, of which the late Thomas Graham made up his title expressly as heir of provision and on possession, maintained to be sufficient for establishing the title by prescription, and excluding all enquiry as to the original validity of the title either in the Earl of Home, or in his immediate dispositive.

The Officers of State meet this defence by an argument, which appears to me to be inconsistent with the whole principle of the statutory law of prescription. They present us with an elaborate deduction of what they state to have been the actual nature and merits of the titles by which this right of patronage had been held previous to the date of Lord Home's disposition in 1732—one hundred and two years before the date of the present action—the effect of which, when stripped of the special matter thus involved, is simply to infer that that title proceeded *a non habente potestatem*, and, therefore, that it and all that followed on it must be null and void.

No. 29.

Dec. 10, 1844.
Her Majesty's
Advocate v.
Graham.

If the principle of this plea could be listened to as a general doctrine, we might turn our backs on the law of positive prescription; for, in nine cases out of ten which have been tried in reference to that law, the allegation of the party seeking to erect the right prescriptively possessed, has been, that the original titles founded on had proceeded *a non habente potestatem*; and I humbly apprehend, that if the statute has any meaning in its preamble, and the enactment following it, the very purpose of it was to exclude any such enquiry, and to raise an absolute presumption of error, falsehood, forgery, or some other fatal nullity, against all the averments, and all the muniments founded on in support of them, for showing that the titles by which the possession has been held were derived from some party who had no power to constitute them. The particular grounds on which such a defect of power may be alleged, cannot alter the thing. Apart from prescription, the offer to prove that the title is derived *a non habente potestatem*, by a party who, but for that title, would have right to the property, is as relevant on one ground as on another. But, in a case of prescription, to answer the plea by undertaking to show that, on the merits of the titles, the defender's author had not power to grant the dispositions, is, in my judgment, to do away with prescription altogether. Without going so far as to say, with Lord Braxfield, in *Scott v. Stewart*, 10th August 1778,¹ that "it is the purpose of prescription to support bad titles: good titles standing in no need of prescription"—I hold that it is the purpose of prescription to exclude all enquiry as to whether titles, habile in their form, on which prescriptive possession has followed, were in their original nature and constitution good or bad—and specially the enquiry, whether the author from whom they have proceeded had power to grant them or not. When prescription is raised, there is an absolute presumption that they are good. And, having this view of the objects of the statute, I would say confidently, in the words of Lord Fraser, in *Campbell v. Wilson*, December 19, 1765,² that this law of prescription, by so excluding all such questions, "is the great security of our most valuable property, our land rights."

If we have got thus far in regard to the principles which regulate the law of prescription, I should have thought that the present case should be of easy solution. There are titles vested in the defenders and their authors, from the year 1732, down to the date of the summons in the present action in 1824, which, according to all authorities, in the absence of every other enquiry, are habile and sufficient, as titles of prescriptive possession, for securing the right under the statute. It may be, that the disposition by Lord Home in 1732 contains more

¹ Hailes, IX.² Monboddo,—Supplement, V. 915.

No. 29.

Dec. 10, 1844.
Her Majesty's
Advocate v.
Graham.

than was necessary to its purpose. It narrates that Lord Home had right ~~by~~ the patronage of Bothkennar, in virtue of his undoubted right to the temporality of the Abbacy of Eccles, of which the kirk of Bothkennar is said to have been a part. This is probably true. But I humbly apprehend that it is foreign to the present enquiry on the effect of the law of prescription. If, whenever the charter, disposition, or other title, on which prescription is pleaded, refers to prior rights or titles as the foundation of the granter's own right, it is competent to investigate and try the whole merits as to the validity of such titles in the person of the granter, there would be an end of the law of prescription in a vast proportion of the cases to which it applies. Just take the common case of a charter of lands, with infeftment thereon, or seisins standing together for a hundred years, and with full undisturbed possession—would it avail against the prescriptive right, that, in the original charter, it might be *narrative* set forth that the granter derived his own right from some prior title or specified grant, to the effect of enabling the party challenging this right in the grantee to try the whole question as to the validity of that prior title or grant, by reference to extraneous documents, or the general history of such rights? This would be just to say, that the statute has no effect at all. But the case appears to me to be the same with regard to a right of patronage held by disposition, with prescriptive right.

I am of opinion, that the possession established in the present case is sufficient. I may say a few words on it afterwards; but at present I assume it to be so.

How, then, is it that this case of prescription can be resisted? It is said that there is an exception from the rule, that rights of patronage may be carried by personal disposition, and that, if the right has been once feudalized, it requires infeftment; and then the pursuers just assume that, if the right had been at one time in the Crown, it is the same case as if it were a right held by infeftment; because the Crown requires no infeftment to support its original title *jure coronæ*. This appears to me to be a most inconclusive plea in all its parts. In the first place, I have doubts whether the assumed exception refers at all to a case of prescription. I have not observed that it is so stated by any authority, except one, for which I have great respect, Mr Dunlop, in rather a loose expression. I should look for earlier authority. And, if it is to be so applied in a case like the present, I do not see what it amounts to but a controlling of the prescriptive title, by looking back into anterior rights, which, according to the words of the Act, it is not competent to enquire into. But, at any rate, there is a clearer fallacy in the plea. The doctrine seems to me to refer, not to any thing in the original creation of the right of patronage, but to the state of the title in feudal form in the person of the disponee's author; and to a question with another party deriving right from him. If that author had made it a feudal estate, though it might be perfectly competent for him to convey it by personal disposition, it might be reasonably doubtful whether a prescriptive right could be established on that title, so as to exclude a third party obtaining a competent feudal title from the same author. I don't say how that might be, seeing no precise authority on it. But it is evidently a very different thing to say, that it would not exclude other parties, not deriving any right from that author, but raising up other titles alleged to be preferable to his. In that case, the feudal title might or might not, according to circumstances, exclude the personal right, as long as no prescription was in the

way. But I should think it a clear matter that it would not overrule a prior personal right fortified by prescriptive possession.

No. 29.

There is, however, yet a remaining difficulty in this part of the argument of the patrons. They assume that, if they can show that there was an original title to this patronage in the Crown, derived from the Abbey annexed to the Crown, that title must be held as equivalent to a title by seisin, though none existed. I cannot see any truth or correct reasoning in this plea. The assumed or conceded fact is, that the patronage was not held by any feudal title, and passed to the Crown without it; and, even assuming it to be otherwise, the moment it came to be vested in the Crown it no longer could be a feudal subject; and might pass by personal titles quite sufficient to create a ground of prescriptive right. There, *in*, however it came to Lord Home, there is no absurdity or anomaly in the idea, that in one way or another he had such a title, that his disposition might be sufficient for warranting the possession which followed, and by that possession establishing a valid right by positive prescription. For I can by no means assent to the proposition, that the assumption of a right in the Crown is necessarily equivalent to a title by seisin. I should rather say it was quite otherwise—and that the right, being once in the Crown, even though previously feudalized, might pass by any competent form of title, and equally by personal disposition as by charter and seisin. And then, in the question of prescription, how can it be that, according to the principle of the statute 1617, it should be held that the statute shall not take effect, merely because by intricate investigation you make out that, at some time or another, that right of patronage had once been in the Crown.

If, indeed, it were true that, in the case of patronage, the statute does not affect the rights of the Crown, (which, after all, is the real drift of the argument, contrary to the express words of the statute,) there might be a serious ground of difficulty. But this has not been said, and cannot be seriously maintained. And yet, if it be not so said, I see not how the argument can be maintained, any more than it might be by any private family founding on a title, whether by infestment or not, derived from some entirely different party antecedent to Lord Home's disposition. It always comes to the same thing, whether the law of prescription is to have effect or not. If it has, it is the same for all parties, once the habile title, and the peaceable possession, are established.

Suppose the case of a simple disposition of a patronage by the Crown, not followed by infestment, but followed by possession for centuries. Could another dispose of the Crown evict that right? I apprehend, clearly not; and yet that is a much stronger case than that of a party not deriving right from the first disposition attempting such eviction.

A singular view of this point of the case has been suggested, which, if I understand it, imports that there must be a double prescription. First, forty years' possession on a personal title, as necessary to render it a habile title for prescription, and then another course of forty years to validate it against a claim founded on a prior title alleged to be preferable. I know not on what authority this can be said. No such thing is to be found in the statute; and it seems truly to amount to a denial of the general rule of law laid down by all the authorities, and recognised by the Court in many cases, that, in rights of patronage held without seisin, a personal disposition, with forty years' possession, establishes a prescriptive right under the statute. It is impossible, therefore, in my opinion, that we can now sanction such a proposition.

Dec. 10, 1844.
Her Majesty's
Advocate v.
Graham.

No. 29.

Dec. 10, 1844.
Her Majesty's
Advocate v.
Graham.

The main stay of the plea of the pursuers originally consisted in an assumption that the Act 1617 could not affect the property of the Crown annexed by the Act 1587, and that an act of dissolution was indispensably necessary; and on the further assumption, that this right of patronage was annexed to the Crown as belonging to the Abbacy of Eccles. We can scarcely have any hesitation now on this point. The Act 1587 expressly excepts lay patronages. But surely the words of the statute 1617, applying expressly to the Crown generally, might have seemed a sufficient answer to the plea; and the concurring authority of M'Kenzie, whose statement in his *Observations* seems little affected by the sentence in his *Institute*, Stair, and Erskine, may surely be thought sufficient to settle the point, that the statute does apply to the annexed property of the Crown, notwithstanding a rash expression in Stewart's *Answers to Dirleton*, contrary to the assumption in Dirleton's doubt itself, and foreign to the matter of the question stated, which evidently had reference to the negative prescription. But this is put out of all doubt by the Act of Sederunt 1630, in which the officers of the Crown and the Court equally held it to be unquestionable that the Act did apply, and was distinctly intended to apply, to the annexed property of the Crown, and that the prescription could only be interrupted by a positive proceeding, adopted on the part of the King, within the thirteen years allowed by the statute; and by the two reported cases mentioned by the Justice-Clerk,¹ which proceed on the same clear assumption. There might have been much reason to doubt the legality or the effect of that extraordinary proceeding; but it was confirmed by the Act 1633. It certainly could not, in any view, go further than to keep the matter open in any particular case for forty years from the date of the publication in 1630. It cannot bear on the present case, otherwise than as it demonstrates that the Act 1617 was universally held to apply to the annexed property.

If it were necessary to the result, the plea fails in the other branch of it. There is no evidence to satisfy the Court that this patronage ever was annexed to the Crown. It was said that it was not a patronage properly, but a benefice of the Priory of Eccles. This would rather prove the reverse of the proposition. But what occasion or competency is there to enquire into it? Above a hundred years ago, Lord Home held it. He conveyed it to Mr Graham by disposition in 1732; and it was settled by marriage contract in 1760. *Ex hypothesi* prescription has long run. And what competency, then, is there in the Crown, or any one else, now alleging annexation at an earlier period, any more than there would be in alleging any other defect or nullity in Lord Home's title? I see no competency in the enquiry.

On the second part of the case, the question of possession, I have no doubt that the acts of possession here established are quite sufficient to sustain the prescriptive right.

There may be possession of a right of patronage in various ways; but, no doubt, the chief use of it is in acts of presentation to the benefice. Now here, though, upon the first vacancy after 1732, which happened in 1743, the settlement was allowed to take place by popular call, Mr Graham concurring in it, according to the practice very common at that period, and which had been followed on the previous vacancy in 1722, there are three distinct acts of presentation,

¹ Mor. 11298.

No. 29.

Dec. 10, 1844.
Her Majesty's
Advocate v.
Graham.

in 1765, 1783, and 1796, followed in each case by the induction and long possession of the presentee as minister of the parish; and more than forty years had elapsed even from the last of those dates before the present action was raised in 1842. It is evident therefore, that, according to all the authorities, there is, by these acts, the most abundant possession which can be required in any such case. But, in addition to this, it is shown from the records of the Teind-Court, that in two several processes of locality, in 1774 and 1830, first Mr William Graham, and then Mr James Graham, were expressly recognised as the patrons and titulars of the parish; and, in the first of these instances, an important privilege attached to the right of patronage was asserted, exercised, and given effect to. If any thing more were wanting, the negative fact would be conclusive, that neither in 1722 nor in 1743—nor on any of the three successive vacancies in 1765, 1783, and 1796—nor in any of the processes of locality—was any claim to the patronage put forward on the part of the Crown. In such circumstances, a more complete case of positive prescription of such a right can hardly be conceived.

An attempt is made, indeed, to impeach the validity of the acts of presentation, on the ground that, in two of them, those of 1765 and 1783, there was a special personal disqualification in the two Mr Grahams, and that the parties who presented were trustees for them. The defenders say truly, that there is no evidence of the fact on which the objection is founded; and it is not a little doubtful whether it could have been entertained, even though it had been raised at the time.

But what relevancy is there in the statement, in a question of prescription like the present? The question is, whether acts of presentation were, as matter of fact, exercised under the title of Graham of Airth. If any of those acts were liable to any challenge or objection, on personal objection, they were not, in fact, challenged or objected to. The ministers were all inducted into the benefice in virtue of them; all and each of them were far beyond the years of prescription before the date of this action—even if that were necessary to exclude such a challenge now; and the ministers so inducted had successively had full possession of the benefice for at least seventy-seven years. I apprehend that such possession was possession for the patron; that that simple fact establishes possession under the title of patronage; and that it is now altogether incompetent to enquire into such grounds of objection to the particular acts of presentation.

LORD COCKBURN.—The whole case of the pursuer depends upon the fact, that this patronage was anciently feudalized in the hands of the Crown. It was so, he says, by its having formed a portion of the barony of Eccles, which devolved on the Crown at the Reformation; or at least its having been annexed to the Crown, so matter how.

If I could not decide the question before us without knowing the exact truth of this statement, I should require more information than we have even yet obtained; and no wonder, for the defender has expressly declined to go into historical researches, which he thinks he has a plea to exclude. But I desire no further investigation, because I hold all this matter to be superfluous and irrelevant. Its introduction into the discussion has only given an air of difficulty, and perhaps even of mystery, to a cause which, when confined to its proper merits, is exceedingly simple.

The defender holds this patronage under a grant from a private party. The deed does not state, or imply, that the patronage had been acquired from the

No. 29. Crown, or had ever belonged to it. On the contrary, it contains statements and provisions rather of an opposite tendency. All that it sets forth with respect to the disposer's title to dispoise, is, that he is the "undoubted owner" of the patronage. The defender and his predecessors have possessed upon this disposition for above forty years—at least I hold this to be the fact. He has not possessed upon a seisin, but only upon a personal title. A personal title, however, is sufficient for the prescription of a patronage.

Dec. 10, 1844.
Her Majesty's
Advocate v.
Graham.

Now, I do not require to go beyond this single and well-established principle, that possession for forty years, upon an adequate title, no matter what it may happen to be, excludes all discussion of alleged pre-existing flaws.

I am not aware that this principle is even attempted to be questioned in its application to the case of a private party. Suppose that the Crown was not here, but that the pursuer was an individual, to whom, were it not for the defender's prescription, this patronage would belong. I do not understand it to be maintained that this private party could disturb the prescriptive title, by getting into objections which would have been irresistible if stated before the forty years had expired. In the case of all other objections, except that of feudalization, the defender himself does not maintain this. In law and in justice, there can be no stronger objections to a title than that it proceeded from fraud—force—incapacity—or a non domino. These are the greatest flaws that can exist, yet it is admitted, or at least it is certain, that prescription excludes the statement of them all—and, indeed, that this is its very purpose. It seems to be imagined that there is something peculiar in the objection, that the personal title is inconsistent with an ancient feudalization. But I see no peculiarity in this whatever. A personal title being sufficient for the prescription of a patronage, what charm is there in the objection of previous feudalization, that should let it in, as an objection, after forty years? I have no idea that the feudal title, without possession, could be preferred to the personal one with it.

If this be the law between two private parties, I see no ground for any distinction in favour of the Crown. The statute enacts none. On the contrary, it secures parties against trouble after forty years, even from "His Majesty." Even as to the Crown, it excludes every objection except that of forgery. Accordingly, when, in 1630, the Crown availed itself of the statutory permission to interrupt current or past prescriptions, it made its act of interruption include patronages, and all its annexed property—a fact which seems to me perfectly conclusive. For I cannot suppose that the advisers of the Crown would have made it reach property against which prescription could not operate. This proceeding shows what was understood near the time of the statute.

It disposes of all that is said about ancient annexation. In so far as the (assumed) fact of annexation is employed to show that there must necessarily have been a feudalization—let it be assumed that feudalization in the hands of the Crown had, at one time, taken place. What then? The forty years' possession excludes all consideration of that fact. And, besides, there is nothing in the defenders' title to connect him with the Crown; and surely it will not be contended that feudalization by one party can be listened to in opposition to prescription, upon an adequate title, by a different party. This would just be to declare that possession upon a personal title, though it had extended to a thousand years, afforded no security against the objection, that still there had been a prior period at which the right had been feudalized in the hands of some party or other.

No. 29.

If, again, the fact of annexation be used to found the plea that there can be no prescription in the face of a public statute, there are two answers to this. One is, that the case of Forbes (29th November 1827) shows that prescription is conclusive against even the violation of an Act of Parliament. Had it not been for this decision, however, I should think this questionable. The other answer is, that there is no absolute illegality in a disposition by the Crown of its annexed property. There may have been a dissolution. The pursuer challenges the defender to produce one here. But he forgets that he is beyond the forty years. The defender is bound to produce nothing except an adequate title and possession. The prescription operates on the principle, that, if the objection had been stated in due time, every thing would have been found to be right. In the case of Buchanan, (30th November 1826,) the judgment was in substance, that prescription of a patronage could not be escaped from by an undissolved annexation.

Dec. 10, 1844.
Her Majesty's
Advocate v.
Graham.

It has been argued, that the defender's own title shows that his authors understood that it had been feudalized. I see no evidence of this fact. But, at any rate, their understanding would be perfectly immaterial. The title contains some of the apparatus by means of which a feudal entry with the Crown might have been attempted. But, still, an effectual personal disposition was obtained; and the force of this cannot be impaired by any superfluous matter with which it may happen to be connected.

I have only to add, that this very identical question seems to me to have been decided against the pursuer in the case of Stewart in 1810. It is true that it was there discovered, at last, that there was a feudal title. But before this discovery was made, and while it was still a competition between the Crown and a private party, who had prescribed upon what was then supposed to be a personal title, a judgment was pronounced in favour of prescription.

THE COURT accordingly sustained the second plea in law stated for the defenders on the record,* and assoilzied the defenders from the whole conclusions of the libel.

W. H. SANDS, W.S.—DUNDAS and WILSON, W.S.—Agents.

* This plea in law was in these terms :—" Prescription having run in the defenders' favour, upon a formal title *ex facie* good and sufficient, all enquiry into the elder titles is excluded, and it is no longer competent for the pursuer to raise any question with regard to the state of the right in the person of the Earl of Home, the defender's author."

No. 30.

CHRISTOPHER WOOD, Pursuer.—*Inglis*.

Dec. 10, 1844.

ROBERT ANSTRUTHER and JAMES RENTON, Defenders.—*Penney*.

Wood v.

Anstruther.

Expenses—Process—Summons.—Rule adopted by the auditor, in taxing accounts of expenses, given effect to, viz.,—That where the expense of making written copies of the summons for service amounts nearly to the expense of printing it, parties ought to print the summons at once, and that charges for copies, and also for printing, will not both be allowed.

Dec. 10, 1844. SEQUEL of case, ante, Vol. VI. p. 291.

2D DIVISION.

Ld. Cockburn.

T.

In taxing the account of expenses in this case, the auditor had disallowed a charge for a written copy of the summons for service against the defender, Mr Anstruther, as furth of the kingdom, and another copy for service on Mr Renton, amounting to £5. A charge of £6, 3s. had been made, and was allowed, for the expense of printing the summons; and the auditor's ground of disallowing the charge for the written copies was, that the summons ought to have been printed at first.

Inglis, for the pursuer, objected to the auditor's report, and contended that he was not bound to have known that the action was to be defended. Had the action not been defended, it would not have been necessary to print the summons.

Penney answered;—That it was perfectly well known that the action would be defended. The rule generally adopted by the auditor was a very reasonable one. When the expense of making service copies of the summons came only to a few shillings, he allowed it, although the summons was subsequently printed; but where the expense of the copies came, as in the present case, to within a very little of the expense of printing, he disallowed it, holding that the party ought to have printed at once.

THE COURT repelled the objection, with expenses.

THOMSON PAUL, W.S.—ROD and MARTIN, W.S.—Agents.

W. A. WELSH, Advocate and Defender.—*Logan.*

No. 31.

J. D. MILNE (Black's Trustee,) Respondent and Pursuer.—*Cowan—
C. Robertson.*Dec. 12, 1844.
Welsh v.
Milne.

Process—Remit—Record—Production—Bill of Exchange—Foreign.—1. A party who had concurred in a judicial remit to a barrister at New York, with regard to a point in the law of South Carolina—held not entitled, upon an unfavourable opinion being returned, to have a new remit made to lawyers in South Carolina, on the allegation that the practice of that state differed from that stated in the opinion of the New York lawyer. 2. Where a party had, on a closed record, founded upon an instrument of protest of a bill as being a valid protest for non-acceptance and non-payment, and it had been found to be a protest for non-payment merely—Held that he was not entitled to have the cause delayed, in order that he might produce a protest for non-acceptance.

THIS was an action by Mr J. D. Milne, trustee on the sequestrated estate of James Black, against Mr W. A. Welsh, for payment of the contents of a bill of exchange, which had been drawn upon a party residing in Charleston, South Carolina. Acceptance of this bill having been refused when presented at Charleston for that purpose, the bill was noted for non-acceptance, but no protest was drawn out. It was subsequently, when due, protested for non-payment. Among other defences to the action, Welsh maintained that the bill had not been duly negotiated, and to preserve recourse against him as payee and first indorser, it was necessary that there should have been a protest for non-acceptance. On the other hand, Milne maintained that there was due negotiation of the bill, and that the protest which had been taken was sufficient. The record having been closed, a joint case was prepared for the parties for opinion of American counsel, on the points—1. Whether, in the circumstances, a protest for non-acceptance was necessary to preserve recourse at the instance of the holder of the bill against the payee and first indorser; and 2. Whether, according to the law and practice of South Carolina, the instrument of protest which had been taken was one for non-acceptance and non-payment, or for non-payment merely. This joint case was approved of by interlocutor of the Lord Ordinary, which authorized it to be transmitted to America, and “laid before an eminent barrister at New York for opinion.” The case was accordingly transmitted to Mr Joseph Blunt, a solicitor in New York, and by him laid before Mr John Duer, an eminent counsellor there. An opinion was returned to the effect that, by the law of the United States, with exception of the state of Pennsylvania, a protest for non-acceptance was necessary in order to preserve recourse, and that the instrument of protest in question was not, by the law of South Carolina, a valid protest for non-acceptance and non-payment, but for non-payment merely.

Dec. 12, 1844.
2d DIVISION.
Lord Wood
R.

No. 31.

Dec. 13, 1844.
Gilchrist v.
Gilchrist.

Milne then moved the Lord Ordinary for a new remit to lawyers of South Carolina, contending that the question must be regulated by the law of that state, and that he had received information from the notary at Charleston, that the law there was different from that stated by the lawyers at New York, as might be instructed by the evidence of lawyers and bankers in South Carolina. He further contended, that in the event of the opinion being held correctly to state the law of America, he should be allowed time to obtain from the notary an extended protest, in terms of his noting for non-acceptance, and that the same should be allowed to be produced in process.

The Lord Ordinary refused the motion, and repelled the objection to the mode in which the opinion had been taken.

Milne reclaimed.

The Court were of opinion that, as Milne had joined in having the opinion of lawyers at New York taken, and had acquiesced in the Lord Ordinary's interlocutor remitting it to them, and as there was no irregularity or mistake in the mode of taking the opinion, and it showed that they had examined into the law of South Carolina, he was not entitled to have a new remit; and further, that as the record was closed, as Milne had perilled his case on the protest produced, as being a sufficient protest for non-acceptance, he was not entitled, on its being found not to be so, to ask delay till he should produce a proper protest.

THE COURT accordingly adhered.

JAMES STUART, S.S.C.—GREEN & MORTON, W.S.—Agents.

No. 32.

MRS ANN C. GILCHRIST OF NORRIS, and HUSBAND, Pursuers.—

Rutherford—Henderson.

MRS JANET GILCHRIST OF MARSHALL, and MRS MARGARET GILCHRIST OF LAING, Defenders.—*Ld.-Adv. M'Neill—More.*

Process—Jury Trial—Decree in Absence—Agent and Client—Attorney's Certificate.—Where a verdict at a Jury trial proceeded in absence of one of the parties, after due notice of trial to the agents who had acted for that party, and after a motion had been made by one of them to delay the trial, and the verdict was subsequently applied, and decree extracted;—Held, that this was not, in the circumstances, to be considered as a decree in absence, and that it was incompetent to reduce it on the allegations—1. That the pursuers, from poverty, been unable to make appearance at the trial; and, 2. That notice of trial had been given to a properly qualified agent on the pursuers' behalf or to themselves personally, the party who conducted the case for them, and whom notice had been given, not having taken out the attorney's certificate.

Dec. 13, 1844.

To DIVERSION.
Lord Cuning-
hame.

R.

MRS ANN Gilchrist of Norris, daughter, and Robertson Gilchrist brother, of the late James Gilchrist, both expedite services to him as he

Each party brought a process of reduction of the other's service, in which the main question at issue was, whether Mrs Norris was a legitimate daughter of James Gilchrist. These actions were conjoined, and a record made up and closed. Upon Robertson Gilchrist's death, his sisters and representatives, Mrs Janet Gilchrist or Marshall, and Mrs Margaret Gilchrist or Laing, were sisted as parties to the conjoined process.

No. 82.

Dec. 13, 1844.
Gilchrist v.
Gilchrist.

In the earlier stages of the cause a Mr Johnson acted as agent for Mrs Norris. Mr Johnson was not at that time a certified agent of Court, and had not taken out the attorney's certificate for the two previous years, 1839 and 1840. Mrs Norris had, some time in June 1840, obtained Mr Alexander Simson, solicitor in Leith, to act as her agent, and he continued to do so until the issue was adjusted. In the February or March preceding the trial, Mr Simson not having been provided with the requisite funds, ceased to act as agent in the cause. On the 6th of March the defenders gave notice of trial, which was served both upon Mr Simson and Mr Johnson. After this, Mr Johnson appeared to have resumed his agency, as, upon the 17th of March, he made an application to the Lord President, at chambers, to have the trial postponed, on the ground that a material witness for the pursuer would be unable, or unwilling, to come from England, as to which it was said enquiry had been made. Counsel attended at the motion. The application was refused, on the ground that the allegation was not true.

An issue having been adjusted, Mrs Norris was appointed to stand as pursuer, and the case was set down for trial upon 23d March 1841. No appearance was made for Mrs Norris at the trial, and the following verdict was returned by the jury:—"Compeared the said defenders by their counsel and agents, but no appearance was made for the pursuers, though it was made to appear to the Court, that due notice of trial had been given by the agents of the defenders to the agents of the pursuers; and a jury having been impaneled and sworn to try the said issue between the parties, they say upon their oaths, that in respect of the matters proven before them, they find for the defenders."

This verdict was applied in the usual way, by an interlocutor of 28th May annulling the defenders from the conclusions of the action at the instance of Mrs Norris, and reducing, decerning, and declaring, in terms of the counter action raised by Robertson Gilchrist. The expenses were also taxed and decerned for, of date 10th June, and the decree was extracted. Of the date 28th May, Mr Johnson appeared again to have acted as agent for the pursuers in an application presented by them for the benefit of the poor's-roll.

In August 1843, Mrs Norris brought a reduction of the verdict, and decree following upon it. The main ground of reduction was, that the verdict had proceeded in absence, the pursuers' procurator having, shortly before the trial, thrown up the case, in consequence of his not having

No. 32. been provided with funds, and the pursuers having been from poverty unable to make any appearance at the trial. And, further, that no notice of trial had been served upon any properly qualified agent for the pursuers in the cause, nor upon the pursuers themselves personally.

Dec. 13, 1844.
Gilchrist v.
Gilchrist.

The Lord Ordinary, considering the defences stated to the action to be preliminary, before giving any order to satisfy the production, allowed the defenders to give in a condescendence of their objections to the pursuers' title, and to the relevancy of the summons as laid.

The defenders pleaded ;—

1. It is incompetent for this Court to review upon the merits any decrees which have been pronounced in foro contradictorio upon any grounds which were competent and omitted, or proponed and repelled. And by the statute 1672, it is also enacted, that “where there is once compareance for any party, and defences proponed, the decree shall be holden as done in foro, albeit the advocata thereafter pass from his compareance.”¹

2. In the circumstances of the case, it is now incompetent, on such grounds as these libelled, to review on the merits the final judgments and decrees in question, or to enter into any discussion of the merits, or to appoint the defenders to satisfy the production as now craved.

3. As it is provided by the statute introducing Jury trial, that if, after a verdict shall be returned by a jury, a new trial shall not be applied for, or shall be refused, “the verdict shall be final and conclusive as to the fact or facts found by the jury, and shall be so taken and considered by the Court of Session in pronouncing their judgment, and shall not be liable to be questioned anywhere,”² it is utterly incompetent, in the present or in any other form, to bring under review the verdict of the jury above mentioned, or to attempt to impeach or set it aside; and it is equally incompetent to entertain any of the other reasons of reduction.

4. Further, the pursuers ought not to have been permitted to carry on even the present preliminary litigation, till they had previously paid the expenses decerned for against them in the former conjoined actions, which they have never yet done.³

The pursuers pleaded ;—

1. The verdict and judgment having proceeded in absence, *et sine causa cognita*, and no evidence having yet been led on the only question in the cause, namely, the legitimacy of the pursuer Mrs Norris, that question has not truly become *res judicata*, and falls still to be settled according to evidence.

2. No valid and regular notice of the trial was given to the pursuers,

¹ Act 1672, c. 16.

² 55 Geo. III., c. 42, sect. 8.

³ *Authorities for Defenders*.—Lumsden v. the Australian Company, 18th December 1834; Smith v. Hart, 16th January 1827; Clark v. Mather, 3d January 1829; Tough v. Smith, 5th June 1832.

and the verdict in consequence, and in other respects, was irregularly No. 32:
obtained.

3. The pursuers, in the circumstances in which they were placed, being in poor condition, and ignorant of the insufficient steps which had been taken to attend to their interests, could not prevent the said verdict and judgment in absence being taken out against them, and are not now excluded from proving the legitimacy of the pursuer, Mrs Norris.¹

The Lord Ordinary reported the cause upon cases.²

Dec. 13, 1844.
Gilchrist v.
Gilchrist.

¹ *Authorities for Pursuers.*—Millie, 27th November 1801, (M. 12176;) Leith, 7th June 1822, (1 Sh. 468;) Clerk, 17th November 1825, (4 S. & D. 182;) Petrie v. Hardie, November 1817, unreported; Fraser, 26th September 1818; Forbes, 28th September 1818; Wilson, 5th March 1823, Lord Chief Commissioner.

² * *NORR.*—The present case is taken to report, as it involves a question of the greatest importance in practice; while this mode of obtaining the opinion of the Court is probably the most easy for the pursuers, who represent themselves in extreme poverty.

* The object of the action, as explained fully on record, is to set aside the verdict of a jury returned in March 1841, and final and extracted decrees of the Court pronounced thereon in May and June 1841, being upwards of two years previous to the commencement of this new process.

* The question is, If the pursuers have stated any relevant grounds for reponing them against the verdict and decrees libelled on?

* The grounds of reduction insisted on by the pursuers will be found to resolve into these pleas—that the verdict and decrees under reduction were in absence; that this arose from the great poverty of the pursuers in being unable to advance the necessary sums to their agent to conduct the trial; and that no notice of the trial was given to a qualified agent for their behoof.

* The last of these grounds of challenge, the Lord Ordinary conceives to be altogether unfounded in point of fact. The pursuers had an agent who was known and recognized in the Court as an established practitioner, who held the attorney's license recently before. He acted for them first in the early stages of the cause; and afterwards he received the notice of trial and acted on it, having endeavoured, on the part of the pursuers, to get the trial put off, from the alleged absence and refusal of a material witness in England to attend. In such a case it would be a very hard and unreasonable doctrine indeed to hold, that any of the notices required by law to be given to the opposite agent in a suit, could be treated as void, because it turned out that the agent, while ostensibly the legal manager of the cause, and unobjected to by any of the judicial and public authorities, happened to have no license. No precedent has been found to afford any sanction to such a plea.

* The question at issue then comes to this, Whether the verdict of a jury for a defender, in absence of the pursuer, and a decree of absolver following thereon, can be opened up, on the ground that these proceedings passed by default of the pursuer, in consequence of his poverty and inability to proceed with the action?

* It humbly appears to the Lord Ordinary, that this is a question attended with great difficulty, and he is hardly prepared to form any decided opinion on it, without hearing the deliberation of the Court.

* On the one hand, the enactment of the Jury Court Act of 1815, 55 Geo. III., cap. 42, § 8, is most express, declaring 'that the verdict shall be final and conclusive as to the fact or facts found by the jury, and shall be so taken and considered by the Court of Session in pronouncing their judgment, and shall not be liable to be questioned any where;' while, on the other hand, it is strongly repugnant at least to natural justice and equity, that any point should be held as res

No. 32.

LORD MEDWYN was of opinion that the verdict could not be set aside.

LORD MONCREIFF.—I am compelled to be of the same opinion. This is really

Dec. 13, 1844.
 Gilchrist v.
 Gilchrist.

judicata, which has not truly been adjudicated by the Court on a fair hearing of both parties.

“ At present, the Lord Ordinary can only briefly indicate the views which have occurred to him on the first consideration of this important question of form.

“ 1. In considering the present question, the Court will probably not be disposed to lay it down as an invariable and imperative rule, that they are precluded in all cases, by the terms of the Act of 55 Geo. III. before quoted, from giving a party redress when a verdict has been obtained from a jury by deception or fraudulent practice, or by any unexpected and supervening legal incapacity and inability of the party prejudiced to attend to his own interest at the time of the trial. The statute does not supersede or abrogate the equitable power of the Court at common law to give redress and protection to every party injured by proceedings which it is essential to justice to correct. But,

“ 2. The question here is, whether the averments of the pursuers present any specialities so peculiar and so clamant as to entitle the Court at common law to reduce a verdict and decree of absolvitor following on it, after the interval which has elapsed in the present instance? On this point, the Lord Ordinary entertains great doubt. There is no tangible charge of impropriety, or of wrong practice of any sort, imputed to the defenders; but the pursuer's action is founded on an allegation that their agent threw up their case on the eve of trial from their poverty and inability to furnish him with funds to carry on the trial, and that fact the pursuers offer to prove. But it is apprehended that such an enquiry would be alike irrelevant and vexatious. If parties are injured by any sudden or unjustifiable abandonment of their case by their agent on the eve of a trial, they may have a well-founded claim of damage against the agent; but the judgment in favour of the other party cannot be annulled after a long interval by the misconduct of their opponents' agent.

“ 3. Although the proceedings under reduction cannot properly be viewed as judgments in absence, but as decrees that passed by default, there appears to be no case on record in which a decree pronounced after liti-contestation, and after extract, has been opened up, when no charge of personal exception, or fraudulent practice, could be substantiated against the party or his agent who took the decree. On the contrary, the law of Scotland has been always peculiarly jealous of allowing parties to renew litigation who have once entered appearance and failed to support their action when the day of hearing arrived, and allowed a decree to be extracted, and to remain so for years. The cases of Forbes, 12th February 1830, and the later case of Lumsdaine, 18th December 1834, are sufficient illustrations of the rule.

“ 4. If the pursuers could be reponed on any ground against the proceedings which they now seek to reduce, it could only be on payment of previous expenses, a condition with which the pursuers, according to their representation of their pecuniary circumstances, probably could not comply. The allegation of poverty, it is thought, affords no relevant ground for absolving a party from the legal consequences attaching to him from gross mismanagement and neglect in the conduct of a suit. As illustrative of that rule, reference may be made to the case of Pratt against Lord Dundas, (8 Shaw, 120,) where the agent for a party on the poor's roll omitted to get a reclaiming petition marked by the clerk, and it was found by the Court that the parties could not be reponed without payment of previous costs.

“ On the same point also, the late case of Walker and Wedderburn may be usefully cited. In that instance a bankrupt, who had assigned his reversion in a sequestrated estate, brought a complaint against the trustee. The complainer had assigned his interest to a third party, and the respondent objected to the complaint that it was truly a process for the benefit of a solvent assignee sued in the name

not a decree in absence. I have no notion that this party can have this verdict set aside, by discovering afterwards that the agent who acted for her had no license.

LORD COCKBURN.—I am of the same opinion.

LORD JUSTICE-CLERK.—I am of the same opinion. I am not prepared to say that I go upon the clause in the Jury Court Act of 1815, or that I hold that an effect is to be given to the verdict, different from what would be given to any interlocutor in the cause. But I look upon it as a good verdict, which must stand, unless some sufficient cause is shown for reducing it, and the judgment of the Court following upon it. I give no opinion as to whether the question of this party's status is finally determined by the verdict or not. The only question before us, is the competency of reducing this extracted decree of Court. The reasons of reduction seem all to fail in point of fact. At all events, though this pursuer, living in Edinburgh, might not have been able to get an agent to appear for her at the trial, she certainly was not entitled after that to leave matters alone, and allow the verdict to be applied, and decree extracted. It certainly is not a decree in absence, for it proceeds on a verdict, and upon a closed record. Neither is the verdict one in absence, in the legal sense of the terms. The party had due notice. She was preparing for trial. She had an agent—made an application to delay the trial—but when that was refused, chose not to appear. There have been some peculiar cases, in which the plea of poverty has been sustained, but in circumstances very different from the present, and we must not permit it to be made a plea for entering into interminable litigation.

No. 32.

Dec. 13, 1844.
Gibbs v.
Gibbs.

of a bankrupt, and therefore it was insisted that the real party interested should be cited. This the Court found; whereupon the bankrupt got a retrocession, and proposed to carry on the suit in his own name; but the Court here in the first instance, and afterwards the court of appeal, found that the bankrupt before being set into such a plea must pay the whole previous costs. See 1 D. & B. Reports, p. 682; and see Bell's Reports in House of Lords, 23d March 1843.

"5. While the preceding considerations weigh strongly with the Lord Ordinary against the competency of the pursuers reducing the decree here, he must confess that he entertains some doubt of the competency and regularity of the whole proceedings before the jury, which, if not satisfactorily obviated, would be fatal to the decree. By the Act of Sederunt, 29th November 1825, § 47, it is provided, 'that if it shall be made to appear to the Jury-court, that a party has abandoned his suit, or if the pursuers, or the party appointed to stand as pursuer before the Jury-court, shall not proceed to trial within twelve months after issues have been finally prepared; or if, after having given or received notice of trial, the pursuer does not appear at the trial, and proceed with his evidence, unless reasonable cause for such delay, or for his failing to appear, is shown to the satisfaction of the Jury-court, it shall be competent to apply to the Jury-court to remit the case back to the Court from whence it came, and that such Court shall hold the party as confessed, and proceed therein as in other cases in which the parties are held as confessed.' This regulation seems to have been framed to save absent parties from the severe enactment of the statute of 1815, before quoted, whereby it is declared that verdicts after being returned and final, shall not be questioned any where; with which view it is provided by the Act of Sederunt, that when a party does not appear at the commencement of a trial, it shall be competent to the Court (instead of impanelling a jury for verdict) to remit the case to the Court of Session to hold the defaulter as confessed. If that course was imperative, then the taking of a verdict was erroneous, and the whole subsequent proceedings would be liable to challenge. As this ground, however, is not taken by the pursuers, it probably admits of a satisfactory answer."

No. 32. I may notice, in reference to observations of the Lord Ordinary, in the close of his note, upon the 47th section of the Act of Sederunt, 29th November 1825, that that difficulty is out of the case. No such blunder was committed as following an incompetent course, the Act of Sederunt of 1825 having been then repealed, and the procedure in question was necessarily regulated by the existing Act of 16th February 1841, section 46, which, by a subsequent short Act of Sederunt, took effect before this trial; and the motion for delay was made under the new Act of Sederunt.

Dec. 14, 1844.
Magistrates of
Campbeltown
v. Galbreath.

THE COURT accordingly assoilized the defenders from the conclusions of the action.

JAMES BELL, S.S.C.—WILLIAM YOUNG, W.S.—Agents.

No. 33. **MAGISTRATES OF CAMPBELTOWN, Pursuers.**—*Rutherford*—G. G. Bell. D. S. GALBREATH, Defender.—*Ld.-Adv. M^cNeill*—*Sol.-Gen. Anderson*—*Macfarlane*.

Harbour—Burgh—Clause.—In construing a grant of free port to a royal burgh, in these terms,—“Unacum libero portu marino in lacu de Campbeltowne nunc et in omni tempore futuro nuncupando Port-Campbell vel in ulla alia parte seu partibus infra limites dicti lacus prout illis magis conveniens videbitur;”—Held that this was a grant of free seaport and harbour over the whole space of water called the Loch of Campbeltown.

Dec. 14, 1844. BY charter of erection from the Crown of the royal burgh of Campbeltown, there was granted to the Magistrates a right of free port in these terms:—“Unacum libero portu marino in lacu de Campbeltowne nunc et in omni tempore futuro nuncupando Port Campbell vel in ulla alia parte seu partibus infra limites dicti lacus prout illis magis conveniens videbitur Et similiter cum consensu prædict. dedimus et disposuimus præscript preposito ballivis concilio et communitati dicti burghi eorumque successoribus integras minutas custumas dict. hepdomodarium fororum et nundinarum cum anchoragij navium telonij lie decksilver navium stationum lie plankage omnibusque alijs divorijs et emolumentis prædicti portus marini in omne tempus futurum in usum proprium dicti burghi applicandi cum potestate illis eadem imponendi levandi et exigendi similiter et tam libere in integris respectibus sicuti quodvis aliud burgum regale in dicto nostro regno in usu est prestare.” A quay or harbour had accordingly been erected by the Magistrates at Campbeltown.

2d DIVISION.
Lord Justice-
Clerk.
Jury Cause.

The Magistrates of Campbeltown, in July 1840, raised an action against (inter alios) Mr D. S. Galbreath, proprietor of the lands of Ballygreggan and Dalintober, situated at the head of Campbeltown loch, and within a short distance of the quay of the burgh, and upon which the quay of Dalintober had been built, to have it found and declared, (1.)

That they were entitled, under their royal grant, and certain minutes and enactments of their predecessors, and tables of dues therein contained, and by the possession and use of payment following upon the same, to exact the dues set forth in the tables upon all vessels, goods, or other property mentioned therein, within the bounds and liberties of the burgh, or of the said seaport, or harbour, or shores thereof. And (2.) That the defenders had no right to load or unload goods belonging to themselves, or for their own use, upon any of the shores of the said seaport or harbour, without consent of the pursuers, and payment of the dues exigible by them; or to land or receive the goods of others thereon except under the pursuer's grant of free port, and subject to the payments and conditions of their rights of harbour, &c.

No. 33.

Dec. 14, 1844.
Magistrates of
Campbeltown
v. Galbreath.

The following issues were fixed to try the case:—

“It being admitted that a royal charter was granted in the year 1700, conferring certain rights, powers, and privileges, upon the Magistrates and burgh of Campbeltown, and, in particular, conferring on said Magistrates and burgh a right of harbour, as expressed in said charter:

“It being also admitted that the Magistrates and Council of the said burgh did, at different times, and more particularly in November 1757, September 1795, and September 1799, pass certain acts and minutes of council, containing certain schedules or tables of dues, being Nos. 6, 7, and 8 of process:

And

“It being further admitted that the defender, David Stewart Galbreath, is proprietor of the lands of Ballygreggan and Dalintober and others, on which the quay of Dalintober has been built:—

“1. Whether the said quay of Dalintober is situated within the limits or boundary of the said grant of harbour in favour of the Magistrates and Burgh of Campbeltown?

“2. Whether the Magistrates and Town-Council of Campbeltown, by themselves or their tacksmen, have, under the said charter, and in virtue of the said acts of council, levied the various duties, taxes, and customs set forth in the said schedules, or any of them, upon the goods enumerated in the said schedules, or some of them, shipped or landed at the said quay of Dalintober, and that for upwards of forty years prior to January 1840?

“3. Whether the said Magistrates and Town-Council of Campbeltown, by themselves or their tacksmen, have, under the said charter, and in virtue of the said acts of Council, levied the various duties, taxes, and customs set forth in the said schedules, or any of them, upon the goods enumerated in the said schedules, or some of them, shipped or landed at the quay of Campbeltown, and that for upwards of forty years prior to January 1840?”

No. 33.
Dec. 14, 1844.
Magistrates of
Campbeltown
v. Galbreath.

At the trial, it was contended by the counsel for the defender ;—That, according to the sound construction of the grant of harbour, it was not a grant of free port and harbour over the whole bounds of the Loch of Campbeltown, as contended for by the pursuers ; that, on the contrary, it was a grant of free port and harbour somewhere within the Loch of Campbeltown, to be selected by the grantees, and did not give the rights and privileges of a free port and harbour, and of levying shore and quayage dues at any place or station other than that which, in acting on the grant, the grantees might fix on for their port or harbour.

In the course of his charge, the Lord Justice-Clerk stated to the jury, —“ In reference to the first issue, that, according to the construction of the charter of erection, the grant is a grant of free seaport and harbour over the whole space of water called the Loch of Campbeltown, whatever that space may be shown to be. But that he did not put the case to the jury as one depending on the construction of the grant alone, without reference to the evidence which may be adduced as to the extent of what was known and intended to be described as the Loch of Campbeltown in the grant ; that the question was put in an issue for a jury, to be decided on the evidence that may be adduced, with the aid of such directions as the Judge gives as to the charter, and that the real question comes to be on the evidence, what is to be held to be the Loch of Campbeltown, taking into view the possession which has followed upon the grant.”

To this direction the defender excepted.

The verdict of the jury was—“ Find for the pursuers on the third issue against the defender, D. S. Galbreath : Find that the quay of Dalintober is situated within the limits or boundary of the grant of harbour in favour of the Magistrates and burgh of Campbeltown : Find that the pursuers, or their tacksmen, have from time to time levied at the quay of Dalintober a duty of one penny halfpenny per boll, or fourpence per ton, on cargoes of potatoes when not belonging to freemen, and also a duty of fourpence per ton on bark, and this in assertion of the right to the dues contained in the table of 1799, since the date of the said table.”

In support of the bill of exceptions, the defender pleaded ;—

The charge of the presiding Judge was erroneous, both as to the construction of the charter, and the way in which the jury were directed to apply the evidence. The charter did not confer a right of free port over the whole Loch of Campbeltown, but gave merely a power of selecting a place most convenient within the loch, where the harbour was to be, to which, when the selection was once made, the power of the Magistrates to levy dues was to be limited. Having built their quay at Campbeltown, they had no right to levy at Dalintober. Had it been intended that a district was to be assigned to the harbour, or that the Magistrates

were to have power to levy over the whole bounds of the loch, other and well known forms of expression, common in similar grants, would have been used.¹

No. 33.
Dec. 14, 1844.
Magistrates of
Campbeltown
v. Galbreath.

As put by the presiding Judge, the question which went to the jury was, what, according to the evidence, were the natural boundaries of the loch of Campbeltown named in the grant. The grant to the Magistrates was one, not of the whole loch, but merely of a seaport somewhere in the loch. It was a right which, while it could not go beyond the loch, might be something materially less. If this grant, so limited, were capable of being extended by possession, the question which ought to have been put to the jury was, what that possession had been? Instead of the question in the charge, the question they ought to have been asked was, what were the Magistrates' rights of free port under the grant, as explained by possession—did they extend over the whole, or merely a part of the loch?²

LORD MEDWYN.—The object of the action in which the trial took place, in which the direction excepted to was granted, was to establish that the Magistrates of Campbeltown were entitled, under their grant of harbour, to levy shore-dues at Dalintober, and other places within the Loch of Campbeltown. Whether, in short, under the terms and meaning of their grant, the quay of Dalintober is situated within the limits of the grant of harbour in favour of the Magistrates, was therefore an essential part of the pursuers' case, and is embraced in the first issue.

Now, the defender alleged that the grant is limited, and only gives right to a harbour somewhere within the Loch of Campbeltown, at a single spot to be selected by them, and did not give a right of harbour any where else within the bounds of the loch; and therefore, as they had selected the burgh of Campbeltown, and built two quays there, they could have no right to levy dues at the quay of Dalintober. The Judge held that this was not necessarily the construction to be put on the grant; and in this view the charge was right.

I think that, under this grant, the Magistrates were not restricted to a harbour at a single spot within the Loch of Campbeltown, but might have a right of free port over any part and every part of the loch, at Port-Campbell, "*vel in ulla sua parte seu partibus*," in the plural, plainly implying more places than one. This is, I think, the legal construction of such a grant—nay, I might say the necessary construction—that it must have a considerable locality within which its privileges are to be exercised, so that these may not be evaded by others con-

¹ *Magistrates of Edinburgh v. Scott*, June 10, 1836, (14 S. & D. 922;) *Agnew v. Magistrates of Stranraer*, Nov. 27, 1822, (2 S. p. 42.)

² *Authorities for Defender.*—Treatise of Sir Mathew Hale in Hargrave's Tracts, p. 59; *Stair*, 2, 1, 5; *Town of Dumbarton*, Feb. 6, 1666, (M. p. 10909;) *Maclean v. Davidson*, Feb. 27, 1841, (ante, Vol. III. p. 646.)

Authorities for Pursuers.—*Erek.* 2, 6, 17; *Bell's Princ.* 654; *Sir Mathew Hale*, Hargrave's Tracts, p. 46; *Magistrates of Wigton*, Jan. 15, 1834, (12 S. & D. 289.)

No. 38. striving to escape the use of the piers or quays expressly erected for the exercise of the right.

Dec. 14, 1844.
Magistrates of
Campbeltown
v. Galbreath.

But a grant of this kind being for the use of the public, and to be enjoyed by the public upon payment of dues leviable from them, if there be any ambiguity in its terms, or doubt about its extent, can best be explained by possession of the grantees, and acquiescence on the part of the public; therefore, the Judge informed the jury that he did not put the case to the jury as depending on his construction of the grant alone, without reference to the evidence as to the extent of what was known and intended to be described as the Loch of Campbeltown in the grant. That such grants may be construed by possession is unquestionable, and is well illustrated in the case of Dumbarton; and, I may further notice, a similar grant as to customs in the Magistrates of Wigton, 15th January 1834, as to explanation of an ancient grant to a burgh, by the usage under it, which gave the right to levy customs far beyond the territory of the burgh. I think the next question comes to be, if the evidence supported the construction that the harbour was over the whole of the Loch of Campbeltown, what is to be held to be the Loch of Campbeltown. Nor does this appear very different, in effect at least, from what was contended for by the Lord Advocate, that it should have been thus, What was the space of water included within the grant? This does not seem to me to be the exception taken at the trial, and narrated in the bill. But be it that there is no objection on that ground. The grant was first construed to mean, that it extended over the whole space of the Loch of Campbeltown, and the jury were instructed so to hold, more especially if supported by the evidence, and thus the space of water included within the grant was the whole loch; and, of course, to ascertain what is to be held the Loch of Campbeltown will ascertain the space of water included within the grant. I think this a right mode for arriving at the meaning and extent of the grant, and that it correctly enabled the jury to dispose of the first issue, if the quay of Dalintober is situated within the limits of the grant of harbour in favour of the Magistrates.

I am for disallowing the exception.

LORD MONCREIFF was of the same opinion.

LORD COCKBURN.—I am of opinion that the bill ought to be disallowed.

1. As at present advised, I think that, under the charter, it is competent for the pursuers to erect harbours wherever they please, upon their own ground, within the lake. They are not restricted to a single port, with the creation of which their powers are to be exhausted; but they may erect them "in ulla alia parte seu partibus." But though I indicate this to be my opinion because this point has been argued, I reserve myself if it should ever hereafter come into question; because I do not conceive that a decision upon it is necessary at present.

2. Because, assuming the pursuers to be restricted to the single harbour of Campbeltown, they hold this harbour, under the grant, with a defined district attached to it. The description of a limit within which such grants—whether of free port, of ferry, or of any thing of the kind—are to be exercised, is always given, and indeed is indispensable; because, without protection from intrusion, the grant would be useless. Here, the limit is the lake of Campbeltown. It may be doubtful what this is; but, the lake being ascertained, the pursuers' right under the charter covers it.

No. 33.

Dec. 14, 1844.
Magistrates of
Campbeltown
v. Galbreath.

Now, if this be so, the charge on the only point on which it has been excepted to seems to me to be perfectly correct. The charter, as now to be considered, might very possibly have been affected by the usage of levying; and therefore it is very possible that some direction to the jury may have been required on this matter. But there is no exception upon any thing said, or not said, upon this subject. What the defender maintained, in reference to the point meant to be excepted to, as set forth in the bill, was, that the grant "was not a grant of free port over the whole bounds of the Loch of Campbeltown," but was only "a grant of free port and harbour somewhere" (plainly meaning at one place) "to be selected by the grantees, and did not give the rights and privileges of a free port and harbour, and of levying dues at any place or station other than the single one thus selected. The charge upon this is, 1st, that the defence is wrong in his construction, in which I agree with the Judge who tried; but this was not sufficient of itself to enable the jury to decide; because, still, there were two things by which the operation of the charter was liable to be affected, viz. the evidence as to what should be held to be the loch, and as to the possession (i. e. the practice of levying) by which it has been followed. I think this a distinct and correct direction on the only point of law now raised. When the defender represents it as a charge instructing the jury, that there was otherwise nothing before them except the mere fact of the boundaries of the loch, he either mistakes the plain meaning of the charge, or wishes to introduce matter not properly excepted to.

Lord Justice-CLERK.—Two questions have been here raised. Of these the first is, what is the construction to be put upon the grant? I conceive that a grant of free port has no necessary connexion with the erection of a quay or harbour. I do not consider a grant of free port merely as a power to erect a particular quay, but as a right of free trade, and a power, within certain limits, to levy anchorage and other dues allowed by the grant. I do not understand that it prevents other parties from erecting quays upon their own ground, or from landing goods within the bounds of the grant, but only they must pay dues leviable under the grant, in terms of the judgment in the case of Dalintober. If this be the meaning of a grant of free port, what is the only question arising under this charter? The issue is, Whether the quay of Dalintober is situated within the limits of the grant of harbour in favour of the Magistrates? For the charter had been explained to the jury, the only question which arose for their consideration was, what was meant to be given by that grant—what was the Loch of Campbeltown, as known and meant in the grant? After the charter had been read to them, and they had been told that it was a good title, under which the Magistrates could claim the whole loch, the next point was, what was the loch in the grant? It might not have been the Loch of Campbeltown, as actually so known. It might have been larger, or it might have been less extensive. Possession was of importance for ascertaining what was meant to be the loch referred to in the grant, and the jury were accordingly directed to look at the evidence of possession. They were told to consider the possession which had taken place on the grant. In reality, the second point made by the Lord Advocate was not raise any different question. This direction was given solely on the issue, for it was given for the purpose of enabling the jury to ascertain whether Dalintober was within the grant of harbour.

I have only to add, that this discussion shows the importance of disposing of

No. 33. questions of law before the case goes to trial. The question raised under this bill is one which ought to have been settled before the trial.

Dec. 14, 1844.
Grant v.
Innes.

THE COURT accordingly disallowed the exception.

FERRIERS and DUFF, W.S.—LOCKHART, HUNTER, and WHITEHEAD, W.S.—Agents.

No. 34. CAPTAIN ALEXANDER GRANT, Petitioner.—*Lord-Adv. M^cNeill—Cook.*
COSMO INNES and MRS ISABELLA ROSE or INNES, Respondents.—
Rutherford—Neaves.

Minor—Curator.—Petition to the Court to have a minor, who had been placed by her deceased father under the care of a maternal aunt and her husband, appointed to reside where she would have an opportunity of making an unbiased choice of curators—refused, on the ground that two summonses of choosing curators were in dependence, which were the proper processes in which to make the application.

Dec. 14, 1844. IN 1836, Miss Isabella Grant, then a child of four years old, was sent home from India by her father, Mr Patrick Grant, and placed by him under the care of her maternal aunt, Mrs Innes, wife of Mr Cosmo Innes, advocate. Miss Grant's mother had died shortly before. Mr Patrick Grant died in 1842. Upon this Mr Cosmo Innes, at the suggestion of Mr Grant's agent in India, and in compliance with the wish of his widow, (Mr Grant having married a second time,) obtained himself appointed factor loco tutoris to Miss Grant. From the time she came from India, Miss Grant remained under the care of Mr and Mrs Innes.

2D DIVISION.
R.

In 1844, in consequence of some proceedings taken by Captain Alexander Grant, a brother of Patrick Grant, who had then returned from India, a summons of choosing of curators was raised in name of Miss Grant by Mr Innes, she being then twelve years of age. A similar summons was also subsequently raised in her name by Captain Grant.

In these circumstances Captain Grant presented a petition against Mr and Mrs Innes, praying the Court to appoint a person with whom Miss Grant might reside till a day fixed by the Court, so as "to afford her a reasonable opportunity of deliberately, and of her free-will, making a choice of curators."¹

LORD JUSTICE-CLERK.—Before the petition was presented, two summonses of choosing curators had been brought into Court, at the instance of each of the parties. If there is any relevant ground for granting the objects of this application,

¹ *Authority for Petitioner.*—Bargany v. Hamilton, July 14, 1702, (M. 16319.)

the remedy will be granted in these processes. It is in these processes that the application should be made. This is quite an irregular and uncalled for proceeding. It is not here alleged, as has been in some cases, that the residence of the minor is an improper one. No. 34.
Dec. 18, 1844.
Sloan.

LORD MEDWYN.—I am of the same opinion. This is not the proper process for granting the prayer of the petition, for removing this girl from where she was placed by her father. In the processes for choosing curators, the subject of this application will, and ought to be considered.

LORD MONCREIFF.—I am clearly of the same opinion. The petition is uncalled for by any circumstances stated in it. It was said by the Lord Advocate, that there was a disposition to withdraw her from her father's relations. I cannot see the slightest ground for this. But besides, the summonses for choosing curators are already in Court. The only prayer of the petition is, that she should be put in a situation where she may make an unbiassed choice. I cannot see that the house of her maternal aunt, where she was placed by her father, is an unsuitable residence for this purpose.

LORD COCKBURN.—The fact of the summonses being raised is sufficient for me. But were I asked to give an opinion further, I should say that this application is not only groundless, but perfectly extravagant.

THE COURT accordingly refused the petition.

JOHN HUNTER, W.S.—INNES and ROBERTSON, W.S.—Agents.

JOHN SLOAN, Petitioner.—*Handyside.*

No. 35.

PETITION for the appointment of a *curator bonis* to a lunatic. The petition named three persons to hold the office jointly, and prayed for their appointment. The LORD PRESIDENT intimated, that the Court had determined never to appoint more than one person to such office; and accordingly only one of the persons named was appointed. The Dec. 18, 1844.
1st Division.

—Agents.

No. 36.

Dec. 18, 1844.
King v. Baillie.JAMES KING, Defender.—*Maitland*.JAMES BAILLIE, Changer.—*Rutherford—Buchanan*.

Stamp—Stats. 55 Geo. III. c. 184, and 37 Geo. III. c. 136, § 2.—1. Held by the Lord Ordinary, and acquiesced in, that an assignation of a bill and diligence for a consideration must be written upon a deed stamp of £1, 15s. 2. Held by the Court that the subsequent stamping of such assignation validated diligence which had proceeded in virtue of it while unstamped.

Dec. 18, 1844.

1st DIVISION.
Ld. Robertson.
N.

JOHN KERR was holder of a bill, dated 12th April 1836, for £58 at four months, upon which, having been dishonoured, he had duly raised letters of horning, and charged the acceptor, James King. Having failed to recover, Kerr in 1843 sold the bill and diligence to James Baillie, and executed a deed of assignation in his favour, which was written on a ten shilling stamp, and bore that the price paid was £10. Upon this assignation Baillie raised letters of caption, and put King in prison.

King presented a note of suspension and liberation, upon the ground that the assignation upon which the caption proceeded was written upon a wrong stamp of inferior value to that required by law.

The question thus raised was, Whether an assignation of a bill for a price fell under that part of the schedule of the Stamp Act, (55 Geo. III. cap. 184,) which imposed *ad valorem* duties, as the charger contended? Or under that part which related to assignations of real or personal property, and imposed a stamp-duty of £1, 5s., or under that part which imposed a stamp-duty of £1, 15s. upon all deeds or conveyances not otherwise provided for, and not exempted, as was contended alternatively by the suspender?

The Lord Ordinary in vacation, (Fullerton,) passed the note, and granted warrant of liberation without caution.*

The cause upon the passed note having come to depend before Lord Robertson, his Lordship pronounced this interlocutor:—"In respect the deed of assignation, in virtue of which the letters of caption were raised and executed at the instance of the charger, is not duly stamped in terms

* "NOTE.—The Lord Ordinary thinks the objection to the stamp well-founded. It seems to be fixed by the English cases referred to in Chitty on the stamp laws, that the conveyance of a debt for a consideration is not a sale of property falling under that part of the schedule which imposes *ad valorem* duties; but requires a deed stamp of £1, 15s. under the general head of 'deed' or 'conveyance,' not falling under any of the special descriptions, and not expressly excluded from duty."

of law, suspends the letters and charge *simpliciter*, and decerns: Finds No. 36.
the charger liable in expenses." *

Dec. 18, 1844.
King v. Baillie.

* "NOTE.—The title of the charger is rested on an assignation, dated the 12th of April 1843, to a debt of £58 : 2 : 3, contained in an accepted bill dated the 12th of April 1836, with a protest, letters of horning, and executions of charge and poinding thereon; and the price paid for this assignation is stated in the deed to have been £10 sterling. The assignation is written on a stamp of the value of 10s. only, and it is objected that the proper stamp-duty was either an assignation stamp of £1, 5s., or an ordinary conveyance or deed stamp of £1, 15s. In the schedule of the Stamp Act, 55 Geo. III. cap. 184, assignation is thus entered—'Assignation or assignment of any property, real or personal, heritable or moveable, not otherwise charged in this schedule, nor expressly exempted from all stamp-duty, £1, 5s.'

'If a debt is to be considered as heritable or moveable property, under this description, then the present assignation is insufficiently stamped; if not, and it be not otherwise charged in the schedule, it will fall under the case of an ordinary conveyance or deed, which is thus stated under both the word conveyance, and under the word 'deed of any kind whatever, not otherwise charged in this schedule, nor expressly exempted from all stamp-duty, £1, 15s.'

'In the view of falling under this branch of the statute also, the assignation is insufficiently stamped; but it is contended that the deed is liable to the *ad valorem* duty only, and that as the purchase or consideration money was under £20, the deed is correctly stamped with a stamp of the value of 10s. The words of the schedule, under which it is contended that the *ad valorem* duty is the proper stamp-duty payable on this assignation, are as follows:—'Conveyance, whether grant, disposition, lease, assignation, transfer, release, renunciation, of any other kind or description whatsoever, upon the sale of any lands, tenements, rents, annuities, or other property, real or personal, heritable or moveable, or of any right, title, interest, or claim, in, to, out, of, or upon, any lands, tenements, rents, annuities, or other property; that is to say, for and in respect of the principal or only deed, instrument, or writing, whereby the lands or other things sold shall be granted, leased, assigned, transferred, released, renounced, or otherwise conveyed to, or vested in, the purchaser or purchasers, or any other person or persons, by him, her, or their direction.'

"It does not appear to the Lord Ordinary that the respondent's is a correct view of the statute, or that an assignation to a debt for a valuable consideration is a conveyance by sale of property, under the meaning of this branch of the schedule. It refers to the sale of 'lands, tenements, rents, annuities, or other property, real or personal, heritable or moveable,' or of any right arising from such property. Now, the assignation of a debt, whether constituted by bill, with diligence following thereon, or by decree, or in any other manner, cannot surely be considered as an assignment upon the sale of moveable property; yet there are no other words which could subject such an assignment in an *ad valorem* duty, and freedom from duty, unless actually imposed, is to be presumed. Further, if such assignations were liable in an *ad valorem* duty, then surely all other assignations of moveable as well as heritable property would be liable in the same duty. In this view nothing would be covered by the branch of the schedule imposing a duty of £1, 5s. on all assignations of any property, real or personal, heritable or moveable. This is a result plainly inconsistent with any sound construction of the Act.

"If the matter, therefore, stood upon the construction of the statute, independent of authority, the Lord Ordinary could have no hesitation in concurring in the opinion expressed by Lord Fullerton on passing the note of suspension; but, as stated by his Lordship in the note issued by him, there are two English cases which seem to fix that an assignation of this description is not to be considered as

No. 36. The charger reclaimed, and, in the mean time, got the assignation duly stamped with a £1, 15s. stamp-duty. This being stated to the
 Dec. 18, 1844. Court when the case was moved in the short roll, their Lordships remitted back to the Lord Ordinary to hear parties upon the effect of the subsequent stamping, and with power to recal his former interlocutor.

The charger pleaded, that the Act 37 Geo. III. cap. 136, which authorized deeds to be stamped after they were written, declared in sect. 2, that any deed stamped in virtue of it should have in all respects the same effect as if the paper had been duly stamped before the deed was written.¹ The Court must, therefore, treat the assignation just as if it had been properly stamped at first, and could not look to the date of the receipt for stamp-duty or penalty.²

The suspender answered, that the section of the statute referred to related only to the document itself, declaring that it should be as valid as if it had been stamped from the beginning, but making no provision for proceedings had upon it while unstamped.

The Lord Ordinary pronounced the following interlocutor:—"In respect the deed of assignation founded on is now duly stamped, and that the charger is thereby in right of the debt, the justice of which is not

a conveyance of property under this branch of the statute. In the case of *Warren v. Howe*, 10th November 1823, (*Dowling and Ryland's Rep.* Vol. III. p. 494,) an assignment of a judgment debt was held not to be a conveyance of property within the meaning of this clause of the Act, and therefore as it had an *ad valorem* stamp of £1, 10s. and not a common deed stamp of £1, 15s., it was held not sufficiently stamped. Lord Chief-Justice Abbott observes, 'The Act speaks of "lands, tenements, rents, annuities, or other property, for or in respect of the deed, whereby the lands, or other things sold, shall be conveyed to the purchaser." I think the terms "other property" must be understood as applying to such property as is ordinarily the subject of sale, and readily convertible into money. It cannot be said that a judgment debt falls within that description, and therefore this instrument is not governed by the clause already alluded to.' In the case of *Belcher v. Sykes and Others*, 9th February 1827, (*Barn. and Cress. Rep.* Vol. VI. p. 234,) where one partner sold and assigned his share in a concern to another, at the price of £50,000; this was, in like manner, held not to be a conveyance of property within the meaning of the Act, so as to be liable in an *ad valorem* duty, but that an ordinary deed stamp was sufficient, and the authority of the case of *Warren v. Howe* was recognised. It therefore appears that the law of England, which is of the highest authority in matters of this kind, has settled the point in question; and the Lord Ordinary has therefore no hesitation, under all the circumstances, in suspending the charge."

¹ This section of the statute is in these terms:—"Every instrument, matter, or thing engrossed, printed, or written on any vellum, parchment, or paper, so stamped as aforesaid, shall have and be deemed of the like force and validity in the law as if the vellum, parchment, or paper so stamped, had been duly stamped before such instrument, matter, or thing had been engrossed, printed, or written thereon, any former law to the contrary notwithstanding."

² *Robb*, July 9, 1830; *Morris v. Glen*, Nov. 24, 1843; *Davidson*, Nov. 13, 1838. English cases—*Burton v. Kirkby*, (7 Taunt. 174;) *Rose v. Tomlinson*, (3 Dowling, 49.)

disputed—Repels the reasons of suspension and liberation ; finds the letters and charge orderly proceeded, and decerns : Finds the charger entitled to expenses, with the exception of those incurred in the discussion with regard to the stamping of the assignation, and also subject to modification : Appoints an account thereof to be lodged, and remits the same to the auditor to tax and report ; and, with a view to the foresaid modification, allows the suspender to lodge an account of the expenses incurred by him in the foresaid discussion as to the stamp, and remits the same to the auditor to tax and report.”

Both parties reclaimed.

LORD PRESIDENT.—I agree with the Lord Ordinary. I think the clause of the statute referred to, and the decisions which have been cited, are conclusive. The statute says, that a deed stamped in virtue of it shall have in every respect the same effect as if it had been written on a proper stamp at first. Can a party say, that because certain proceedings leading to incarceration had taken place, the stamping shall not have this full effect given to it ? I think not. In England, where they have so much practice in regard to the stamp laws, it has been held, that where full execution had taken place on an unstamped document, every thing was validated by the subsequent stamping. The time of stamping is not what the Court looks at. I therefore think the interlocutor should be adhered to.

LORD MACKENZIE.—I am quite clear that the statute has a complete retrospective action. I cannot see that the circumstance of personal diligence having been used makes any distinction.

LORD FULLERTON.—I cannot get the better of the cases—they are so very strong. Had the point been open, I should have had the greatest possible difficulty. No doubt, under the statute, a document originally unstamped must, after being stamped, be held good from its date ; but the question remains, whether all proceedings upon the document, when unstamped, are validated by the subsequent stamping. But for the decisions, I should have great difficulty here. Suppose an unstamped document were produced at a Jury trial, and being rejected, a bill of exception was brought, and the document got stamped in the mean time, would the exception be allowed on this ground ? I cannot, however, get over the English decisions, which hold not only that a document, subsequently stamped, is good, but that it is in all respects the same as if it had been stamped *ab initio*.

LORD JEFFREY.—I concur. The Court is bound to hold the document stamped *ab initio*. There is no impugning of the Lord Ordinary's first interlocutor holding the document unstamped. When a document is incomplete from want of the proper stamp, the holder is allowed to perfect it, his proceedings upon it being suspended *hoc statu* ; but they are validated *retro* by the stamping of the document. Every thing is suspended till the party shall have thus validated the whole proceedings. An executor unconfirmed is dealt with in the same way. The purpose of the statute is the advantage of the revenue, not effect as between party and party. In the case put by Lord Fullerton, of an exception to the rejection of an unstamped document which is stamped before the bill of exceptions is discussed, the only question would be, whether the judgment was good at the time—whether the document was rightly rejected ?

No. 36.

Dec. 18, 1844.
King v. Baillie.

No. 36.

THE COURT accordingly adhered on the merits, but, before answer as to expenses, appointed accounts to be given in.

Dec. 18, 1844.
Marshall v.
Dobson.

WM. WOTHERSPOON, S.S.C.—JOHN CULLEN, W.S.—Agents.

No. 37.

JOSEPH MARSHALL and MANDATARY, Pursuers.—*Deas*.

DAVID DOBSON, Defender.—*Inglis—Ross*.

Diligence—Meditatione Fugæ Warrant—Stat. 5 and 6 Will. IV. c. 70.—A meditatione fugæ warrant granted in respect of a debt not exceeding £8 : 6 : 8, is illegal under 5 and 6 Will. IV. c. 70.

Dec. 18, 1844.

2d Division.
Lord Justice-
Clerk.
Jury Cause.

JOSEPH MARSHALL, druggist in Glasgow, raised an action of damages against David Dobson, upholsterer, Edinburgh, for wrongous apprehension on a meditatione fugæ warrant, in respect of a debt which he alleged was under £8 : 6 : 8. This warrant, the pursuer maintained, was illegal under the 5 and 6 Will. IV. c. 70, entitled "An Act for abolishing in Scotland imprisonment for civil debts of small amount."

The case having gone to trial, the jury found that the debt in question was under £8 : 6 : 8, and that the sum had been increased with the view of obviating any objection to the legality of the warrant. The verdict further proceeded—"Find that the said warrant was wrongously obtained, and the pursuer wrongously apprehended in virtue of the same: Find the pursuers entitled to £50 sterling of damages, but subject to the opinion of the Court, whether the said warrant was illegal under 5 and 6 Will. IV. c. 70; and if the Court shall be of opinion that the said warrant was competently and legally obtained, with power to the Court to enter up the verdict for the defender."

In consequence of a case from the Bill-chamber in the First Division of the Court, their Lordships of the Second Division appointed the question reserved in the verdict to be argued before the whole Court.

The defender argued;—The purpose of the statute, as stated in the preamble, and the narrative there given of the object and report of the commission, was the abolition of imprisonment as a means of enforcing payment of sums below the statutory amount. It was intended as a relief to debtors who were unable to pay. No provision was made in terms for the case of a fugæ warrant. The object of the warrant was not to enforce payment, but to prevent fraud on the part of the debtor, by removing his person and his moveable property beyond the reach of his creditors. The proper answer to the fugæ warrant was to find caution de judicio sisti, in which case no incarceration followed. This could not be said to be the case of hardship contemplated by the statute, that of a poor person being thrown into jail for a small debt, and thus deprived of the means of pay-

ing his creditors. Nor could it be said that no adequate advantage resulted from it. The fugæ warrant partook more of the character of diligence to enforce obligations *ad facta prestanda*, which were excepted in § 5 of the Act. It did not require him to pay or consign, or even find security for his debt, but merely to do something always within his power—to find caution to abstain from an act of fraud. That this was its character was shown by its having been used against witnesses and lavers suspected of an intention to abscond.¹ Both in its objects and legal character the fugæ warrant differed widely from the ordinary process for enforcing payment of debt; imprisonment under it could not be said to be imprisonment for civil debt, and it did not fall under either the terms or intention of the statute.²

The pursuer argued;—The fugæ warrant was a mode of enforcing payment of a civil debt by proceeding against the person of the debtor. It was not of the nature of a warrant for the prevention of fraud or crime. Its object and effect was not to attach his funds and property, so as to prevent them from being carried out of the country, but to detain his person till the creditor should be able to do diligence against him by imprisonment. It was an auxiliary proceeding, of which the sole ultimate object was imprisonment; and as such, not being excepted in the statute, it must be held, under the comprehensive words employed, to be done away with in all cases in which imprisonment was abolished.³

Further, in the report of the law commission narrated in the preamble of the statute, it appeared that imprisonments under meditatione fugæ warrants formed a portion of the imprisonments for civil debt, from which the commissioners recommended that the legislature should grant relief.

Of this date the LORD PRESIDENT delivered the opinion of the Court:—

The verdict in this case is in the following terms:—(Reads.) The point thus reserved for the opinion of the Court has been fully argued, and is now to be determined according to appointment; and, as we are all agreed, I am now to announce the judgment, on a full consideration of the Act of 5th and 6th Will. IV. c. 70, and the arguments that have been urged on both sides. We are of opinion, That the warrant in question was illegal, and that the verdict for the pursuer in this action of damages must stand good.

¹ Watson, (M. 8548;) Strathmore and Panmure v. Innes, (M. 8549.)

² *Authorities for Defender*.—Act of Sederunt, June 14, 1671; Brown, Nov. 16, 1792, (M. 11763;) M'Laren, July 8, 1820, (F. C. ;) 6 and 7 Geo. IV. c. 56; Kamp, June 16, 1786; Blair v. Simson, July 6, 1821, (1 S. & D. p. 107;) Ersk. 1, 3, 8.

³ *Persuers' Authorities*.—A v. B, June 6, 1843, (ante, Vol. V. p. 1116;) Bastow, (Hume, p. 400;) Stewart, July 8, 1809, (F. C. ;) Pitcairn, Feb. 18, 1715; Bell's Com. Vol. II. pp. 565 and 566; Heron, M. 8550; Report of Scotch Law Commissioners, pp. 52, 53, and 58; Bell on Cessio, p. 106.

No. 37.

Dec. 18, 1844.
Marshall v.
Dobson.

The very title of this Act, viz. "An Act for abolishing, in Scotland, imprisonment for civil debts of small amount," is in itself an element confirmatory of its true object and intendment; and when its preamble and various clauses are attended to, no doubt can be entertained that it meant to abolish, and does totally abolish, and declare to be illegal, any imprisonment whatever on account of a civil debt that does not exceed in amount the specified sum of £8 : 6 : 8, except in such cases as are specially pointed out in the 5th or excepting section, in which no mention whatever is made of meditatione fugæ warrants.

The 1st section, keeping its preamble in view, is expressed in plain and explicit terms, providing the remedy for the evil pointed out by the commissioners, and declaring illegal all imprisonment on account of any civil debt which shall not exceed, &c.

The 2d section is equally free from doubt, while it superadds to the full enumeration therein contained, the words "or other warrants," which seem used for the more amply and effectually carrying out the object of the legislature. That the use of a meditatione fugæ warrant was meant to be prohibited, as much as any other mode of imprisonment, seems obvious from attending to its true nature and purpose; it being just a compulsitor that has gradually been introduced, (the first instance of it as granted by the Court, and with hesitation, as noticed in the Dictionary, being in 1665,) under the pain of immediate imprisonment, for the finding caution de judicio sisti; or, in other words, by securing the presentment of the debtor, in order to enable his creditor to have parata executio for his debt, and thereby ensure execution of ultimate diligence against his person. But, then, in such a case as the present, the debt as to which the meditatione fugæ warrant is used being under the statutory amount, it cannot be the ground of any legal imprisonment, and its preliminary must also be illegal. It would, indeed, be manifestly to defeat the humane purpose of the Act, were the creditor to be authorized to torture the debtor by such an imprisonment as is allowed under a meditatione fugæ warrant, in the too probable event of his inability to find the requisite caution; while it is to be recollected, that the very first step after obtaining the warrant of the magistrate is to apprehend the person of the debtor, in order to his being examined; and the statute in question expressly declares it to be illegal for any officer or messenger to apprehend or detain in custody any debtor for a civil debt of the restricted amount.

The 4th section of the Act may likewise be referred to as indicative of the true purpose of the legislature; while the 5th, as already noticed, amidst all its other exceptions, makes no reference whatever to the case of imprisonment on meditatione fugæ warrants.

As to the danger which it is said may arise by debtors attempting to leave the country, and withdraw their effects from the diligence of their creditors, in regard to small debts, by our now finding meditatione fugæ warrants illegal in such cases, I hold it would be quite competent, if any illegal attempt were made to carry off moveable effects, in order to defeat the rights of creditors, to apply by a summary petition to the Judge Ordinary or magistrate, who would immediately enquire into the facts; and if any fraudulent or unfair purpose can be shown to be in view, grant proper authority for preventing its accomplishment. This procedure will be amply sufficient to obviate the evil, and protect the rights of creditors, without the necessity of resorting to a meditatione fugæ warrant against the per-

me of a debtor, which, on account of a debt under the legal amount, stands absolutely protected by the statute now under consideration. No. 37.

Without adding more, we are of opinion that the warrant in question was illegal under the 5th and 6th of Will. IV. Dec. 19, 1844.
Gallie v. Wylie.

Wighton v. Smith.

THE following interlocutor was pronounced:—"In conformity with the opinion of the whole Court, find that the warrant referred to in the verdict was illegal under the 5 and 6 Will. IV. c. 70; and, in respect of the said verdict, decern against the defender for payment of the sum of £50 of damages."

ALEXANDER JAMES, S.S.C.—GEORGE COTTON, S.S.C.—Agents.

J. B. GALLIE and OTHERS, Pursuers.—*Ld.-Adv. M'Neill.*

No. 38.

ALEXANDER WYLIE, Defender.—*Munro.*

Expenses—Process—Jury-Trial.—IN a jury-trial which had lasted a day and a half, and in which a number of documents had been produced in evidence, the Court (on an objection to the auditor's report) sustained a charge for fees paid to three counsel in the special circumstances of the case. Dec. 19, 1844.
2d DIVISION.
Lord Justice-Clerk.
Jury Cause.

WILLIAM HUNT, W.S.—WILLIAM ALEXANDER, W.S.—Agents.

JAMES WIGHTON, Advocate.—*Sandford.*

No. 39.

DUNCAN SMITH, Respondent.—*G. Bell.*

Process—Reference to Oath.—IN a reference to oath, the agent of the party referring having refused to proceed with the examination on the day fixed by the commissioner on account of his client's absence—circumstances in which the Court remitted to the commissioner to fix a new diet upon the party referring paying £10, 10s. of expenses.

IN this case, the Court, on 28th November, sustained a minute of reference to the advocator's oath, and remitted to Mr Crawford, advocate, to take it. Mr Crawford, on 6th December, fixed the diet for the 14th, and this was duly intimated to both parties, and not objected to. On the 10th, the respondent's agent proposed to change the diet to the 13th, which was declined by the advocator's agent, and the 14th of new agreed on. On the 14th, the advocator appeared before the commissioner, along with his counsel and agent. The agent for the respondent also appeared. Dec. 20, 1844.
1st DIVISION.
W.

No. 39.

Dec. 20, 1844.
Robertson v.
Ogilvie's
Trustees.

ed, but declined to proceed with the reference on account of the absence of his client, whom he had expected from Dumbartonshire, but who had not arrived. The counsel for the advocator refused to consent to delay, and the commissioner called upon the respondent's agent to proceed with the examination notwithstanding of his client's absence, and he having declined, reported the matter to the Court.

The commissioner's report was this day moved.

G. Bell, for the respondent, moved that the case be remitted to the commissioner to fix a new diet.

Sandford, for the advocator, opposed the motion, contending that the respondent must be held to have fallen from the reference; or that he must at least pay expenses before being allowed to proceed.

LORD JEFFREY.—I think the respondent has fallen from his reference. It is a great stretch to allow it to be renewed even on payment of the whole expenses incurred by his refusal to proceed at the diet fixed, for he has been guilty of a gross contempt of Court.

LORD MACKENZIE.—If there had not been considerable expenses, I should have been for refusing the application altogether; but they operate as a check, and may be viewed as a kind of fine or penalty.

THE COURT concurred in remitting to the commissioner to fix a new diet upon the respondent paying £10, 10s. of expenses.

DANIEL FISHER, S.S.C.—WM. MUIR, S.S.C.—Agents.

No. 40.

JAMES ROBERTSON, Pursuer.—*Inglis*.
OGILVIE'S TRUSTEES, &c., Defenders.—*Moir*.

Trust—Writ—Holograph—Erasure in substantialibus—Approbate and Reprobate—Homologation.—1. Terms of a clause in a trust-deed, by which party not named in the dispositive clause along with the other trustees, was validly nominated a trustee. 2. Held that erasures in the names and designation of three out of seven trustees, in favour of whom, and the survivors or survivor of them, the major part alive and accepting being a quorum, the trust was conceived were not in *substantialibus*. 3. Held that a statement in a deed, that it was holograph of the granter, was *prima facie* evidence that it was so, and threw the burden of proving the contrary upon the challenger, but that such statement afforded no presumption that words written upon erasures were also holograph. 4. Opinion that erasures in *substantialibus* did not vitiate a holograph deed, proved that the writing superinduced was also holograph. 5. Question whether the doctrines of approbate and reprobate, and homologation, applied to a deed vitiated by erasure in *substantialibus*.

In 1808, George Ogilvie, senior, executed a trust-disposition and settlement, whereby he conveyed his whole estate, heritable and moveable, to six trustees, for the purpose, 1st, of implementing the provisions made by him in favour of his wife by antenuptial contract; 2d, of giving her a liferent of a certain tenement in Dundee; 3d, of dividing the residue among his children; and failing them, 4th, of giving a liferent thereof to his widow; and on her death, or on his own, if he should survive her, 5th, of paying certain legacies, and especially a legacy of £2000, to be invested and accumulated for a hundred years, and then applied in founding an hospital in Dundee. The trust was in favour of the trustees named, the survivor or survivors, and acceptor or acceptors, with power to assume others, and a majority being a quorum. The trustees were also nominated executors. The dispositive clause made mention of only six trustees, the widow not being one of them; but, after the provision in her favour in the second purpose of the trust, there followed a clause in these terms:—"And I do hereby nominate and appoint my said spouse to be always one of the quorum of my trustees while alive and residing in Dundee; but in case of her refusal or leaving Dundee, my said trustees, or their quorum, shall proceed in the execution of the trust in the same manner as if she were not appointed one of them; and I also appoint her to manage and receive the whole rents, interest, and annual profits of my trust estate, out of which she shall retain for herself the annuity she is entitled to receive from it, and she is to apply the balance as her discretion shall direct for the maintenance, clothing, and education of my children, and the expenses attending the present trust, until my said children respectively arrive at the age of twenty-one years complete, if they shall live till then: And further, after an inventory is made out of my whole real and personal estate, (of which there shall be two copies subscribed by my said trustees,) my whole writs and title-deeds, and vouchers of debt, shall be committed to the charge of my said spouse, and my trustees shall always have access to the same when they shall have occasion; but if my said spouse shall be incapable, through infirmity or any other cause, in either case my said trustees shall appoint a proper person for said purposes."

A question thus arose, which may be stated here, so as not to embarrass it with the other circumstances of the case, whether the widow was a trustee, and as such also an executor nominate? The Court unanimously held that she was.

Of the six trustees named in the dispositive clause, the names and designations of two, and the name of a third, were written upon erasures, but apparently in the same hand as the rest of the deed, which the testing clause bore was all written by the granter himself. No mention was made of the erasures in the testing clause.

In 1813, Ogilvie, senior, executed another trust-deed, whereby he conveyed certain heritage, and bound himself, on the death of himself or

No. 40.

Dec. 20, 1844.
Robertson v.
Ogilvie's
Trustees.

1st DIVISION.
Lord Cuning-
hame.
W.

No. 40. his wife, whichever should survive, to pay to the trustees £1300 for the purpose of giving a liferent of the heritage to his son George, and the fee to his children, and, in a certain event, of paying to him the £1300 in a particular manner. This deed did not narrate or mention the deed of 1808.

Dec. 20, 1844.
Robertson v.
Ogilvie's
Trustees.

In 1819 he executed, on the back of the deed of 1808, a *codicil*, whereby he revoked it so far as it related to his son George, and directed that he and his children (if he had any) should have the annual profit of the whole residue of the trust estate in such proportions as the trustees should think proper; and that after his and their decease, the estate should be applied as directed in the deed of 1808.

In 1825 he executed another deed, with reference to that of 1813, directing that the £1300 thereby provided to his son George should be invested by the trustees on heritable security in their own names in trust for George in liferent and his children in fee; whom failing, his own nearest heirs and assignees. This deed, like that of 1813, made no mention of the deed of 1808.

Ogilvie, senior, died in 1825, and was survived by Mrs Ogilvie, his wife, and his son George, then nineteen years of age. With the exception of Mrs Ogilvie, none of the trustees accepted. She expedite a confirmation, qua relict and executrix nominate under the deed of 1808, gave up an inventory, and entered on the management of the whole estate. In the course of her management, she, in the exercise of the discretion committed to her by the deed of 1808, paid various sums amounting to about £100 to George, and with his concurrence granted a tack of part of the heritage in which the trust was narrated.

George died unmarried in 1829, predeceasing his mother. He left a trust-settlement, executed in 1827, which narrated the whole deeds executed by his father, and conveyed to trustees for behoof of his mother, "all and sundry the whole heritable and moveable means and estate, funds and effects of every nature and denomination, and wheresoever situated, which shall belong to me at the time of my decease, with the whole vouchers and instructions thereof, and all that has followed or is competent to follow thereupon, and particularly without prejudice to the said generality, all right, title, and interest competent, or that may be competent to me, under, or in virtue of, the deeds before narrated, or as heir or representative of any of the persons named or referred to in the said deeds, with power to my said trustees or trustee to take whatever steps they may consider proper for reducing or setting aside, by any legal means, any part of the deeds hereinbefore narrated, which they may consider prejudicial to me, surrogating hereby and substituting my said trustees or trustee in my full right and place of the premises, with full power to him or them to do every thing in relation thereto as fully and freely as I could do myself."

Mrs Ogilvie died in September 1841, leaving two trust-settlements, dated respectively in 1831 and 1841, whereby she conveyed her whole estate to trustees, and declared it to be her wish that her husband's deed of 1808 "should be carried into full effect, according to the plain sense and meaning of the same."

No. 40.

Dec. 20, 1844.
Robertson v.
Ogilvie's
Trustees.

Upon George's death, James Robertson of Glenloin was the nearest heir to Ogilvie senior, his maternal uncle, and expedite a general service to him in 1842.

He then raised action against Mrs Ogilvie's trustees for payment of the £1300 destined by Ogilvie senior's deed of 1825, altering that of 1813, to his own nearest heirs, failing George's children.

During the dependence of this action, he brought a reduction of the deed of 1808 and codicil of 1819, and of Mrs Ogilvie's confirmation as executrix of her husband. The main ground of reduction, and the only one ultimately insisted in, was vitiation in *substantialibus*, in respect of the names and designations of two of the trustees, and the name of a third, being written upon erasures, as before mentioned.

This action of reduction was defended by Mrs Ogilvie's trustees and the Kirk-Session of Dundee. Their pleas in substance were;—

I. The pursuer's challenge was barred, in respect, 1st, That George Ogilvie, junior, (his father's heir-at-law,) having approbated and homologated the deed by his conduct mentioned in the preceding narrative, all challenge at the instance of a remoter heir was excluded. 2d, That all the testamentary deeds of Ogilvie, senior, must be taken together as forming his settlement, and the pursuer, by claiming under one of these deeds, approbated the whole.

II. But, separatim, the deed was valid, in respect, 1st, That the erasures were made, and the names as appearing on the deed were written by the trustor himself, of whom the whole deed was holograph; and erasures in *substantialibus* did not vitiate a holograph deed, where the writing superinduced was also holograph. 2d, That erasures in the names and designations of trustees were not in *substantialibus*. 3d, That a majority of the trustees was a quorum; and the nomination of the majority, including Mrs Ogilvie, who was the only accepting trustee, was free from exception.

It was conceded in argument by the pursuer, though not admitted on record, that the writing upon the erasures was in the same hand as the rest of the deed.

The Lord Ordinary pronounced the following interlocutor:—"Sustains the defences urged for both classes of defenders, repels the reasons of reduction, and assoilzies the defenders from this action; reserving to the pursuer to urge any claim competent to him as heir-at-law in a competent process on the import of the trust-deed and codicil under reduction, holding the same as subsisting deeds, and to the defenders all

No. 40. defences to such claim as accords: Finds the defenders entitled to expenses." *

Dec. 20, 1844.

Robertson v.

Ogilvie's

Trustees.

The pursuer reclaimed.

LORD PRESIDENT.—After hearing a full argument on this reclaiming note, the Court took time to consider their judgment, and, after deliberation, I have not seen sufficient grounds for altering the Lord Ordinary's interlocutor.

I. I am disposed to hold that the objection founded on the erasures appearing in the deed of 1808, are not of such a nature as can be held such vitiations in *substantialibus* as are sufficient to cut down that deed. 1st, We must hold it

* "NOTE.—The chief authorities relied on by the pursuer are, the late case of Reid and Kedder, decided in the House of Lords in 1841, (1 Robinson, p. 184,) and the still more recent case of Shepherd and Grant, decided in this Court in January 1844.¹ But there are important distinctions between the present case and the authorities founded on by the pursuer.

"(1.) This case differs in the most essential points from those founded on by the pursuer. The names erased here were only those of certain trustees and executors; and it seems to be a point of fixed law, that the erasure of the names of such parties does not vitiate the deed *in toto*, or operate as a revocation or voidance of provisions left to third parties by clauses of the deed clearly and fairly written out, and entirely free from all objection. It is sufficient to refer to the well known cases of Ferguson and Kemp, (Dict. p. 16949,) and to the latter case of Mr John Anstruther's trust deed. See Shaw's Reports, Vol. I. 26th June 1822.

"(2.) The names of the substituted trustees written on the erasure here occur in a deed holograph of the truster. He also authenticated the alteration by a holograph marginal addition, which he subscribed; and the writing on the erasure appears *ex facie* to be holograph, and is offered to be proved as holograph by the defenders. The pursuer denies the competency of such proof; but the Lord Ordinary is not satisfied that such proof is excluded in support of a deed, which is *prima facie* holograph, more especially when the alteration is vouched by an annotation of the granter of the deed, written and subscribed by himself.

"As laid down by Lord President Blair, in the case of Adam, in 1810, (Fac. Coll. 19th July 1810,) the foundation of all challenges on the ground of erasure is fraud, actual, or possible, or implied. But, in the present case, every suspicion of that sort is excluded.

"(3.) There was the most distinct homologation and confirmation of the trust settlement by the undoubted apparent heir of the truster, the only party then entitled to challenge it, who not only did not choose to reduce it, but executed a settlement of his own in 1827, after his majority, narrating the names of the trustees as they were last filled up by his father, at full length, as those which he (the heir-apparent) recognized, acknowledged, and confirmed. It is difficult to see how any heir coming after Ogilvie, junior, can challenge the father's deed. Had the trustees of old Mr Ogilvie brought a declarator of validity of the deed in question, and referred its authenticity to the apparent heir's oath, a decree in favour of the deed would surely have barred future challenge. But a formal deed under the apparent heir's hand is supposed to be equally effectual.

"It is said that a plea of homologation in circumstances equally strong was overruled by the majority of the Court in the case of Shepherd and Grant. But it is thought that the deed under the hand of George Ogilvie, junior, in 1827, reciting and acknowledging the names of the trustees written on the erasure of the deed under reduction, is rather a more explicit act of homologation than could be founded on in Mr Shepherd's case."

¹ Shepherd v. Grant's Trustees, Jan. 24, 1844, (ante, Vol. VI. p. 464.)

No. 40.

Dec. 20, 1844.
Robertson v.
Ogilvie's
Trustees.

conceded, that the deed is holograph of the granter, as it bears on its face, and that the writing on the erasures is also in his hand. If these facts are seriously meant to be contested, the contrary averments must be proved, and by the pursuer of the reduction. 2d, I cannot hold that the names of three trustees only being written on erasures is fatal to this deed. There are three other trustees named in the deed, as to whom no erasure whatever occurs; and moreover I am satisfied, from the terms of the deed in a subsequent part, that the testator's widow must be held as effectually nominated one of his trustees, and entitled to act as such. We have, therefore, four out of seven trustees—the major part being entitled to act—for bringing the will into execution, and to whom no objection lies; and therefore it was quite capable of being carried into full operation. 3d, But erasures as to some of the trustees named to carry a deed into execution—the whole purposes of which are liable to no objection, and especially in a deed holograph of the granter, and whose own writing is superinduced on the erasures—stand quite differently from erasures in the name of a disponee. I entertain great doubt, therefore, of holding that this is a case to be ruled by those of Kedder, and Shepherd, and Grant, where the erasures were as to the names of the disponees, and indeed written *aliena manu*, and no notice of them in the testing clause.

II. But besides the above grounds for adhering to the Lord Ordinary's interlocutor, I have been from the first impressed with the importance of the defence arising from the fact, that this pursuer has claimed benefit from one of those deeds—viz. that of 1813—that were executed by his relation old Mr Ogilvie; while he now contends for the reduction of the deed of 1808. The whole series of the different deeds and codicils of Mr Ogilvie must be viewed as composing the general settlement of his affairs; and on the principles so recently recognised in the case of *Lord Breadalbane's Trustees v. Buckingham*,¹ as to the doctrine of approbate and reprobate, I think it necessarily follows that this pursuer is barred from his present challenge of the deed 1808, which he finds necessary to reduce and set aside by the present action; and I cannot enter into the distinction, that such reduction proceeds entirely on the allegation of the deed of 1808 being void and null. A deed that is attempted to be executed in the face of declared and settled law, may also be said to be null; but, at any rate, both require to be reduced by a decree. Suppose a deed liable to reduction on the ground of incapacity is challenged, is not that also a deed, as the act of an insane man, void and null in law; and if composing part of a general settlement, could it be reduced by a pursuer who claims and draws direct benefit from another deed executed by the same testator? I think it could not.

I am, therefore, for adhering to the interlocutor, without at all resting on the acts of George Ogilvie, junior, as having recognised his father's deed of 1808.

LORD MACKENZIE.—I concur generally in your Lordship's opinion, and also in the note of the Lord Ordinary. The deed of 1808 is not simply a holograph deed, but is also witnessed. That cannot take away its privilege as a holograph deed. It may be better, but cannot be worse; and this has not been contended. There is another writer but the maker himself, and he announces himself as the writer; and I therefore agree that we must consider it to be all holograph. There is the most complete offer of proof that it is so; but I am not sure that the pursuer seriously denies that any part of it is not in the maker's handwriting; and I rather

¹ March 5, 1840, (ante, Vol. II. p. 731.)

No. 40. proceed on the supposition, that there is an admission that it is all a holograph deed. Then, viewing it in that light, I do not think that an erasure and superinduction can have the effect of a vitiation. 1st, I can find no decision applying the ordinary doctrine of erasure to holograph deeds, and neither can I find any *dictum* to that effect. I do not think our writers, though they use general words, mean to include holograph deeds; but, on the contrary, I think they rather exclude them from the operation of the doctrine of erasure. What is the reason why an erasure is so fatal to an ordinary deed? It is plainly this—that the deed all depends on its relation to the subscription.—It must appear to be a deed that has never been changed, so that the subscription may prove the whole deed; but all that depends on the deed being unchanged. If part of it appears to have been changed, it cannot be known that it is what was signed; for it cannot be certain that it was not changed without the authority of the granter. That is the way the argument is commonly put—that it cannot be certain the changes were not made after subscription, and without the authority of the granter. But it is plain that this argument is not applicable to a holograph deed, the authenticity of which does not wholly depend on the signature. We hold, in conformity with the opinion of Stair, that a holograph deed must be signed; but Stair assigns as the reason, that if the deed is not signed, we cannot be sure that it was a completed deed—not that it is not probative, but that it was not completed. If the maker declared in the deed that it should be valid without subscription, in virtue of the superinduction, that deed would be quite valid. The postscript to a letter is quite good without signature. In short, a holograph deed depends mainly on the handwriting of the granter, in which it is proved or admitted to be. Then the ordinary doctrine of erasure and superinduction cannot apply, for there is no room to say that the alteration or change was not made by the granter; on the contrary, being in his handwriting, proves that it was made by him; so that it stands in the same situation as an ordinary deed, when it has an express clause mentioning that the alteration was made by the granter. The holograph writing extending over the erasure makes it just as certain. As to the time of the erasure, it is nothing to the purpose; for it is just as competent for a party to write his deed, or alter it above the subscription, as in any other way. I agree, therefore, on that point.

I agree also in the second point mentioned by the Lord Ordinary, that the erasures here, even if vitiations, are not *in substantialibus*. A disponent's name is undoubtedly *in substantialibus*, but a disponent is a party interested under the deed. In a trust-deed, the beneficiaries alone are the true disponents. I cannot think an erasure in the names of trustees *in substantialibus*. The non-acceptance or death of all the trustees would not have defeated the deed. The erasure here could not be made by the beneficiaries, and it is hardly possible to suppose that it was not made by the granter; but if not, it must have been made by some idle person who had no right to meddle with it.

As to the third point—viz. homologation—I have great difficulty. An apparent heir may homologate a deathbed deed, because a deathbed deed is good as a conveyance, though the heir has the privilege of reducing it so far as to his prejudice; but so far as not, it is a good probative deed. If the heir chose to renounce his privilege, the deed would be good. But homologation does not apply to the case of an improbative deed; for it is not a conveyance, and cannot be turned into a conveyance by the next heir thinking proper to homologate. At least the point admits of great doubt.

There is another ground of decision mentioned by the Lord Ordinary—viz.

Dec. 20, 1844.
Robertson v.
Ogilvie's
Trustees.

approve and reprobate—which I am more inclined to adopt, but I would rather not go upon it either. I shall only say, therefore, that on the two last points I have difficulty, and reserve an opinion; but that on the two first, I think the case must be decided as the Lord Ordinary has done.

No. 40.
Dec. 20, 1844.
Robertson v.
Ogilvie's
Trustees.

LORD FULLERTON.—There have been some points here raised in argument, upon which I should not be much inclined to give a decided opinion; and I have the less scruple in waiving the consideration of them, because I think they are not essential to the determination of what I consider to be the main question between these parties.

One of the points to which I allude is, the supposed incompetency of the pursuer reducing the trust-deed of 1808, while he has taken benefit of the remaining deeds of 1813 and 1825; which, it is said, must be taken along with the deed of 1808, as constituting the testamentary dispositions of the granter. It has been said, that in many cases it has been found that the whole deeds are to be read as forming the settlement of the granter, and that the principle of approve and reprobate is equally applicable, though the provision in favour of the party is not contained in the identical conveyance of which he challenges the validity.

Now, while I admit the principle, I must be permitted to entertain great doubt of the application of it to a case like the present. The doctrine of approve and reprobate has been applied, and that most extensively, to all cases in which a party taking benefit by one part of a deed, or part of a settlement combined of various deeds, attempts to challenge another part of it on the ground of want of power, or defect in the technical form of expression necessary to convey. It has been so applied as to bar a challenge on the head of deathbed, if the deathbed deed forms part of a settlement of which the heir has taken benefit, and to bar an heir who has challenged a deed on the head of deathbed from taking benefit of any testamentary provision in his favour. Upon similar grounds, it has been held to afford support to words in an English will, otherwise insufficient for carrying Scotch heritage, when the heir took benefit in other respects from the will. But in all those cases it will be found that the grounds of challenge, though perfectly good in the question of power or defect of technical expression, left the conveyance in full force as an intelligible declaration of the granter's intention. Nothing could bring that out more clearly than the judgments pronounced in the case of *Trotter v. Trotter*, 5th December 1826,¹ and *Murray v. Smith*, 4th March 1828,² contrasted with that pronounced in the case of *Dundas v. Dundas*, January 14, 1829.³ In the first cases, it was held that the principle of approve and reprobate could not apply, because the words in the English will did not, in English construction, sufficiently express the intention to convey the heritage in Scotland. On the other hand, in the case of *Dundas*, it was held that the principle did apply, and that, as the deed was a Scotch deed, the Court here was entitled to construe it, and to determine whether or not the words were broad enough to cover the intention to convey heritage situated in England. I refer to these cases as showing that the principle of approve and reprobate requires, for its application, that the deed, however defective in the matter of power or technical expression, should be, at least, a good intelligible expression of the granter's intention. Indeed, that lies at the bottom of the whole doctrine. The defective deed receives effect, not as a conveyance, but as a condition; but then it is clear that a condition, in order

¹ 5 S. 78.

² 6 S. 690.

³ 7 S. 241.

No. 40. to be good against any party, must, although not technically, be clearly and unequivocally expressed.

Dec. 20, 1844.
Robertson v.
Ogilvie's
Trustees.

Now, as at present informed, I do not well see how this can be predicated of a deed, in which there is a defect like that urged here, viz. an erasure in *substantialibus*. That objection, as given effect to in various cases, goes, not to the matter of power or of technicality of expression, but to the existence of any expression of intention at all. If you cannot read the deed in one particular, without which it has no meaning, that is a nullity which does not seem to be remediable on the principle of approbate and reprobate. It is not a nullity resting on the defect of power, or of any particular form of expression or conveyance, in both of which cases the defective conveyance may be read as a condition. But there is no expression of any thing which can be read even as a condition. There are no circumstances on which the principle of approbate and reprobate can rest. The distinction between the two descriptions of cases is easily seen. There is no doubt that a mere bequest of Scotch heritage may, in certain circumstances, operate as a condition in favour of the legatee, to which the heir may be bound to give effect. But let it be supposed that the name of the legatee were written on an erasure, I do not well see how, in that case, the heir could be barred from his challenge, which, in that view, would rest on the ground, not of there being an informal expression of intention, but of there being no expression of intention at all, either as a conveyance or a condition.

These observations, however, all presuppose that the erasure is of that kind, and appears under those circumstances which necessarily give it the character of an erasure in *substantialibus*, absolutely destructive of the whole force and meaning of the deed. For it is quite possible that there may be cases—such, for instance, as that which is said by the defenders to exist here—of a deed erased and written over in the handwriting of the granter, in which the deed may not be absolutely null as an expression of intention. In such cases, it may be a much nicer question whether the principle of approbate and reprobate would not apply, and precisely for the reason that the question may admit of various shades of distinction. I think it would be inexpedient to enter upon it, unless absolutely necessary for the decision of this cause, which, on the ground afterwards to be assigned, I do not hold it to be.

Another point raised on the part of the defenders in this case, is one nearly resembling, though not quite identical with that just alluded to. It is that of homologation; the question being, whether a deed, null in *substantialibus*, in consequence of an erasure, admits of being so confirmed. This is a matter upon which I should certainly not be disposed to give any very confident opinion, without further argument. In the case of Shepherd, the view which I took, as well as some of the other Judges, certainly would go far to sustain the competency of such a plea. But then the opinion of certain of the other Judges was directly the reverse; and I am bound to admit, that, looking at the special circumstances of the case of Shepherd, it would be very difficult indeed to reconcile the judgment ultimately pronounced by the Court with the supposition, that a deed null in *substantialibus*, in consequence of an erasure, did admit of being either confirmed by homologation, or defended by the principle of approbate and reprobate.

Another point which has been discussed here, is the effect of an erasure in the name of the donee in a holograph deed, and written over in the handwriting

of the granter. For I think we are bound to consider the body of the deed as holograph, by the force of the testing-clause, until that be disproved; and, so far from its being disproved, I do not think it is now contested. But then the testing-clause affords no presumption in favour of the words written on an erasure; and there the burden of proof would certainly lie on the party founding on the deed. Now, though I think the question of holograph or not is one which in itself admits of parole proof, the legal effect of it, even if established in the affirmative, is not quite clear; and perhaps, if we were inclined to enter into that discussion, the proper course would be to allow a proof before answer, so as to ascertain the true state of the fact before we applied the law.

But the defenders, without waiving this, have asked a judgment upon the case without going into any such proof; and, in my opinion, the circumstances of the case, and grounds of reduction, are such as to admit of that course.

The single ground of reduction now insisted on is, that the deed is erased *in substantialibus*. The alleged *substantialia* being the names and designations of two, and the name of another, being the third, of the trustees; these names being written upon erasures. It is only in the names of these three trustees that there is my erasure. The whole beneficial interests created by the trust are expressed with sufficient clearness, or at least without being exposed to the charge of intrinsic nullity; and the names of the other four trustees, including the widow, are exposed to no objection. I mention the widow, because I think it quite clear that, by the terms of the deed, the widow was effectually named as a trustee. And further, it is most important to observe that the trust is conceived in favour of the trustees named, and "to the survivors or survivor of them, (the major part alive and accepting at the time, and residing in Scotland, being always a quorum,) they also having power to assume additional trustees."

Now these circumstances raise the question, whether, in the case of a trust for purposes specially described, and not involving any particular discretion on the part of the trustees, granted to the survivors or survivor, and in which the majority of the trustees alive, and accepting, is to form a quorum, the names of three out of seven trustees can be held, *inter essentialia*, of such a deed, so as to attach to the erasure of these names the total annihilation of the deed? It is sufficiently obvious, that in every case of the kind much depends on the nature of the deed. According to Lord Stair, "What points are *de substantialibus*, must be esteemed by the nature of the writ."¹ And looking at the nature of the writ here, I think there is no room for holding the defaced or erased words to be of that character.

In the first place, the whole beneficial interests created by the deed are left uncanceled and untouched. They remain the unequivocal expression of the granter's intentions, and form, in truth, the substantialia of such a deed. The trust is nothing but the machinery for carrying those intentions into effect; and so far from being essential to the support of the beneficial interests, it is well known that these interests are protected, and means taken for carrying the granter's intentions regarding them into effect, after the whole apparatus contrived by him for that effect has irrecoverably fallen to the ground.

This consideration would go far to support a defence, much more general than

No. 40.

Dec. 20, 1844.
Robertson v.
Ogilvie's
Trustees.

¹ Stair, IV. 42, § 19.

No. 40. is necessary in the present case, as it affords a strong analogy in favour of the proposition, that a total failure of the appointment of trustees, in consequence of erasure in all the names, might not be fatal to the deed.

Dec. 20, 1844.
Robertson v.
Ogilvie's
Trustees.

But it is unnecessary to go into this, because the second and most important remark on the deed is, that while the whole beneficial interests are left entire, the merely administrative part of the deed is not totally obliterated, but left in force, to an extent which the granter clearly declared to be sufficient for the management and extrication of the beneficial interests.

So far from rendering the trust management dependent on the joint acceptance and administration of all the trustees, he has provided not only that four, the number whose names are still a valid part of the deed, may be a quorum, even if all accept, but that the trust shall go to the survivors or survivor; and he also gives them a power to assume new trustees.

By the terms of the deed, then, the truster clearly contemplated the possibility of four, nay, even one, administering the trust affairs; and, in such a case, it is impossible for me to hold that these erasures, which, at the worst, raise a difficulty in ascertaining the names of three trustees out of seven, shall be fatal to the clearly expressed intentions of the truster. I cannot hold these erasures in that part of the deed to be in *substantialibus*, because the deed itself declares, with sufficient clearness, that, independently of them, the whole of its provisions may secure the very effect which the granter intended.

In fact there are but two views which can be taken of these defects of the deed. The erasures and superinductions are either the act of a third party, or of the granter himself. If the former, it is impossible to see why this accident—for, in relation to the granter, it would (in that view) be nothing but an accident—should have any stronger effect in invalidating the nomination and powers of the remaining trustees than any other accident, such as death or non-acceptance, by which the erased nominations might have been frustrated.

If, on the other hand, the erasure and superinduction was the act of the truster himself, and is even on that view to be held a bad nomination, what does the case come to, but that the truster has validly named four trustees, and has blundered the nomination of three others, while, by the very constitution of the trust, he has declared that four, or even one trustee, may act with effect.

The cases referred to by the pursuer, in which the rule has been applied to the effect of annulling the deeds, differ from the present in a most essential particular. In those cases, such as *Reid v. Kedder*, and *Shepherd v. Grant*, the erasure was in the name, not of the donee merely in form or in trust, but the donee of the right and interest. That was truly an erasure in *essentialibus*, because the ascertainment, in legitimate form, of the party to take, like the ascertainment of the subject to be taken, is indispensable to such a deed as an expression of intention.

But here, as has been already mentioned, the objection, such as it is, lies only to what may be called the administrative part of the deed. In this particular it more nearly resembles in principle the case of *Kemps v. Ferguson*,¹ in which it was found that the vitiation in the name of the executor did not void the legacies; and it is still more nearly touched by the case of *Anstruther's Trustees*,² in

¹ M. 16949.

² *Earl of Traquair and Others*, June 26, 1822.

which a vitiation, in the name of one out of several trustees, was held not to be fatal to the deed, "the Court (according to the Report¹) holding that the deed had not been vitiated in *substantialibus*, and that it was capable of being carried into effect." These observations are quite as applicable to the present case. They evidently proceed on the ground that the name of one trustee out of several is not *de substantialibus* in such a deed—a principle which seems to me to be well founded in itself, and to be quite sufficient to support the present defence; for here, though the erasures are more numerous, they are still only in the names of trustees; and there are left, still legible and forming part of the legally attested deed, names enough to fulfil every requisite in the way of administration, which the granter declared by the constitution of the trust to be sufficient for carrying the deed into effect.

On that ground, viz. that on considering, agreeably to the decision of Lord Stair, the nature of the writ, the defects are not *de substantialibus* of the deed, I think the defenders ought to be assoilzied from the conclusion of the action.

LORD JEFFREY.—I concur generally in thinking that the substance of the Lord Ordinary's interlocutor must be adhered to. In regard to the details, I own that the opinion in which I am most disposed to coincide is that last delivered by Lord Fullerton. On one material point of the case I rather think we cannot proceed without proof—I mean the question as to whether the superinduced words are, as well as the body of the deed, holograph of the granter; and, in the view of the possibility of this case being disposed of elsewhere, I own I rather incline to the proposition of allowing a proof on that point before answer; but at the same time I confess, that were I sitting in the court of last resort, I should not think that necessary, for I quite concur in thinking that the vitiation here is not in *substantialibus* of the deed; and on that ground alone I am quite ready to concur in the opinion that the reasons of reduction ought to be repelled. I think the erasure here is not in the name of the donee, properly speaking. It is admitted that the death of the whole of the trustees on the same day with the truster, would not have annulled the deed in favour of the proper donees, the beneficiaries. Whether the erasure was made by a third party, or by the maker of the deed, in neither case ought it to annul it. I entirely concur in the views of all your Lordships on that point; but it would be a relief to my mind if the counsel for the pursuer would state whether they are prepared to admit that the words on the erasures are in the handwriting of the granter. I hold it proved by the statement in the testing clause, that the body of the deed is holograph; and if it be admitted that the words on the erasures are holograph also, I should then have no doubt about the case; but if the pursuer avers that they are in another hand, there should be a proof before answer.

Rutherford.—Those trustees whose names are written on erasures have declined to act, which relieves the case of difficulty. It is unnecessary to say any thing about the defences; the opinion of the Court will be given effect to, by adhering to the interlocutor so far as it repels the reasons of reduction, and assoilzies the defenders with expenses.

¹ Shaw, I. 527.

No. 40.

THE COURT adhered in the terms suggested by Mr Rutherford.

Dec. 20, 1844.
Morton v.
Scott.J. and J. WRIGHT, W.S.—JOHN MURDOCH, S.S.C.—LOCKHART, HUNTER, and
WHITEHEAD, W.S.—Agents.

No. 41.

JAMES MORTON AND ANOTHER, Pursuers.—*Maitland*.
ROBERT SCOTT AND OTHERS, Defenders.—*Ld.-Adv. McNeill—Moir*.

Process—Jury Trial—A. S. 16th February 1841.—Where a defender had given notice of trial by proviso under the 11th section of the A. S. 16th February 1841, and had countermanded;—Held that he was not entitled thereafter to retain the lead in the cause, and that a second notice of trial by him was incompetent without further failure by the pursuer.

Dec. 20, 1844.

2d Division.
Jury Cause.

In this case, the pursuers had given notice of trial. They countermanded their notice, and not having renewed it within the requisite period, the defenders gave notice of trial by proviso, in terms of the 11th section of the Act of Sederunt 16th February 1841, for the next Christmas sittings.¹ The defenders thereafter countermanded, and, on the same day, gave the pursuers a new notice of trial for the Spring sittings.

The pursuer objected to this notice as incompetent.

LORD JUSTICE CLERK.—It is clear that this notice by the defenders is irregular. They had got the lead, and were entitled to give the former notice, and had then an opportunity of bringing on the trial if they chose. But they countermanded, and on the same day gave notice of trial for six months afterwards. This second notice is quite incompetent. I have no idea that the defenders having obtained the lead, were entitled to keep it for ever after. Their countermand deprived them of the benefit of the lead. That is given when the pursuer delays the case, in order that the defender may be enabled to prevent further delay. But if the defender himself follows the same course, and countermands, he has lost the only claim to the lead which the Act of Sederunt recognized. That, because he once obtained the lead in the special circumstances stated in the Act of Sederunt, he should be entitled always to retain it, and to retain it in the very circumstances by reason of which the pursuer lost it, would be equally unreasonable and injurious. The motion proceeds on an entire misapprehension of the clause in the Act of Sederunt, which is a remedy for the defender's protection in a special case. If he abandons the notice he then gives, his privilege is at an end.

The other Judges concurred in holding the notice to be irregular, and fixed the trial to take place at the Christmas sittings.

WILLIAM WOTHERSPOON, S.S.C.—CAMPBELL and TRAILL, W.S.—Agents.

¹ Alexander's Supplement to Acts of Sederunt, p. 93.

ROBERT CROCKATT WILSON and OTHERS, Appellants.—

No. 42.

*Lord Advocate M'Neill—Neaves.*PETER ROBERT DRUMMOND and OTHERS, Respondents.—*Rutherford—*

Dec. 21, 1844.

E. S. Gordon.

Wilson v.

Drummond.

Bankruptcy—Trustee—Affidavit—Stat. 2 and 3 Vict. c. 41, § 9.—A creditor in a sequestration gave in three affidavits to three separate debts, which affidavits bore no reference to each other, and in none of which was the amount of the whole sum, for which the creditor claimed to vote, specified;—Held, in conformity with the opinion of the majority of the whole Judges, repudiating the case of *Black v. Dixon*, (ante, Vol. V. p. 1077,) that the creditor was entitled to vote for the whole amount of the whole three affidavits.

WILSON and DRUMMOND were competitors for the office of trustee upon the sequestrated estate of William Colin Johnston. Wilson was declared elected by the meeting of creditors. Certain persons were at the same time, after a competition, elected commissioners. Drummond and his proposer appealed to the Sheriff against both the election of the trustee and commissioners; and the question raised was, whether the creditors had properly sustained the vote of James Seaton as mandatory for Mrs Isabella Trotter. This lady had given in three distinct claims, supported by as many separate affidavits, which bore no reference to each other, and in none of which were her whole claims accumulated and the amount specified, each specifying the amount of only the particular claim which it embraced. The mandatory's vote was accordingly objected to upon the authority of the case of *Black v. Dixon*, May 27, 1843, (ante, Vol. V. p. 1077.)

Dec. 21, 1844.
Whole Court.
Bill-Chamber.

In the appeal, Seaton abandoned the two last claims and affidavits of Mrs Trotter, but maintained the validity of his vote upon the first claim and relative affidavit, (for £364,) which was sufficient, if sustained, to support Wilson's election.

The Sheriff-substitute¹ pronounced the following interlocutor:—"After hearing parties' procurators, and on the Sheriff-substitute indicating an opinion that the decision in the case of *Black v. Dixon*, 27th May 1843, must be followed, Mr Seaton gave up the two last claims and affidavits for Mrs Trotter, and the relative votes given thereon, but maintained his right to claim the benefit of the vote on the affidavit for £364 : 2 : 9½, first recorded in the minutes: The Sheriff-substitute, therefore, of consent sustained the appeal as against the two claims and affidavits for Mrs Trotter, last recorded in the minutes, and now judicially departed from: The Sheriff-substitute finds that the state of the vote and

¹ Of Perthshire—Barclay.

No. 42. the validity of the affidavits as supporting the vote, must be decided according to the state of the facts as existing at the meeting, when the affidavits and vouchers were produced and the votes given: Therefore finds that the claim of £364 : 2 : 9½ must be held as made and voted on at the same time, and alongst with two other claims by the same creditor for other sums; and that the said affidavit, as well as the other affidavits for the same creditor, not bearing reference to the other claims at the same time made and voted on, nor specifying the accumulated sum for which she made oath and claimed to vote, is not in terms of law, and cannot support the vote, and accordingly sustains the appeal, and repels the claim founded on said affidavit." *

Dec. 21, 1844.
Wilson v.
Drummond.

The Sheriff-substitute accordingly found Drummond duly elected trustee, and the competitors of the commissioners elected by the creditors duly elected commissioners.

Wilson and the commissioners elected by the creditors appealed to the Lord Ordinary on the bills, who reported the case to the Court.

Counsel were heard in the First Division on 23d November last, when Lord Fullerton and Lord Jeffrey having expressed strong doubts of the soundness of the decision in the case of *Black v. Dixon*,¹ and of its conclusiveness as to the interpretation of a recent statute, the case was ap-

* "NOTE.—The decision in *Black's* case, though very rigid, must be followed. It was argued for Mrs Trotter that there the vote was given for the cumulo amount of the whole three affidavits, whereas in the present instance the votes were given separately on each claim. It is not thought that this makes any material distinction in principle. The objection still exists, that the creditor claimed at the same time for several debts, and that in no one affidavit did she swear to the total amount of her accumulated debt, for which she presently claimed to vote. There is certainly room for arguing that the words of the statute and the rule of the decisions in the previous cases of *Murray* and *Jeffrey*, are in reference to the separate statement, and addition or subtraction of principal and interest, and the statement of the balance, and do not in terms apply to separate claims of debt. There is also obvious advantage in having separate affidavits for separate debts, because, if any one item of debt was liable to an objection, it is thought the whole affidavit became vitiated, seeing that the accumulated sum was then erroneous; but this advantage under the decision in *Black's* case cannot now be had. There is no greater difficulty in reckoning separate affidavits for one party than the same number for different parties, to whom the claims might have been assigned before sequestration. Besides, if the rule is to be held good, every supplemental affidavit ought to connect itself with the previous ones, and carry forward the accumulated balance. Nevertheless, the decision in the case of *Black* must, in the mean time, be held as authority. If the whole three affidavits were bad at the time of the vote, it is not thought that one of them can subsequently be made good by abandoning the other two, otherwise untenable. The whole must stand or fall as one and together. Reference was made to the case of *Mories v. Glen*, where a voucher was allowed to be subsequently stamped. But this is in unison with the practice of courts of law. The document being otherwise unexceptionable, and the stamp being imposed merely for the public revenue, so soon as it is impressed, its effect operates retrospectively, and the document is held to be stamped at the time of making the deed."

¹ May 27, 1843, (ante, Vol. V. p. 1077.)

pointed to be argued before the whole Court by one counsel on each side. No. 42.

The *Lord-Advocate*, for the appellants, argued, that the 9th sect. of the Act alone was applicable to the case; and the true meaning of it was simply, that the debt put forward by a creditor should be fortified by his oath. The clauses as to the accumulation of interest, and deduction of securities, (from sect. 32 to sect 37 inclusive, excepting sect. 35,) had no application. There was no provision in the Act to exclude more affidavits than one. Suppose a creditor with a contingent and a positive debt, must he include them in the same affidavit? Contingent debts were provided for by sect. 39. The case of *Black v. Dixon* ought not to be followed as a precedent; but, at any rate, the present case was distinguished from it by the circumstance of the creditor being willing to stand upon his first claim and relative affidavit.

Dec. 21, 1844.
Wilson v.
Drummond.

Rutherford, for the respondents, argued, that the case of *Black v. Dixon* was precisely in point, and, being an authority in a matter of practice, ought not lightly to be disregarded. It was supported by the cases under the former Act, which, as to the matter in question, was substantially the same as the present.¹ Sect. 9 of the present Act was quite precise; it spoke of only one debt and one affidavit, and clearly meant that the whole debt for which a creditor claimed should appear in one affidavit; sects. 32, 33, and 34, showed distinctly that the Act contemplated the clear balance for which a creditor claimed, appearing upon one affidavit. If a creditor chose to swear separately to separate claims, it was at least necessary that his last affidavit should refer to the preceding, stating the amount of all his claims, and containing an oath that that amount was due. The affidavits here made no such reference to each other, and there was therefore no oath that the amount of the whole was due, for a creditor might safely swear to debts separately, while he could not swear to the whole. Some of them might only be due in the event of the others not being paid, and the safeguard, against unjust claims, of a prosecution for perjury would thus be lost.

The case was this day advised by the whole Court.*

LORD PRESIDENT.—I regret that there should be a difference of opinion in this case. If I were satisfied that there had been a practice following upon the judgment of the Second Division in the case of *Black*, I should not have been for departing from it; but I cannot hold that the point was so determined there as to become a rule of practice.

Holding, as I am disposed to do, that the judgments in the cases of *Jeffrey* and *Phillips* are sound, I think these cases are not decisive of the present question.

¹ *Jeffrey v. Creighton*, Jan. 20, 1821, (F. C.); *Murray v. Phillips*, June 22, 1821, (1 S. 81.)

* Lord Cuninghame was absent from indisposition.

No. 42. In the case of Jeffrey,¹ I hold the rubric to be a correct statement of the decision. It is in these terms :—" A creditor claiming on a bankrupt estate must specify in his affidavit the precise balance for which he claims, after deduction of the value of the separate securities he holds." With that judgment I do not wish to interfere. In the other case of Phillips,² the rubric is equally clear and specific. That also is a decision which I do not interfere with. In the present case, in regard to each of the three affidavits, there is no departure from any thing required by these decisions. There is no omission to deduct securities. The difficulty I find is this, that there is no clause in the present Bankrupt Act which requires that there shall never be more than one affidavit, though there are more stringent and explicit requirements as to the valuation and deduction of securities. But in regard to a claim such as this, which is clear as to three debts therein stated, there is nothing in the Act which warrants me to say that it is not competent for the party to produce more than one affidavit; and indeed that is conceded under this qualification, that the last should refer to the former, and specify the full balance. There is, however, no clause in the Act to that effect. I observe that Professor Bell, in that part of his work where he is treating of the effect of the 24th section of the former Act, makes this important observation :—" This is a point which may deserve attention in the renewal of the statute." When we come to look at the new Act, and find nothing in it declaring that there shall be one affidavit, in which the whole debt of the claimant shall be included, and that it shall be incompetent to have more than one, we are not entitled to supply that defect in the Act. I am, therefore, disposed to hold that there is no such regulation to be found in the Act, and that in the case before us, the affidavits being liable to no exception, the party is not precluded from saying, Here is what I claim on in these writings—there are affidavits of these debts, and I claim to vote on them accordingly.

But there is another point in the case—that supposing we were bound by the decision in the case of Black, whether, where there are several affidavits, the party is not entitled to say, when the votes come to be scrutinized, that he adheres to one affidavit and puts his vote upon it, and that he is entitled to ask back the other affidavits, and put them in his pocket or in the fire? I have formed a clear opinion upon that point also. But I am of opinion that we are not tied down by the decision in the case of Black, and I therefore think the vote good.

LORD MACKENZIE.—I concur in the result of the opinion just delivered. I think the first of the three claims must be sustained, supposing the others to be rejected, the first standing on a separate affidavit, which specifies the amount of debt, and is in all respects good under the Act. The case of Black is not against the validity of such claim. That case afforded no *termini habiles* for that question. There the claim was made to vote for the whole, or nothing; that is expressly stated in the report. Therefore, on this last ground I have no difficulty, and see no ground why the vote, as restricted, should not be sustained.

But, so far as your Lordship's opinion goes beyond that, I cannot concur. In

¹ Jeffrey v. Creighton, Jan. 20, 1821, (F. C.) .

² Murray v. Phillips, June 22, 1821, (1 S. 81.)

No. 42.

Dec. 21, 1844.

Wilson v.
Drammond.

the case of Black, there were three claims and three affidavits, and the objection was taken that it was not competent to put in three affidavits not referring to one another, and the last not containing a distinct statement that the creditor claimed on the whole, and that objection was unanimously sustained by the Second Division. That is a decision on a point of practice, and therefore is not to be departed from, unless we have a clear opinion that it is wrong. I cannot see that the Bankrupt Act authorized a creditor to vote at once on more than one affidavit. There is no authority in the Act for such a procedure; and if not, we cannot sanction it. The Act is to be equitably interpreted, but we cannot push it to this extent—to admit a claim not authorized by it. If the claim is not under the 9th section of the Act, it is not authorized by the Act at all. That section says, (his Lordship read it.) It appears to me that this affords no warrant for more than one claim and one affidavit; and there is no provision for more. The clerk is directed to enter the one sum for which the party claimed, (section 45.) It would have been easy for the Act to have said debt or debts, and oath or oaths; but it has not done so, and the clerk is not directed to make a calculation, but to write down a sum. It is an obvious observation, that, if we once go beyond one, there is no limit: Any creditor may divide his claim into as many claims and debts as he pleases, and may leave the amount to be gathered from a multitude of sums and oaths. There may be a thousand oaths applicable to a thousand claims, and it may be said they are all sanctioned by section 9 of the Act. I cannot take that view. I think the statute requires that there shall be one affidavit, specifying the whole amount of debt on which the creditor claims. I cannot see that there is any expediency in any other interpretation. There is no advantage from allowing two claims. Where is the difficulty of uniting them into one?—where is the difficulty of a creditor saying for himself what he calls on the clerk to say for him—what is the total amount of his claim? I am, therefore, inclined to adhere to the construction of this clause adopted by the Second Division in the case of Black.

A great many special clauses of the Act have been referred to, requiring that, in particular cases, a balance shall be struck. I don't put this case on these clauses further than this, that they indicate the existence of the general rule; they take it for granted that all the claims are to be single claims, as I have mentioned; they assume that each creditor is to give in a single claim and affidavit specifying a definite sum. These afford an indication, as I think, of the general rule being as I have stated it. It is taken for granted that there is no need for stating the balance, except where addition or deduction is to be made, that being done from the nature of one claim. I don't wish to extend these sections to this case further than as affording an indication of the meaning of section 9.

LORD JUSTICE-CLERK.—I agree with Lord Mackenzie.

LORD FULLERTON.—I agree with the Lord President in thinking that there is nothing in the Act to prevent separate claims and separate affidavits; and I see the strongest reasons in expediency for allowing them. But the difficulty in this case arises from the operation of the 9th section of the Act, when taken with the terms of the affidavits. A creditor, to be entitled to vote for any particular amount, must produce an oath to a debt of that amount. I think separate affidavits may be framed so as to comply with the Act, and be good evidence that the whole debt is due; but the difficulty here is, that the affidavits have no refer-

No. 42. ence one to another, so as to afford this evidence. It does not appear to me that they are affidavits bearing on the face of them that the whole amount of the debt is due. They may be separate parts of the same debt, to each of which the party may safely swear; and it may not follow that the whole amount was due. Two words would have done it—it was not necessary to swear to the whole debts over again; but the last should have borne to be in addition to the former. I am not disposed to make much allowance for a creditor who goes out of the ordinary course. If he goes out of it, what he does must be completely equivalent to what he has omitted. I think a reference in the last affidavit to the former ones, so as to show, on the face of it, that the amount of the whole was due, would have been sufficient. This view necessarily leads to the conclusion, that the first affidavit here is perfectly good, for the subsequent ones don't void the first. The objection is, that the second, not referring to the first, is not a good affidavit that the additional sum is due. Therefore, I have no difficulty in holding that the claim on the first affidavit is good. I don't give any countenance to the notion, that it is not competent to have more affidavits than one.

LORDS MEDWYN, MONCREIFF, JEFFREY, MURRAY, IVORY, WOOD, and ROBERTSON concurred with the Lord President; and LORD COCKBURN concurred with Lord Mackenzie.

The following interlocutor was pronounced by the First Division:—

“IN conformity with the opinion of the majority of the whole Judges, recal the deliverance appealed from; sustain the vote of Mrs Trotter for the *cumulo* amount of the whole three affidavits, and find that the appellants were duly elected trustee and commissioners on the sequestrated estates in question; and remit to the Sheriff to confirm them accordingly; find the appellants entitled to their expenses, both before the Sheriff and in this Court.”

JOHN GARDINER, S.S.C.—JAMES T. HILL, W.S.—Agents.

MAGISTRATES OF CAMPBELTOWN, Pursuers.—*Rutherford—G. G. Bell.* No. 43.

D. S. GALBREATH, Defender.—*Ld.-Adv. M'Neill—Sol.-Gen.*

Anderson—Macfarlane.

Dec. 21, 1844.
Magistrates of
Campbeltown
v. Galbreath.

Process—Jury-Trial—Verdict.—1. Where a jury had returned a special verdict, finding that certain facts had been proved,—Objection repelled, that the verdict did not exhaust the issue, by returning an explicit affirmative or negative answer to it. 2. Under an issue as to whether the pursuers had for forty years levied the shore dues set forth in certain schedules or tables of dues, the jury found that they had “from time to time,” “in assertion” of their right, levied a lesser rate of dues than that in the tables, upon some of the articles specified therein,—Held that this was a verdict generally negative of the issue. 3. The Judge at a trial having directed the jury as to the shape in which they should return their verdict, without any exception having been taken, and the jury having returned a verdict in terms of the charge,—Opinion, that it was incompetent for the party who had thus failed to except, to move for a new trial, on the ground that the verdict was not an answer to the issue.

For a statement of the nature of this action, the issues sent to trial, Dec. 21, 1844. and the verdict of the jury, see report, ante, p. 220.

Mr Galbreath now moved for a new trial, on the grounds, 1. That the verdict returned upon the second issue was contrary to evidence; and 2. That it was not an answer to, and did not exhaust the issue.

2d DIVISION.
Lord Justice-
Clerk.
Jury Cause.

1. In virtue of the powers conferred upon them by their charter of erection, the Magistrates of Campbeltown had, in the years 1757, 1795, and 1799, issued successive minutes of council, with schedules or tables of dues, fixing the sums to be paid by unfreemen, as anchorage, quayage, and shore dues. The anchorage dues were dues payable upon every vessel anchoring within the harbour; the quayage were exigible from every vessel loading or unloading goods at the quays of the burgh, or any where within the harbour; and the shore dues were leviable upon a variety of articles of export and import, specified in the tables. By the last table, that of 1799, a distinction was for the first time made between the rate of shore dues leviable upon certain specified goods when landed or shipped at the quays of the burgh, and when landed or shipped at other parts of the harbour or loch; in the latter case, a higher rate of shore dues being exigible. By this table, potatoes, amongst other things, when shipped from the burgh quays, were declared to be liable in a shore due of a penny-halfpenny per boll, and when landed there, in payment only of the causeway custom; while a duty of threepence-halfpenny per boll was imposed upon them when brought to all other parts of the harbour than the burgh quays. The duty chargeable on bark, according to the tables, was one penny-halfpenny per boll—three bolls being about a ton. The tables made no distinction as to the dues leviable on this article, in respect of the place to which it might be brought. Besides

No. 43. bark and potatoes, the two articles mentioned in the verdict on the second issue, the tables appointed shore dues to be levied on a great variety of other articles.

Dec. 21, 1844.
Magistrates of
Campbeltown
v. Galbreath.

The exaction of quayage dues was, by the table 1757, limited to the quays of the burgh; but was by the subsequent tables of 1795 and 1799, extended to vessels loading or unloading any where within the harbour.

At an early stage of the process, a minute had been given in for Mr Galbreath, stating that he did not dispute the pursuers' claims to the anchorage dues; or to the dues relating to the quay of Campbeltown, for which they were at liberty to take decree,—but only in so far as these claims applied to his own lands and quay of Dalintober.

It was argued for Mr Galbreath in support of the other ground on which he moved for a new trial;—

2. The question in the second issue was, had the pursuers levied the duties contained in the table 1799 at Dalintober for forty years? This question involved pure matter of fact, to which an answer in the affirmative or negative might have been returned. The jury were asked if the pursuers had levied 3½d. on potatoes—the duty in the table applicable to Dalintober. The answer returned by them was, that they had levied something which was not the duty in the table—viz. a duty of 1½d. Further, they were asked if the levy had been made for a period of forty years? To this important question, the answer which they returned was, that it had been made from “time to time.” It was difficult to say what meaning was to be attached to this finding. Several interpretations might be put upon it which were inconsistent with the evidence. For instance, were it to be read as a finding that a levy had been made upon potatoes prior to 1816, this was contrary to evidence, as there had been no proof adduced at the trial of such levy having been made before that time. The verdict was flexible in its meaning, might be expanded or contracted, and did not answer the question in the issue, so as to exclude constructions inconsistent with the fact. The defender was therefore entitled either to have it set aside, or to have its meaning fixed, so that all such interpretations should be excluded from it.

The pursuers answered, that it was not necessary that a verdict should answer an issue directly in the affirmative or the negative. In the present case, the jury could not have done so. They could not have found that there had been no levy on the one hand, nor could they have found on the other, that the pursuers had levied upon the whole articles, and up to the full amount of the dues in the tables. They therefore returned a special verdict, exhausting the whole facts that had been proved to them—viz. that a certain levy in assertion of the town's rights had been made from time to time. In so far as regarded the articles specified in the tables, other than potatoes and bark, the pursuers admitted that the verdict was for the defender.

LORD JUSTICE-CLERK.—I will state the views that have occurred to me with regard to this motion. It will be observed that it is made upon one issue only. At one part of his argument, the Solicitor-General pointed to a new trial upon all the issues. But the verdict upon one of the issues, at least, is admitted to be good—therefore I may say, that though we were to allow a new trial upon the second, it does not at all follow that we are to disturb the other issues.

It has been repeatedly decided, and it is a most salutary principle of law, that if a direction is given, or a particular view of a case presented for their determination, to a jury at a trial in the hearing of counsel, and if the jury retire without any exception having been taken to it, and the verdict is received without objection, that it is not competent to raise an objection to the course taken by the Judge in a motion for a new trial. This point was fully discussed in *M'Lellan v. Rodger*, Feb. 9, 1842; and the Court were of opinion in that case, that it was not competent, in a motion for a new trial, to raise any such objection, not stated at the time. And this was not the first judgment upon the point—the case of *Robertson v. Aindie's Trustees*, June 29, 1838, is a strong instance of this—and there was also the prior case of *Campbell of Rockhill* in 1835, where the Lord Justice-General had presented the case to the jury in a particular point of view under the issue, and this had not been objected to at the trial. There are also a number of English cases to the same effect mentioned in *Chitty's Practice*—cases where it was strongly held that, because counsel sat still and made no objection while the Judge was charging the jury, it was incompetent afterwards to raise objection even to the view of the facts stated by the Judge. This is shown in the case of *Chesterman v. Lamb*, (*Adolphus and Ellis*.)

Now, what took place at the trial? The pursuers were clearly entitled, if they thought it material to their case, to have it found that they had proved something less than the issue; and they indicated at the trial a desire to this effect. I told the jury that the pursuers were entitled, if they thought it material, to have a finding that there had been a levying at the quay of Dalintober (if the jury thought that to be proved) in *assertion* of their rights under the tables, not in *exercise* of their rights, for I carefully guarded the expression. This direction was not then objected to by the defender's counsel. And I must say, and I do so in the strongest possible terms, that if the present course of procedure is to be permitted, by admitting the objection which is now for the first time stated, it will undo all the certainty of jury-trial; certainly it will destroy all satisfaction on the part of the Judge trying the case. A motion for a new trial is a mode of reviewing the proceedings in the trial, not a form of procedure for assailing a verdict by after ingenuity. I had reason to believe that the Lord Advocate was perfectly satisfied with the verdict, or the form of the verdict, at the trial. Had it not been so, and had he really then entertained the views he pleaded to us, I cannot think he would have allowed the direction to pass without objection, as to the competency of the jury finding specially what they thought to be proved.

In order, however, to remove any ground for misapprehension, I am willing to assume that we can look at this objection. This part of the verdict is returned upon the second issue. As the tables attempted to make a distinction in amount between the dues to be levied at the quay of Campbeltown, and those that were to be levied over the rest of the loch, fixing the latter at a higher rate, the pursuers probably thought that it might not be enough to have an issue applicable merely to the levying at the quay of Campbeltown. Suppose the pursuers had proved that

No. 43.

Dec. 21, 1844.
Magistrates of
Campbeltown
v. Galbreath.

No. 43.

Dec. 21, 1844.
Magistrates of
Campbeltown
v. Galbreath.

all the dues leviable at Campbeltown had been levied at Dalintober, would they not have been entitled to a finding to that effect, although the higher dues that had application to Dalintober had not been proved to have been levied there?

There is a great difference between the situation of a pursuer and defender in an issue. While the pursuer is bound to prove to the extent of his issue, the defender has the benefit of this, that the issue is negatived to the extent to which the pursuer fails to prove it; and I am clear that the pursuers here have failed to prove, under the issue, a possession for forty years by levying at Dalintober. They have not proved, that as a matter of fact they levied the higher duties, or the Campbeltown table, at Dalintober; and they have only proved a levy upon two of the articles contained in the table. The verdict does not profess to be affirmative of the issue. It is not in favour of the pursuer in terms of the issue. It is the plain expression of men of common understanding, that they held it to be proved that the pursuers did assert their right to dues at Dalintober by the limited levy mentioned in the verdict—showing that they had never relinquished them. It is merely a statement, that from time to time they did do something in assertion of the tables. It is a finding which the pursuers were competently entitled to ask, and it is not capable of misconstruction, or of injuriously affecting the interest of the defender. It is quite new to me, that a jury can only find on an issue of this sort *for the pursuer, or for the defender*, and that if facts within the issue are proved to their satisfaction, on which the Judge thinks an important question of law between the parties may be raised, it is incompetent for the jury to find such facts. But to return to the objection which I stated in the outset, there is nothing I should deplore more than that this verdict should be upset, as I should not then know how to deal with counsel before me at a trial.

As to the other and less important question of whether the verdict is contrary to evidence, I think that it is supported by the evidence.

Rutherford.—That is quite the pursuers' view of the verdict.

LORD MEDWYN.—Without considering whether the defender should have objected to the manner in which the Judge presented the point to the jury in his charge, so as to make a competent foundation for a motion for a new trial, I proceed to consider the motion itself.

A new trial is moved for as to the verdict upon the second issue, as being against evidence, and as not exhausting the issue by returning a full answer to it.

Now, as to this latter ground, I understand that it is the privilege of a jury to return a special verdict, so that they need not answer the whole issue, negatively or affirming it, but may return a verdict in so far as they find any thing proved which it is for the Court to apply. This they have done in the present case, and it will be for the Court to say what is the import of what is found, and how bears on the claim made by the pursuers against the defender, and how far it supports the issue taken by them to support their action. On this ground, then, see no right in the defender to ask for a new trial.

The other ground, that the finding is against evidence, necessarily leads to what would be premature, except that it must be enquired into, in consequence of the motion for a new trial, what has been found by the jury, and what is the import of this special verdict, before it can be said whether it be against evidence or not. It were to be held that this part of the verdict implied that the jury held, and mea-

the Court to deduce from it, that there had been possession by levying shore dues on potatoes and bark at the quay of Dalintober for forty years, in exercise of the rates in the table 1799, the higher rates as to potatoes there, then I would be obliged to say that it was against evidence, because I think the levying did not commence till 1816, and the rate of the table was not paid then; and I must, then, be for allowing a new trial. But, on the other hand, if the finding that from time to time the pursuers levied a smaller rate on potatoes at Dalintober than the table authorized, and the proper dues for bark, in assertion of their right, this does not import forty years' possession in exercise of their right under the table 1799 as to potatoes;—the objection as to the time also applying to the levy on bark, I cannot say that I think this finding is against evidence, but consistent with it, as I do not think the evidence would have warranted the affirmation of the issue in favour of the pursuers, although it would, I think, have enabled the jury to find for the defender, as forty years' possession had not been established. They have not, however, done so; but it was competent for them to do what they have done, to return, instead of this, a special verdict as to the facts established before them, leaving it to the Court to say how far this affirms the issue. There were three points in the issue—1st, Whether the Magistrates levied dues on the table 1799; 2d, at the quay at Dalintober; 3d, for upwards of forty years. Now, I understand that, in so far as any of these are not found by the special verdict, the pursuers fail in their proof, and the verdict must be held to be for the defender. If I could hold that the findings of the jury implied forty years' possession of the rates in the table 1799, I would be for granting a new trial as against evidence. But they have not found this.

LORD MONCREIFF.—I am obliged to your Lordship for the explanation you have given, especially in regard to the state of the law in England. Were I to study these cases, it is probable I should agree with your Lordship, that if any matter of law is laid down by a Judge, a party is not entitled to sit by without taking an exception. There is great probability of soundness and expediency in the rule. But still, when a verdict is presented to us as an answer to an issue, I am afraid that we are obliged to consider it as it stands; and I must say, that I think it would have been better if the jury had here returned an explicit answer to the issue. They might have added to that a statement of the facts they found proved; but it would have been better if they had returned an answer one way or another. If we are of opinion, however, that the verdict is negative of the issue, I do not see the necessity of giving a new trial. If the pursuer does not prove his issue, he must be the loser; and the only question that remains is, whether the finding in the verdict can be stated to be contrary to evidence. I do not think that it was pleaded to us that the verdict, as your Lordship understands it, was contrary to evidence.

I am satisfied to hold that the verdict, as it stands, is in favour of the defender; and this being the case, I can see no ground for a new trial.

LORD COCKBURN.—The Lord Justice-Clerk states that he does not consider this verdict to be contrary to evidence. Such being the view of the Judge who tried the case, it would be a very extraordinary case in which I would differ from him. But, besides, I think it has been proved that the pursuers did levy as stated in the verdict.

Upon the other ground, I think that the verdict does answer the issue. The jury have returned a special verdict, which I hold is an answer in favour of the

No. 43. defenders, out and out; but they say further, on being told to do so by the Judge, (and very properly, I hold,) not only do we find for the defender, but we find, besides, some other special facts. I suppose this motion for a new trial was made because the defender thought that the verdict might be construed against him. On both these grounds, I think there is no reason for disturbing it.

Dec. 22, 1845.
Jopp v. Hay.

The pursuers having consented to the verdict on the second issue being held to be generally in favour of the defender,

THE COURT pronounced this interlocutor:—"Refuse the motion for a rule to show cause why the verdict in this case should not be set aside, and a new trial granted; and of consent of the pursuers, enter up the verdict on the second issue as generally for the defender, David Stewart Galbreath, with the addition of the special finding found by the jury."

FERRIERS & DUFF, W.S.—LOCKHART, HUNTER, & WHITEHEAD, W.S.—Agents.

No. 44.

JOHN JOPP, Petitioner.—*Rutherford—Hector.*

SIR ANDREW LEITH HAY, Respondent.—*Maitland—Handyside.*

Bankruptcy—Sequestration.—1. Held that a person was liable to sequestration for a personal debt, unconnected with trade, contracted while he was a trader, though he had ceased to be so, without owing any trading debts prior to the date of the bill which he granted for the debt, upon which the application for sequestration was founded. 2. Circumstances in which held that a creditor was not barred from applying for sequestration of his debtor's estate, though he had agreed in acceding to a trust to suspend all diligence till the final conclusion of an action, which it was the object of the trust to have tried for behoof of the creditors, and that action, though finally decided in the Court of Session, was still open to be appealed.

Dec. 22, 1845.* PETITION, under the Bankrupt Act, by a creditor for sequestration of the estates of his debtor, opposed under the following circumstances:—

1st Division.

Ld. Robertson.

N.

Sir Andrew Leith Hay became a partner, in 1825, of an insurance company, and also of a banking company, in Aberdeen. He sold out, and ceased to be a partner of the former in 1827, and of the latter in 1833. It did not appear that he had ever in any other way been connected with trade. On 22d March 1836, he granted a promissory-note for £3177:10:1, payable on 20th June 1837, to Alexander Jopp, Aberdeen, "on account of his late father's representatives." It appeared that the father died in 1829. This note was indorsed by Alexander to his brother, John Jopp, W.S., who in 1841, along with certain other creditors of Sir Andrew Leith Hay, subscribed a deed of accession to a

* Decided 14th.

trust-deed executed by him, whereby he conveyed his whole estates to trustees, for the purpose of enabling them, for behoof of the creditors, to try the validity of the entail under which he held them, the creditors acceding binding themselves to supply the necessary funds for that purpose—to use their endeavour to obtain the accession of all the creditors, and, finally, consenting and agreeing for themselves, “respectively and individually, to suspend all diligence, real or personal, against Sir Andrew Leith Hay, and the said lands and others, until the final conclusion of the said action, or whilst the same is *bona fide* defended and insisted in by an heir of entail contained in the destination expressed by the said deed of entail.” Those creditors who acceded formed a very small minority of the whole. No. 44.
Dec. 22, 1844.
Jopp v. Hay.

An action was accordingly instituted, which resulted in the entail being sustained by a unanimous judgment of the Court on 29th December 1842. At a subsequent meeting of the acceding creditors, they refused to supply the funds for an appeal, and resolved that no further proceedings should be had under the trust and deed of accession. On 29th November 1844, Sir Andrew Leith Hay, having failed to induce the creditors to prosecute an appeal, caused his agent to intimate to his opponents that he meant to do so himself.

In December 1840, Sir Andrew Leith Hay granted his concurrence, and became a party to a deed granted by the North of Scotland Assurance Company, whereby they assigned debts which they held against him to the extent of £13,000 to Duncan Davidson, and conveyed Sir Andrew's estates to him in security. Upon this deed, Davidson raised a process of mails and duties, in which he obtained decree in July 1844.

In November following, John Jopp, as creditor in the promissory-note which he held, presented a petition, under the Bankrupt Act, for sequestration of Sir Andrew's estates, upon the allegation that he “is, or has been, a banker, and an underwriter or an insurance broker in Aberdeen,” and is “notour bankrupt.”

Answers were given in for Sir Andrew Leith Hay, objecting, 1st, to the vagueness of the description in the petition, “is, or has been, a banker,” &c.;¹ 2d, That the debt of the petitioner was neither a trading debt, nor contracted while the debtor was a trader, and that, therefore, sequestration could not be awarded upon it;² 3d, That the petitioner was barred from applying for sequestration by the obligation he came under in acceding to the trust, to suspend all diligence until the final conclusion of the action respecting the entail;—it being intended to ap-

¹ Ireland v. Whyte, Nov. 24, 1842, (ante, Vol. V. p. 173.)

² Ogilvie v. Simpson, March 4, 1837, (15 S. 746.)

No. 44. peal the judgment in that action, it could not be held as finally concluded.

Dec. 22, 1844.
Jopp v. Hay.

In support of his application, the petitioner contended,—1st, That the very words of the Bankrupt Act had been used in the description in the petition; 2d, That his debt, though not a trading debt, was contracted while the debtor was a trader, the bill having been granted for a debt due to the petitioner's father, who died in 1829; 3d, That the trust and accession were at an end, by the judgment of the Court of Session in the action, and the creditors refusing to carry it further; and, at all events, a material change of circumstances had occurred by the truster's own act, enabling a non-acceding creditor to do diligence against the estate.

The Lord Ordinary reported the case to the Court.

After hearing counsel, the following opinions were delivered :—

LORD PRESIDENT.—I think there is nothing in the critical objection to the form and shape of the application, which appears to me completely within the Act of Parliament. Then, as to the origin of the debt, it is impossible to look at the decisions without seeing that there is nothing in the objection founded upon that. It is sufficient that the debt is coeval with trading. The last objection is of more importance—that this application is barred by the trust-deed, to which the applicant was an acceding party. It has been long settled that a trust-deed in favour of creditors is no bar to sequestration, and the question here therefore is, whether there are clauses in this particular deed which bar Jopp, an acceding creditor, from making the application. Out of one hundred and thirteen creditors whose names appear in the deed, only thirteen accede to it, Jopp no doubt being one of them. I think it would be a serious matter to hold that no change of circumstances can take place which will warrant the withdrawal of accession when there is such a number of non-acceding creditors. If so, the whole estate for which the trust was granted might be swallowed up in the mean time, the creditors who acceded being barred, whatever they might see going on, from taking any step for the protection of their interests. The non-acceding creditors might get into possession in any of the various ways allowed by the diligence of the law, while those who acceded could not move to help themselves. That is a proposition which I cannot sanction. The object of the trust was to try the validity of the entails at the instance of trustees for creditors, they agreeing “to suspend all diligence, real or personal, against Sir Andrew Leith Hay, and the said lands and others, until the final conclusion of the said action, or whilst the same is *bona fide* defended and insisted in by an heir of entail contained in the destination expressed by the said deeds of entail.” It may be a question whether an application for sequestration is diligence, in the sense of this clause. But to pass by that, what I am moved by is the change of circumstances which has taken place by the act of Sir Andrew Leith Hay himself—the deed granted with his concurrence—

¹ 2 Bell's Com. 316; Dick v. Lyell, Jan. 28, 1815, (F. C.); Grant v. Baillie, May 20, 1830, (8 S. 778.)

which put Davidson in a situation, with reference to accumulated debts to the extent of £13,000, to do diligence against the estate, and enable him to carry it off if it should be found to be held in fee-simple. I hold that to be such a breach of the *bona fide* object of the trust, which, certainly implied that the debtor was to do nothing to affect the rights of the acceding creditors, as to bar him from founding upon any clause in it against them. I think that of itself affords an answer to the defence on the trust deed. On the whole, I cannot say that Sir Andrew Leith Hay is not liable to sequestration.

LORD MACKENZIE.—I concur. In regard to the right contemplated to be granted to a particular creditor, no doubt it is more favourable than if the debtor had spent the money, but still it is objectionable. I have no doubt that it was never contemplated that sequestration should only be granted for trading debts. Being a trader, renders a party liable to sequestration, and then his own private debts are looked to just as much as any others. A party may be a trader, and have no trading debts; he may be a partner of a large banking concern that has no debts, but being a partner renders him liable to sequestration for his own debts.

LORD FULLERTON.—I am of the same opinion. There is nothing in this particular trust or deed of accession to exclude the rule, that a trust for creditors does not prevent sequestration. That principle must apply to the last clause of the deed of accession, as well as any others. That clause might have prevented them beginning diligence against the estate, while none of the other creditors were touching it; but that is not the case here, and there is, therefore, nothing in the clause to prevent the application of the rule.

In regard to the other points of the case, I agree with your Lordships. It cannot be maintained that the debts must be trading debts. A person who is only a partner may be sequestrated, though the company is quite solvent. That is quite conclusive on the point. In the case of Ogilvie, the Court took a very fair view, holding, that if a party can show that he has extinguished all the debts for which he might have been sequestrated when a trader, he may start a new course. But that is clearly not the case here.

LORD JEFFREY.—I concur. I see no difficulty in the point last spoken to. The import of the decisions is, that a party is liable to sequestration for debts prior to, or coeval with, trading, though quite unconnected with trade. The party being by personal description a trader, is liable to be sequestrated for all debts. If debts are connected with the period of trading, they are equally the subject of sequestration with trading debts. The only difficulty is upon the form and object of the trust deed. I view it as a mere agreement among certain creditors to contribute the funds for trying a law question. I think there ought to be a concurrence of all the creditors, or at least a tacit concurrence, *non agendo*, to bar sequestration. Without going into that, the trust here is solely a contract to pay the expenses of a law suit by certain creditors, and to do all they can to prevent the attachment of the estate by other creditors during its dependence. When they on very good grounds—a unanimous judgment of this Court—refuse to appeal, I think they put an end to the arrangement. They say then,—we give up this chance of obtaining payment, and take the other. Then there was a violation of the compact by the truster himself. He takes the creditors bound to do nothing to attach the estate during the dependence of the lawsuit, and he himself enables

No. 44.

Dec. 22, 1844.
Jopp v. Hay.

- No. 44. a non-acceding creditor to obtain a preference over it. I think the objections to sequestration ought to be repelled.

Jan. 14, 1845.
Alexander v.
Barclay.

THE COURT accordingly remitted to the Lord Ordinary to award sequestration, and proceed further in common form.

JAFF and JOHNSTON, W.S.—J. H. BURNETT, W.S.—Agents.

- No. 45. WILLIAM ALEXANDER and JAMES LARGNO, (Alexander's Executors,) Petitioners.—*Rutherford—Handyside.*
WILLIAM BARCLAY, (Judicial Factor on Russell's Estate,) Objector.—*Whigham—Henderson.*

Bankruptcy—Sequestration—2 & 3 Vict., c. 41, § 4.—In an application under the Bankrupt Act, § 4, for sequestration of the estate of a deceased debtor.—Held, that upon consignation of the debt of the applicant by a judicial factor on the estate, (who had raised a reduction of the ground of debt,) sequestration ought to be refused.

Jan. 14, 1845.

1st Division.
Ld. Robertson.
W.

JOHN RUSSELL of Balmade died in 1821, and, several years after, some family disputes having arisen as to his succession, a judicial factor was appointed on his heritable estate. In 1844, Alexander's executors, founding upon a bill for £210, dated in 1819, accepted by Russell, and held by their constituent, and upon which they had obtained decree of constitution against Russell's representatives in 1842, presented a petition under the fourth section of the Bankrupt Act for sequestration of Russell's estate. The judicial factor, the same day on which the petition was presented, had signeted a summons of reduction of the decree of constitution. He opposed sequestration being awarded on these grounds: 1st, That the debt on which the application was founded was not resting-owing, and the decree of constitution was under reduction; and, 2d, That the estate of the deceased debtor was quite solvent, and he was willing to find caution or consign the amount of the petitioners' alleged debt. The petitioners did not deny the solvency of the estate, but maintained, 1st, That the objector, in his character of judicial factor, had no title to appear and oppose the application; 2d, That they had produced *prima facie* evidence that the debt founded on was resting-owing, which was sufficient; and, 3d, That after the expiration of six months from the debtor's death, insolvency was not necessary to entitle a creditor to obtain sequestration.¹

The Lord Ordinary (on 15th July) pronounced the following interlocutor:—"Finds that the claim of the petitioners, which is founded on a

¹ 2 & 3 Vict., c. 41, § 4; Waddell, Jan. 21, 1841, (ante, Vol. III., p. 411.)

bill dated in the year 1819, and on which decree of constitution was obtained in absence, is challenged in a competent process: Finds that the estate of the deceased is under the judicial management of a factor appointed by this Court: Finds that no creditor of the deceased, or other party interested in the succession, concurs in the present application: Finds that the estate is solvent, and that it is not disputed that a surplus has been consigned in bank; and that the heritable property is greatly more than sufficient to answer the petitioners, and all other demands competent against the same: Finds that caution for the debt has also been offered to the petitioners, and rejected by them; and, before further procedure, appoints the petitioners to state in a minute, to be lodged on or before Thursday next—1st, Whether they have any objection to the sufficiency of the caution, or the terms in which the same is offered; 2dly, Whether they are willing that the present process of sequestration should be sisted on consignment of the amount of the debt, with interest; and, 3d, If not, for what purpose, and to what effect the present process is insisted in, pending the action of reduction of their debt: With certification, that if the said minute be not lodged on or before the said day, they will be held as rejecting either caution or consignment.”

Jan. 14, 1845.
Alexander v.
Barclay.

The petitioners, in consequence, gave in a minute in these terms:—

“The petitioners beg to state, first, that they object to accepting caution or consignment from the compeerer, the judicial factor, in respect that their doing so might be held to admit the title of the judicial factor to appear as a respondent in this process of sequestration, and also his title to pursue the action of reduction brought by him; and, second, that their interest is, that they should not be called on to litigate with a party who carries on legal proceedings by the use, not of funds belonging himself, but to others, who do not only not concur with, or sanction his opposition to the petitioners’ claims and proceedings, but who, through their agents (see letters in process) expressly repudiate his present opposition to the petitioners’ application for sequestration. And the petitioners beg further to state, that they have a clear interest to prefer proceedings by sequestration for recovery of their debt to any other less efficient and expeditious mode of getting it realized.”

The Lord Ordinary (on 20th July) pronounced the following interlocutor:—“Having resumed consideration of this case, with the minute lodged in consequence of the interlocutor of 15th current, in which minute the petitioners decline to accept of consignment of their debt, Finds, in the special circumstances of this case, that there is no fair and legitimate ground for insisting in this application, and therefore dismisses the same; refuses the petition, and decerns: Finds the respondent entitled to expenses.” *

* “NOTE.—Mr Russell of Balmade died in the month of January 1821, leaving a trust-settlement. None of the trustees accepted; and his daughter, Mrs Mac-

No. 45. The petitioners reclaimed.

Jan. 14, 1845.
 Alexander v.
 Barclay.

LORD MACKENZIE.—The party, upon making consignment, is entitled to be rid of this application. I think the Lord Ordinary is right.

kay, having served herself heir, entered into possession of the estate, and executed in 1824 a disposition at variance with the trust arrangement. Mrs Ewing, the daughter of Mrs Mackay, afterwards instituted an action of reduction of the service of her mother, and subsequent deeds. The Court, on the 11th of March 1840, appointed Mr James Harper judicial factor; and afterwards, on the 22d of June 1842, the respondent, Mr Barclay, was nominated to that office. The estate is solvent. The certified free rental amounts to £353, 4s. There is a surplus of £800 not denied to be consigned by the judicial factor, and no claims of any magnitude or importance appear to exist against the estate, which is stated to be worth several thousand pounds, as indeed the rental proves it to be.

“The present petitioners state themselves to be creditors of the deceased, under a bill for £210, dated so long ago as the 19th of July 1819. For the amount of this old bill, decree of constitution was obtained on the 1st of March 1842 in absence, against Mr and Mrs Mackay, who were furth of the kingdom at the time. This decree was followed up by an adjudication, and an action of mails and duties. The decrees are now challenged in an action of reduction, which is in dependence before the Lord Ordinary, so that the validity and subsistence of the claim on the old bill, on which more than the years of prescription have run, is brought into question. The summons in this action was raised on the 15th of January 1844.

“The petition for sequestration, founded on the debt thus challenged, was presented to the Court on the same day on which the summons of reduction was signed. An appointment of an interim factor was granted on an application made in absence, in which the fact that the estate was under judicial management was not stated, otherwise no such interim appointment would have been made. The judicial factor having made appearance, however, in this process, a record was made up. On the 6th of June 1844, the Lord Ordinary ordered intimation of the proceedings to be made to the parties interested in the trust-settlement of the late Mr Russell, and also appointed the respondent to say whether he was ready to find caution for the alleged debt claimed by the petitioners. Caution having been offered, the appointment of the interim factor was recalled by interlocutor, dated 18th June, which is now final. A minute was afterwards lodged by certain parties interested in the succession, sisting themselves in opposition to the sequestration, while no concurrence in the application has been made either by any creditor or other party interested. The caution offered has been declined, not on account of its insufficiency, but on the statement that the petitioners are not bound to accept of any caution, or any thing short of payment. The Lord Ordinary also called on the petitioners to state whether they would allow the process to be sisted on consignment; and although the respondent offered to consign, this also has been rejected.

“The petitioners stand on strict law. They say, first, that the fact of the decree of constitution being brought under challenge, is no ground for stopping this sist of diligence; that the management of an estate by a judicial factor is also no ground for excluding sequestration, which must be granted even at the risk of superseding such management, as was held in the case of Newall's Trustees v. Aitchison, 13th June 1840, (2 Dunlop, 1008;) that the Court have no discretion in the matter, and cannot be guided by views of expediency; and finally, that the complete solvency of the estate is no bar to sequestration, as was found in the case of Semple v. Waddel, 21st January 1841, (Dunlop, Vol. III. p. 411.) But without impugning the authority of these decisions, the Lord Ordinary is of opinion that, in the very special circumstances of this case, the sequestration ought not to be awarded, and he does not consider that the Court is bound, as a matter of abso-

LORD JEFFREY.—I cannot hold that insolvency is dispensed with by the new Act in the case of a deceased debtor, (sect. 4,) though the same proof of it is not necessary. But I do not go on that—I go on the consignation. No. 45.
Jan. 14, 1844.
Alexander v.
Barclay.

LORD PRESIDENT.—I think we should find that, on consignation being made, sequestration ought not to be granted.

LORD FULLERTON.—I cannot think the effect of consignation invalidated by the circumstance of the consigner being a judicial factor.

THE COURT pronounced the following interlocutor :—" Find that, upon consignation being made, the application for sequestration ought to be refused ; and to this extent adhere to the interlocutor of the Lord Ordinary reclaimed against."

The petitioners were found liable in expenses, subsequent to the date of the offer of consignation.

WILLIAM ALEXANDER, W.S.—JAMES SOUTER, W.S.—Agents.

late necessity, to grant sequestration, where it is plain that the measure is not insisted in for any *bona fide* purpose, but merely to concuss, by oppressive diligence, immediate payment of a doubtful debt, of which consignation is offered. Not only is the estate perfectly solvent, and under judicial management, and no creditor or party interested concurring with the petitioners, whose debt is rested on a bill dated about twenty-five years ago, and the decree of constitution of which, taken out in absence, being challenged, the present sequestration of the estates of a party who died in 1821 is sought, so as to defeat, if possible, the object of the reduction, and recover the amount of the claim. But this is insisted in in the face of an offer of caution, and even consignation has been rejected. It appears to the Lord Ordinary, therefore, that to grant the sequestration would be a perversion of the diligence of the law, as the petitioners can have no legitimate object in insisting on such a harsh and unnecessary proceeding, and their rejection of caution or consignation, so as to cover the debt if due, is evidence that the application is not insisted in for any fair purpose."

No. 46.

Jan. 15, 1845.
Clarke v.
Wardlaw.

Anderson v.
Forth Marine
Insurance Co.

1st Division.
Single Bills.
W.

ANDREW CLARKE, Petitioner.—*Penney.*MRS JANE WARDLAW or CLARKE, Respondent.—*G. Bell.*

Process—Judge.—Upon a statement by the counsel for the defender, that the Lord Ordinary, before whom the pursuer had enrolled the cause, was an essential witness for the defender, the Court remitted to another Lord Ordinary.

PETITION by the defender in an action, which had been enrolled by the pursuer before Lord Cuninghame, praying to have it remitted to another Lord Ordinary, upon the ground that, in the event of proof being allowed, he (the defender) considered that it would be essential to his case to examine Lord Cuninghame as a witness.

G. Bell, for the pursuer, objected that it was his undoubted right to select the Lord Ordinary; and this right was not to be defeated by the mere statement of the defender, that he meant to examine the Lord Ordinary chosen as a witness. It was at least necessary to have a statement by counsel, that, from his knowledge of the case, he considered his Lordship an essential witness.

Penney, for the defender, stated, that he had been informed, and had no reason to doubt the information, that Lord Cuninghame was a necessary witness for the defender.

THE COURT granted the prayer, and remitted the case to Lord Wood.

SMITH and KINNEAR, W.S.—SCOTT and BALDERSTON, W.S.—Agents.

No. 47. ANDERSON, GARROW, and COMPANY, Pursuers.—*Ld.-Adv. M'Neill—Patton.*

THE FORTH MARINE INSURANCE COMPANY, Defenders.—*Rutherford—T. Mackenzie.*

Proof—Insurance Maritime.—A loss having been incurred under a policy of insurance, the agent of the insured granted a receipt upon the policy to the agent of the underwriters for a certain sum: the agent of the underwriters having become bankrupt,—Held, in an action against them upon the policy at the instance of the insured, that it was incompetent to set aside the effect of the receipt by parole evidence and correspondence between the agents, showing that no money had been paid.

ACTION by Anderson, Garrow, and Company, against the Forth Marine Insurance Company, for £892 : 4 : 7, upon a policy of insurance in their favour over a cargo. The defenders admitted liability, but averred that £400 had been paid to account. They allowed decree to pass against them for the balance, which they paid. The pursuers denied the alleged payment to account, and an issue as to it was sent to trial. The issue, which was preceded by the admission of the policy and liability, and partial payment under it, was in these terms :—

No. 47.

Jan. 15, 1845.

Anderson v.
Forth Marine
Insurance Co.1st Division.
Jury Cause.Lord Justice-
Clerk, Judge at
trial.

“ Whether the said defenders are indebted, and resting-owing, under the said policy, in the sum of £400, being the balance of said sum of £892 : 4 : 7, with interest thereon, or any part thereof ? ”

The case was tried before the Lord Justice-Clerk at the Glasgow Circuit, autumn 1844.

It appeared that the insurance had been effected in Glasgow with Gilkison and Brown, agents there for the defenders, and that after the loss the pursuers had authorized William Waddell of that place to act as their agent in the matter, and obtain a settlement.

The defenders produced the policy of insurance, with a receipt by Waddell endorsed thereon for £400, to account of loss under it. The pursuers offered to prove by parole and letters, that money was not paid in terms of the receipt, but that some arrangement had been entered into between the agents.

The defenders objected that it was incompetent thus to set aside the effect of the receipt, upon the faith of which they had allowed credit for its amount in their settlement with their agents, Gilkison and Brown, who (it was admitted) had become bankrupt prior to the date of the action. That at all events a reduction of the receipt was necessary.

The LORD JUSTICE-CLERK sustained the objection, and held that the case proposed to be proved by the pursuers, and by the evidence tendered, was not relevant in point of law, or receivable from them against the defenders ;—No allegation being made against the *bona fides* of the defenders ; and therefore directed the jury to find a verdict for the defenders.

The pursuers excepted.

The jury returned a verdict for the defenders as directed.

The bill of exceptions was this day advised.

THE COURT unanimously disallowed the exception.

JAMES F. WILKIE, S.S.C.—JOHN GILMOUR, S.S.C.—Agents.

Pursuers' Authorities.—Crawford v. Bennet, June 19, 1827, (2 W. & S. 608 ;) Thomson v. Thomson, July 10, 1828, (6 S. 1129,) and Dec. 1, 1829, (8 S. 156.)

No. 48.

HELEN M'MORINE and OTHERS, Pursuers.—*Rutherford—Marshall.*

Jan. 16, 1845.

HENRY COWIE and MANDATARY, Defenders.—*Ld.-Adv. M'Neil—*

M'Morine v.

Dunlop.

Cowie.

Jurisdiction—Foreign—Executor.—An executor under an Indian will was confirmed in this country, where part of the executry funds were ;—Held, that an action against him with reference to these funds, preceded by arrestment thereof, *jurisdictionis fundandæ causa*, was competent in the Court of Session, though he was resident in London.

Jan. 16, 1845.

1ST DIVISION.
Ld. Robertson.
N.

CAPTAIN CHARLES M'MORINE died in India in 1843, leaving a settlement, whereby, after a special bequest of an Indian subject to a person there, he left the whole residue of his property, of every description, to the surviving children of his late brother, John M'Morine, "to be equally divided amongst them, as soon as the proceeds of my estate can be ascertained, realized, and settled by Messrs Colvin, Ainslie, Cowie, and Company, of Calcutta, whom I hereby constitute and appoint my lawful attornies and executors." This settlement was executed in India the day before the testator's death.

In April 1843, the Supreme Court of Calcutta granted administration of the will to John Cowie, one of the partners of the company named executors ; and in May 1844, Henry Cowie, another partner, who was then in London, was confirmed executor under it in the Commissary Court of Edinburgh—there being about £4500 of the deceased's funds deposited in the British Linen Company's branch in Dumfries.

In June 1844, when Henry Cowie was in London, the surviving children of John M'Morine raised action in the Court of Session against him, having first arrested the funds in Dumfries *jurisdictionis fundandæ causa*, concluding for payment of these funds :—"As part of the funds bequeathed to them by the said will, subject to such deductions as may be necessary or proper ; or otherwise to place the same on a secure investment in this country, for behoof of the said pursuers, at the sight of our said Lords of Council and Session, or to find caution for the amount thereof, so that the pursuers may reap the benefit of the said funds, as intended by the said Charles M'Morine, their uncle."

Henry Cowie raised a multipoleinding in regard to these funds in name of the holder, Robert Adamson, agent for the British Linen Company in Dumfries, and gave in defences to the action against him, pleading as preliminary that it was incompetent, inasmuch as arrestment did not found jurisdiction against a foreign executor resident abroad, to the effect of calling him to account in this country for the execution of his office.¹

¹ Brown's Trustees v. Palmer, Dec. 17, 1830, (9 S. 224.) Macmaster, Jan. 7, 1833, (11 S. 685.)

The pursuers answered, that the present case was distinguished from those of Brown's trustees and Macmaster, in respect, 1st, The executor here had been confirmed in this country; 2d, He was not now resident in the *forum* of the testator, but in London; 3d, The action was not a count and reckoning, but an action for a specific sum; and 4th, The executor had himself brought the fund in dispute into Court by a multiplepointing, of which he was the real raiser.

No. 48.
Jan. 16, 1845.
M'Murine v. Cowie.

The Lord Ordinary pronounced the following interlocutor:—"In respect of the process of multiplepointing instituted by the defenders themselves, and referred to in their defences, repels the defences so far as preliminary, reserving the objections to the title: Conjoins with the said action the said process of multiplepointing, Adamson against Cowie and others, also in this day's roll: And, in respect the defenders intimate their intention to reclaim against this interlocutor, finds them liable in expenses."

The defender reclaimed.

The *Lord Advocate*, for the defender, argued;—The action was substantially an action of count and reckoning; or if not, it was an action for payment without any accounting or ascertainment of the amount of the estate, which was worse. If this action was competent, an executor might be sued in every country in which executry funds were situated. Supposing the action incompetent *per se*, the multiplepointing made no difference. It was incompetent *per se*, because the Court would not interfere with a foreign executor realizing the estate where it happened to be, and accounting for it in the proper forum. The part of the estate situated in this country had been arrested, and a multiplepointing was therefore the proper action for realizing it. It was an action not for distribution but for realization, and was raised by the executor not as a debtor but as a creditor.

Rutherford, for the pursuers, answered;—The interlocutor was quite harmless, merely conjoining this action with the multiplepointing. Were the pursuers not entitled to give in a claim in the multiplepointing, and maintain the same pleas they were maintaining in their action? That was the only effect of the interlocutor. The defence was incompetency, and there was no authority for such defence. Where a foreign executor was either present in this country, or had funds here arrested, an action against him had never been held incompetent. The defence that this was not the convenient or proper forum of accounting, had been sustained where the executor satisfied the Court that he was prepared to answer in the foreign country, but the action had never been found incompetent. In the case of *Peters*,¹ the action was sisted till it should be seen whether the executor would account in the foreign court, and not

¹ *Peters v. Martin*, June 21, 1825, (4 S. 107.)

No. 48. doing so, the action here was sustained. In the case of Macmaster the action was dismissed, not because it was incompetent, but because the more proper forum was elsewhere. In the present case the Court had undoubted jurisdiction—the executor was confirmed here, the funds in question were arrested here, and he himself was pursuing a suit here with reference to them. Nothing more was decided than that the action was competent. It was open for the defender upon the merits to satisfy the Court that this was not the proper forum for accounting.

Jan. 16, 1845.
M'Neil v.
Cowie.

LORD PRESIDENT.—I see no ground for altering the interlocutor. When we come to the merits we shall hear parties as to the forum.

LORD MACKENZIE.—I am of the same opinion, but not on the same grounds with the Lord Ordinary; for I cannot hold that the multiplepinding makes any difference. The executor could not get the fund in any other way. He does not admit the claims of those he calls, and he does not sacrifice any pleas by bringing the process. But setting aside that, I think there is no objection to the jurisdiction of this Court. I could not dismiss a claim in the multiplepinding, and the action being conjoined with it is equivalent.

LORD FULLERTON.—I agree with your Lordships. I never had any difficulty. In the cases of Macmaster and others, the Court held arrestment not sufficient to entitle a party to call an executor to account here as a foreign executor, but there was no objection to jurisdiction in those cases. In this case, the executor, being confirmed in this country, is, *quoad* the funds, here a Scotch executor. It cannot be said that we have no jurisdiction, though, when we examine the case, we may say that this is not the proper forum for accounting. But that is a question on the merits. If the funds here are comparatively small, the greater part of the executry being abroad, the Court may find that the executor ought to be called upon to account only in the foreign court; but if, on the other hand, the greater part or all of the funds are here, I have no idea that the Court would send the parties to the Indian courts, merely because the testator died there, and appointed executors by an Indian will.

LORD JEFFREY.—I am of the same opinion. In such cases the question is not one of jurisdiction, but of *forum competens*, which is properly on the merits—which is the proper forum for accounting? It may be a question *pendente processu*, whether the accounting can go on here. All the funds here may be required to pay urgent debts in India. There is another executor in India, and it may be questionable how far the acting of the one here is competent. But all that is on the merits. That being the view taken, it is unnecessary to say any thing as to the multiplepinding; but as to it I agree with Lord Mackenzie. It is a process of ingathering; the executor was bound to take some means of ingathering the fund; and it being arrested, a multiplepinding was the only competent process. But apart from that, the question being as to *forum competens*, and not as to jurisdiction, I think we should adhere to the interlocutor.

THE COURT accordingly adhered, with additional expenses.

DAVID WELSH, W.S.—GIBSON-CRAIG, DALZIEL, and BRODIE, W.S.—Agents.

JOHN DONALD, Pursuer.—*Rutherford—Buchanan.*

JOHN HART, Defender.

No. 49.

Jan. 17, 1845.
Donald v.
Hart.

Witness—Proof—Process—Jury Trial.—A witness who had failed to appear at a jury trial, to which he had been cited, was subsequently ordered by the Court to appear at the bar, when he alleged illness as his excuse; after a proof of his allegations.—The Court, holding that he had failed to substantiate any such indisposition as should have prevented his attendance, and that at all events he ought, in the circumstances, to have intimated his inability to attend to the agent in the case, fined him £20, and found him also liable to the party who had cited him in the expense in regard to this proof.

In this case, which was an action of damages for wrongful imprisonment, at the instance of John Donald against Mr John Hart, the burgh fiscal of Renfrew, George Hutchison, town clerk of Renfrew, was cited as a witness for the pursuer. He had been also cited for the defender. JAN. 17, 1845.
2D DIVISION.
Lord Justice-Clerk.
Jury Cause.

When the trial came on at Edinburgh, on 6th January 1845, Mr Hutchison was not in attendance. A person of the name of Gibson, who happened to be in Court, having stated upon oath that he had that morning seen Mr Hutchison in Edinburgh, and the execution of citation—from which it appeared that he had been personally cited—having been produced, the presiding Judge (Lord Justice-Clerk) pronounced an interlocutor ordering him to appear personally before the Court.

It subsequently appeared that Gibson's statement, that he had seen Mr Hutchison in Edinburgh on the morning of the trial, was incorrect in point of fact, and that he had mistaken another party for him.

On the 14th January, Mr Hutchison appeared at the bar.

Sol.-Gen. Anderson and Moir stated in his behalf—That the day before the trial he had left his house at Renfrew, and come up to Glasgow, with the view of proceeding next morning to Edinburgh; that while in Glasgow he had been seized with a severe attack of a complaint to which he was liable, and had been unable to proceed to Edinburgh in time for the trial.

The Court having allowed him a proof of his averments, Mr Hutchison, of this date, adduced as witnesses his ordinary medical attendant, and certain parties who had seen him in Glasgow at the time in question. The witnesses were examined in presence of the Court, and were cross-examined by the counsel for the pursuer. A witness was also examined for the pursuer.

The LORD JUSTICE-CLERK stated that the Court had come to an unanimous opinion upon the evidence adduced, and that they did not consider that Mr Hutchison had exculpated himself, or that his illness had been proved to be of such a nature as to incapacitate him from attending at the trial; and that, at all events, it

No. 49. was his duty, with the view of preventing the injury which the loss of his evidence might occasion, to have sent notice to the Glasgow agents in the cause on the morning of the day of trial, if he really was disabled from attending.

Jan. 17, 1845.
Grant v.
Wishart.

THE COURT accordingly pronounced this interlocutor:—"Find that George Hutchison has failed to substantiate a sufficient reason for his failing to appear as a witness at the trial of the cause Donald v. Hart, in terms of his citation, on the 6th day of January instant; and therefore fine and amerciate the said George Hutchison in the sum of £20; and also find him liable to John Donald, pursuer, in the expenses incurred by him in regard to this proof.

JOHN CULLEN, W.S.—JAMES MOORE, S.S.C.—Agents.

No. 50.

DOUGAL GRANT, Pursuer.—*Pyper—Moncrieff.*
DR JAMES WISHART, Defender.—*G. G. Bell—Pattison.*

Agent and Client—Oath on Reference.—An action for payment of a law-agent's account being resisted by the defender on the ground that the business charged to had not been authorized,—Circumstances deposed to by the defender, on reference to his oath, which held to establish employment on his part of the law-agent.

Jan. 17, 1845.

2D DIVISION.
Lord Cuning-
hame.

R.

THIS was an action by Mr Dougal Grant, surviving partner of the firm of Macmillan and Grant, writers in Edinburgh, against Dr James Wishart and the executor of the late Alexander Kelly, writer in Dingwall, for £41 : 14 : 4, being the amount of a business account incurred by them. In the year 1835 an action had been raised in the Court of Session at the instance of John Mackenzie, tenant of Scatwell, in Ross-shire, against Mr Kelly and Dr Wishart, and it was in conducting the defence to this action that the account sued for had been incurred.

Wishart pleaded in defence—1. That the account was prescribed; and 2. That it had not been incurred on his employment.

The Lord Ordinary having found that the account was prescribed, and that resting-owing could only be proved by the writ or oath of the defender, the pursuer gave in a minute of reference to Wishart's oath.

Upon Wishart's deposition, the Lord Ordinary pronounced this interlocutor, with the subjoined note, which states its import:—"In respect that the statement and admissions of the defender, in the said depositions are sufficient to establish that the defender became legally responsible to the pursuers for their legitimate charges in the account libelled on, and that the same is still resting-owing, Finds the oath affirmative of the reference, and therefore repels the plea of prescription and the oth

defence urged for the defenders, and decerns in terms of the libel: Finds No. 50.
the pursuers entitled to expenses." *

Jan. 17, 1845.
Grant v.
Wishart.

* "NOTE.—When the defender swears, towards the conclusion of his deposition, that he does not think that he is indebted to the pursuers for the account libelled on, his deposition is not so much a matter of testimony, in point of fact, as an opinion in point of law, which the Court is entitled and bound to correct if it be wrong. The Lord Ordinary, accordingly, does not wish to impute any mala fides to a person like the defender, in a respectable station, and of honourable repute in his sphere; but, looking to the whole statements together by the defender on oath, he is of opinion that the party has fallen into a mistake as to his liability, which cannot receive effect from the Court.

"The facts of the case, as now established by the defender's oath, are these:—

"1st, That the defender was cited as a co-defender along with Kelly in 1835, in an action before the Court directed against him and Alexander Kelly jointly.

"2d, That he had no other agents than the pursuers to defend him against that action.

"3d, That he gave Alexander Kelly, his co-defender, when cited, a copy of an account due to himself individually by the pursuer, in order to found a claim of compensation thereon for his protection, which counter-account was transmitted to the present pursuers, as law-agents, agreeably to the purpose for which it was delivered, and was in due course produced in process.

"4th, That while the proceedings libelled on were in dependence, the defender came to Edinburgh on other business in 1836, and had two interviews personally with the pursuers, and received from them the process for the purpose of perusal, the papers therein of course showing the proceedings conducted in his name, as well as that of Kelly, and that the defender carried home the process, and returned it to the agents without remark.

"5th, That the defender, while in Edinburgh, received a letter from the pursuers, dated 5th August 1836, specially alluding to his counter-claims in the process, and requiring him to call on the pursuers to give explanations as to his counter-claims, which he did.

"6th, That in none of the said interviews, nor on any other occasion, did the defender ever inform the pursuers that he was not interested in the suit, and was not to incur the ordinary liability imposed on all parties for whose behoof appearance is entered and expenses professionally incurred by law-agents in a court of justice. He is interrogated, 'If he told Macmillan and Grant that they were not to look to him for payment of the expenses of said process? Depones, That he does not recollect a single thing about it.'

"These facts clearly appear to the Lord Ordinary to establish employment of the pursuers by the defender, or by his authority; or at least they establish that the defender so acted towards the pursuers as to lead them to believe and rely on him as one of their employers, on the principles recognised in the analogous cases of *Ross*, (Baron Hume's Decisions, p. 350;) *Campbell*, 29th May 1821; and *Young*, 28th May 1823.

"On the whole, looking to the manner in which business between agent and client is conducted—that formal mandates are seldom taken—and that the authority and acquiescence of the client in the agent's employment are generally matter of inference from the conduct and proceedings of the parties, the Lord Ordinary should hold it a precedent that might lead to much injustice and bad faith if any doubt were entertained as to the legal responsibility of the defender upon the facts fairly admitted by himself in the present instance. Upon the communications made to himself personally by the pursuers, and not objected to or disclaimed, he does not seem to have the shadow of a case, except by alleging that he did not read the process when he got it from the pursuers, and carried home the papers. But it is not in the mouth of a party to set up such an excuse, which, if sustain-

No. 50. Wishart reclaimed, praying the Court to find the oath emitted by him to be negative of the reference; but

JAN. 17, 1845.
Adam v.
M'Robbie.

THE COURT unanimously adhered, with additional expenses.

MACMILLAN & GRANT, S.S.C.—ROBERT LAIDLAW, S.S.C.—Agents.

No. 51.

JAMES ADAM, Claimant.—*G. G. Bell—Pattison.*
ANDREW M'ROBBIE and JOHN GOWANS, Claimants.—*Rutherford—Patton.*
Competing.

Bankruptcy—Sequestration—Discharge—Assignment.—The trustee on a sequestrated estate and the bankrupt, with consent of the commissioners, assigned the whole sequestrated estates to certain trustees, to be applied in payment of the composition: the bankrupt was thereafter discharged; a sum of money, which had belonged to the bankrupt before the sequestration, and had remained in a bank in his name for a number of years after his discharge, having been arrested by the creditor in a debt contracted after the discharge;—Held, in a competition between him and the trustees, that the whole estate of the bankrupt having been conveyed to the latter by the trustee in the sequestration, when he was in full right to do so, no right to the fund in question emerged, at the recal of the sequestration, to the bankrupt or his subsequent creditors; and that the bankrupt having been previously divested by statute, it was not necessary, in order to perfect the right of the trustees, as in a question with him or his creditors, that the assignment in their favour should have been intimated to the bank; and that they were, therefore, entitled to be preferred to the fund.

JAN. 17, 1845. In the year 1827, the estates of John Halley and Company, distillers in Crieff, and of John and David Halley, the partners, as individuals, were sequestrated. By trust-disposition and assignment, dated in January 1828, John and David Halley, and the trustee upon their sequestrated estate, with the consent of the commissioners, conveyed the whole sequestrated estate, heritable and moveable, to certain parties, as trustees. This deed, after narrating an offer of composition which had been made by the bankrupts, and its acceptance by their creditors, vested the whole sequestrated estate in the trustees named, for the purpose of applying its proceeds in payment of the composition and preferable claims, and the relief of the cautioners for the composition, the trustees being taken bound, after doing so, to denude of the residue of David Halley's estate in favour of his wife and children. Upon the 19th April 1828, David Halley was discharged.

ed, would render nugatory every precaution, and the most explicit communications an agent could make to a client."

David Halley and his wife had, subsequent to the date of the discharge, employed Messrs Adam and Brown, W.S., as their agents in conducting various actions, and had incurred to them a business account of £106 : 7 : 7. For this account Adam and Brown raised an action against the Halleys, and obtained decree for payment on 25th January 1830.

No. 51.

Jan. 17, 1845.

Adam v.

M'Robbie.

David Halley had, previous to his bankruptcy and sequestration, kept a deposit account in his own name with the branch of the Commercial Bank at Crieff. At the date of his sequestration in 1827, there had been a balance at his credit of £59 : 17 : 11, which subsequently remained unnoticed, lying in the hands of the bank. On 21st April 1836, Mr James Adam, W.S., (as assignee of Adam and Brown,) raised letters of horning and poinding, containing warrant to arrest, against Mr and Mrs Halley, and arrested this fund in the hands of the Commercial Bank.

A multiplepoinding of the fund having been raised in name of the Commercial Bank, claims were lodged, 1st, For Messrs Andrew M'Robbie and John Gowans, a quorum of the trustees under the trust disposition and assignation of January 1828; 2d, For Mr James Adam; and, 3d, For Mrs Halley and her children. To this latter claim it is not necessary to advert, as the discussion was confined to the two preceding claims.

M'Robbie and Gowans pleaded,—That the fund *in medio* had passed, by virtue of David Halley's sequestration, to the trustee on his estate, and formed part of the estate conveyed by the trust disposition and assignation in favour of the claimants. This conveyance had been executed by the trustee while in the full right of the fund in question, and before the sequestration had terminated, by the discharge and reinvestment of the bankrupt in his estate. The effect of the sequestration had been to divest Halley entirely, leaving him merely a right to claim from the trustee what remained vested in him after its close. He had never been reinstated in the fund in question, as it had previously been made over to the claimants. Mr Adam, therefore, who derived his right through Halley, as his creditor, and could have no higher right than that of his debtor, had no title to claim the fund; nor was he entitled, in dealing with Halley, to rely on this fund being his, merely because it stood in his name. He was bound to have enquired whether it really had returned to him upon the close of the sequestration. In point of fact he was aware of the nature of the arrangement which had been come to between the bankrupt and his creditors under the composition contract.

Mr Adam pleaded,—The assignation founded on by the opposing claimants was incomplete and ineffectual for conveying the fund to them, as it had not been intimated to the bank. The money had originally belonged to Halley, and, before the sequestration, stood vested in him by an unexceptionable title. The effect of the sequestration was not to extinguish the bankrupt's interest and radical right to his estate, but merely to create a burden over it so long as the sequestration lasted. Upon its

No. 51. recal, therefore, the bankrupt became reinvested in his original right. Further, the sum stood in Halley's name subsequent to his discharge, and the claimant was entitled to rely on its being available to him in satisfaction of his debt. Having attached this sum by arrestment, he was entitled to be preferred.¹

Jan. 17, 1845.
Adam v.
M'Robbie.

The Lord Ordinary preferred M'Robbie and Gowans to the fund in *medio*, finding them entitled to expenses.*

¹ *Authorities for M'Robbie and Gowans.*—54 Geo. III. c. 137, §§ 30, 59; 2 & 3 Vict. c. 41, § 116; Bell's Com., Vol. II. 470; Sir L. Gordon v. Crawford, July 6, 1676, (M. 7171;) Somerville v. Redfearn, (1 Dow, 50;) Dingwall v. Maccombie, 6th June 1822, (1 Sh. 463;) Gordon, 5th February 1824, (2 Sh. 675;) Ersk. III. 6, 16.

Authority for Adam.—Bell's Com., Vol. II. 472.

* "NOTE.—The fund in *medio* in this multiplepointing is a sum now in the hands of the Commercial Bank of Scotland, and which was due by the bank to David Halley as an individual, prior to the sequestration of his estates in May 1827.

"On this fund there are three parties competing. 1st, Messrs M'Robbie and Gowans, trustees under a trust-deed executed by Archibald Ross, the trustee in the sequestration of the estates of John Halley and Company, of which company David Halley was a partner, and of the estates of the individual partners John and David, with consent of the commissioners, and by John Halley, and David Halley and his wife, who was interested as liferentrix in certain portions of the estate of David Halley thereby conveyed. 2d, Mrs Halley and her children. 3d, James Adam, as in right of the firm of Adam and Brown, writers to the signet, creditors of David Halley and his wife, in a debt contracted subsequent to Halley's discharge on the 19th April 1828. At the debate, it was intimated that, if the trustees were preferred as in competition with James Adam, the claim for Mrs Halley and others was not to be insisted in, and the debate was therefore confined to the question of competition as between the trustees and James Adam.

"For the trustees, it was stated that they did not insist in any objection to the regularity of the decree and diligence founded on by James Adam, or to the debt in the decree, as having been paid in the manner set forth in the answer to article 4 of Adam's revised condescendence and claim, being now satisfied that payment had not been obtained; and further, that they, the trustees, did not claim any preference in virtue of the arrestments which they had used, but admitted that, if the competition had fallen to be regulated by the diligence of the parties respectively, Adam would have been entitled to be preferred.

"In this way, the only point that remains to be decided is the effect of the trust-deed in favour of the claimants, the trustees, and whether, in virtue of the disposition and assignation therein contained, they have right to the fund in *medio*, preferably to the arrestment used by the claimant Adam, as a creditor of David Halley, in the hands of the bank. The Lord Ordinary is of opinion that the trustees ought to be preferred.

"It is beyond dispute that the fund in *medio* was carried by the sequestration of the individual estates of David Halley, and was vested in the trustee under the sequestration. Then, while the sequestration of the estates of John Halley and Company, and of John Halley and David Halley, as individuals, was settled by composition, the arrangement was, that, in addition to the caution found in compliance with the provisions of the statute, the whole sequestrated estates should (with consent of Mrs Halley, who, as before mentioned, was interested as liferentrix in certain portions of the estate of David Halley) be conveyed to trustees, for, in the first instance, payment of the preferable claims, the security of the composition to the creditors, and the relief of the cautioners. It was upon this

Adam reclaimed.

No. 51.

LORD JUSTICE-CLERK.—After full consideration of this case, I am satisfied with the ground of decision stated in the note of the Lord Ordinary.

Jan. 17, 1815
Adam v.
M'Robbie.

feeling that the composition was accepted of; and accordingly, upon the 23d January 1828, before the sequestration was brought to an end, and the bankrupt David Halley discharged, a deed was executed by the trustee under the sequestration, in whom the whole sequestrated estates were vested, with consent of the commissioners, and by Mr and Mrs Halley, conveying, assigning, and making over these estates to the nominated trustees. Certain of the trustees accepted and acted, and an attempt to have the trust-deed reduced, in respect of the partial acceptance only, failed.—(Halley v. Gowans and others, 20th February 1840; Dunlop, Vol. II. p. 623.) The accepting trustees went on in the management, and, as they allege, have come under engagements or made advances which will exhaust the whole trust-fund, and inter alia the fund in the Commercial Bank, which, as being part of the sequestrated estate of David Halley, was assigned and conveyed to them. It is true, no doubt, that no intimation was given by the trustees to the bank of the disposition and assignation in their favour. But does that circumstance make room for the arrestment at Adam's instance on a debt contracted by Halley subsequent to the date of his discharge? The plea that it does, was rested upon the allegation of Halley's having been reinvested in his estate by his discharge following on the composition-contract, and the termination thereby of the sequestration. Here, however, it is overlooked that, by the mode in which the sequestration was closed, and which was a perfectly legal and competent one, (Bell's Comm. Vol. II. p. 461, and cases cited,) Halley truly never was reinvested in his original right to that part of the sequestrated estate which belonged to him, it having been conveyed by the trustee in whom it was vested (although, no doubt, Halley and Mrs Halley were also parties to the conveyance) to the claimants, the trustees in the trust-deed. The right of these trustees, therefore, it is apprehended, stands upon the right of the trustee in the sequestration, and as the fund in medio was vested in him, and they are assigned and transferred into his right, no intimation was necessary to perfect the right of the trustees, whether as against Halley, or against any party claiming through Halley as his debtor, and attempting to attach the fund by arrestment, which diligence can be of no efficacy, except upon the assumption that Halley had been reinstated in his original right to the fund, and it had thereby come to be again vested in him, for it is only as through Halley, and in his right, that the fund could be reached by the diligence of his creditors. In any question with such parties, the trustees have the benefit of the completed right of the trustee in the sequestration, which was good against Halley, or any one claiming through him, and into which right they were assigned.

"It is thought to be no sufficient answer to this to say, that Adam or any other creditor, seeing that the sequestration was terminated by a composition-contract, and Halley discharged, were entitled to hold that the right of the trustee had ceased, and that Halley was reinvested in his estate; and that, finding the fund standing in his name, with no intimation of any new transference of it by him, they were warranted in relying upon it being his, and open to their diligence. It may be, that where a sequestration is terminated by a composition-contract, the usual consequence is that the funds return to the bankrupt, and he is reinvested in his original right; but that is not necessarily the case. On the contrary, matters may be arranged in the way which here actually took place. The sequestrated estate may never fall back into the person of the bankrupt. The trustee's right may be transferred to others for behoof and security of the creditors and cautioners, and the reinvestiture of the bankrupt thereby prevented. And this being so, it is the business of individuals contracting or dealing with the bankrupt to ascertain how the facts stand; and if they do not, they have themselves to

No. 51.

Jan. 17, 1845.

Adam v.

M'Robbie.

There is a complete conveyance and assignation by the trustee and commissioners of all the sequestrated estate to certain persons primarily for behoof of the cautioners, who were to guarantee payment of the composition offered by the bankrupt. The sequestrated estate was at that time vested in the trustee—not in the bankrupt—and this conveyance is completed before the sequestration is recalled, and is a condition on which the recal proceeded. I am of opinion that the right and title of the trustee having been effectually made over to the respondents, no right or title to the fund in question, after the recal of the sequestration, emerged to the bankrupt, which can be available to any subsequent creditor as a ground of arrestment, or of any other diligence. Intimation to the bank was not necessary as against the bankrupt, for the right had passed to the trustee, and had been by him assigned and conveyed. The right of the respondents is as good as if they had obtained an assignation from the trustee in the course of realizing the sequestrated estate. It is quite true that a recal of a sequestration under the former statute, on a composition-contract, did, generally speaking, vest the bankrupt again in all the property which the trustee had; and that ground of claim, if followed by possession by the bankrupt, and if the assignees had chosen to neglect their rights and interests, and permit such possession, might be sufficient to enable subsequent creditors to attach such funds. Or again, if no notice had been given to the bank, a payment by them *bona fide* to the bankrupt after recal might have been protected; but these cases are not before us. The assignees claim the fund as validly conveyed to them by the assignation from the trustee. I am of opinion that that assignation was effectual; and the bankrupt having been previously divested by force of the statute, there was no necessity for intimation to the bank, in whose books the sum stood in the name of the bankrupt. This being so, and the right to the fund being carried by the assignation, the diligence of arrestment was ineffectual and inoperative, as the sum did not belong to Halley.

I am of opinion, therefore, that we should refuse the reclaiming note.

LORD MEDWYN.—I am of the same opinion. In this multiplepointing there are two claimants on the fund in medio—a sum lodged by David Halley in his own name in the Commercial Bank prior to his sequestration in May 1827. It is claimed by M'Robbie and Gowans, who state that Halley and his creditors agreed to settle by way of composition, and that it was part of this transaction that the estate, heritable and moveable, of the bankrupt, should be made over to them as trustees for the cautioners for the composition, and the reversion was to go to Mrs Halley for herself and children. Accordingly, in January 1828, while the sequestration still subsisted, the trustee, with consent of the commissioners and Mr and Mrs Halley, made the conveyance to them in these terms and for these purposes. On the other hand, the fund is claimed by Mr Adam, a creditor of Halley's, in virtue of an arrestment used by him in the hands of the bank in 1836; and while this diligence is unobjectionable in itself, he maintains that it secured this as a

blame. In the present instance, from the nature of Adam and Brown's connexion with the bankrupt, it can hardly be supposed that the partners of the company were not aware of the terms on which the composition had been agreed to. But, granting it were otherwise, the Lord Ordinary, for the reasons he has assigned, thinks that Adam's claim cannot be sustained in competition with that of the trustee."

sum due to Halley, and of course liable for his debts, which had not been taken possession of by the cautioners, and who had not so much as intimated their assignment to the bank. To support this view, it was maintained that the process of sequestration was merely a burden on the bankrupt's right; so that, when the sequestration was recalled as to the property which was sequestrated, the bankrupt's right revived, and he was reinvested in it, just as if no sequestration had ever occurred. This happened in April 1828, when the process of sequestration was recalled; and thus the arrestment subsequent in date, for Halley's debt was good. But I do not hold that sequestration merely operates as a burden on the bankrupt's right. The act of sequestration transfers to the trustee the full property of all moveable subjects. This fund was vested in the trustee by the act of the law, without assignation; and when the sequestration was put an end to, and when the bankrupt would, of course, be reinvested, or in titulo to be so, (as the case may be,) with his own property, in so far as then in the hands of the trustee undisposed of, the bankrupt clearly in the present case could acquire no property which had been previously three months before the subject of conveyance by the trustee; and not merely disposed of by the trustee, but with the consent of the bankrupt himself, and as the condition on which he obtained his discharge. These trustees held this property not by conveyance from the bankrupt, but by a conveyance from the trustee, who was at the time fully vested in the fund, with the consent of the commissioners; and although it may be that the title was not completed by intimation to the bank at the time of the conveyance, for the best of all reasons, that it was fraudulently concealed by Halley from his creditors, yet this would affect only rights flowing from the trustee or the bank, but not one from the bankrupt. And the title is now complete by production of the claim in this process; and, at all events, the right was such as might be completed if there was no mid-impediment, and quite sufficient to protect the fund from being carried off as a part of the funds of Halley by a creditor of Halley. This it clearly was not, as it was not in the person of the trustee when the sequestration was recalled, when it is alleged the estate at that period in the person of the trustee became the property of the bankrupt. In short, he was divested of this fund when his estate was sequestrated, and he never was either specially or by implication reinvested in it—it having been assigned to the other claimants prior to this by the trustee when in full right of it.

I am for adhering to the interlocutor.

LORD MONCREIFF.—I have come to the same conclusion. I am perfectly satisfied with the grounds of the Lord Ordinary. It is clear that under the old bankrupt statute, the effect of the discharge was to reinvest the bankrupt in his estate; there can be no doubt upon this point. This, however, cannot alter the present case, as the whole estate had been made over by the trustee before the bankrupt was discharged, and while he was in titulo to do so. The effect of sequestration is to divest the bankrupt of his estate, and to vest it in his trustee—it is not a mere burden upon the original right of the bankrupt. It is true there are cases where, after sequestration, a bankrupt may follow out a right of action, but that is because the trustee does not choose to take it up. I consider that this resignation by the trustee was effectual without intimation. It has been said that Mr Adam was in knowledge of the trust-right. I do not think that this is material. There are cases in which knowledge might be of consequence. Suppose

Jan. 17, 1845.
Adam v.
M'Robbie.

No. 51. that the bank had paid away the money while in knowledge of the trust-right. This is the description of case in which this element might have been of importance, but there is no such case here.

Jan. 17, 1845.
Adam v.
M'Robbie.

LORD COCKBURN.—I am of opinion that the interlocutor is right; and this upon the grounds on which the Lord Ordinary has placed it.

The bankrupt was divested of the fund in question, as of all his funds, by the sequestration; and the question is, was he ever so reinvested as that his property could be attached by the diligence of future creditors? I think he was not.

Before the sequestration was recalled, or the bankrupt discharged, and while his whole property was vested in the trustee, an arrangement of a perfectly legal character was made, by which, so far from reassigning to the bankrupt, the funds were conveyed to the cautioners for his composition, with a destination of the reversion, if there should be any, to his wife. The mere facts, that after this the sequestration was recalled, and the bankrupt discharged, implies no reinvestiture of him. If it did, this would equally be implied in every case where a conveyance of the estate to a third party—such as composition sureties—had taken place under the sequestration—a result contrary to the understanding, and indeed to the positive contract, in innumerable cases.

It is said that there was no intimation to the bank of the assignation to the cautioners and the wife. But if it be true that the bankrupt had been divested, there was no necessity for, and indeed no competency in, any such intimation. If the property belonged to the creditors, and was held by the trustee for their behoof, had they not power to give away what was their own? If their doing so be illegal, a different sort of a case would arise. But the arrangement is admitted to have been quite correct. And if it be, I cannot comprehend how a conveyance by the creditors to the sureties can operate as a reconveyance to the bankrupt. That this money had been allowed to stand in his name at the bank, is immaterial. A bankrupt may have had property scattered in his own name all over the world. But the sequestration vests it all in the trustee; and, if it be disposed of under the sequestration, the recall of the sequestration will not make it his again. It is said that his radical right revives. So it does, quoad whatever property remains; but it does not revive to the effect of undoing the composition-contract, and giving him a title to whatever may happen to have been left standing in his name, but which had undoubtedly fallen under the sequestration.

The case of a discharged bankrupt being allowed to resume possession of what was once his property, and to mislead strangers by dealing with it as his own, is not before us, because no such facts occurred.

As there was a defect in the bankrupt's title, and Mr Adam has thus arrested what did not belong to his debtor, it is unnecessary to consider the objection that he was aware of this defect. His ignorance could not create a title in the bankrupt. If any thing were to depend, however, upon his knowledge, the fact would require to be ascertained.

THE COURT accordingly adhered, with additional expenses.

JAMES ADAM, W.S.—DAVID GRAY, S.S.C.—Agents.

MRS A. W. MACKENZIE, Petitioner.—Cook.

No. 52.

Curator Bonis—Process.—Where a person, who was of imbecile mind, had presented a petition and complaint for the removal of a party who had been appointed her curator bonis, the Court refused to appoint a curator ad litem, intimating that the proper course was to present a regular petition for the appointment of an interim curator bonis for the purpose of insisting in the application. Jan. 21, 1845.
Mackenzie.
Miller v.
Oliphant.

MRS A. W. MACKENZIE presented a petition and complaint to the Court, for the purpose of having a party who had been appointed curator bonis to her removed, in consequence of his not having complied with the regulations of the Act of Sederunt, and for obtaining an accounting with him for his intromissions. It was stated in the body of the petition, that the petitioner being still incapable of transacting business, it would be necessary that, at the moving of the petition, a curator ad litem should be appointed to her. Jan. 21, 1845.
2D DIVISION.
T.

LORD JUSTICE-CLERK.—We cannot appoint a curator ad hanc litem on a mere motion at the bar, and on a party's own averment that she who has presented this petition is nevertheless unable to manage her own affairs. You must present a regular petition for a curator bonis. You will find a case of Lamb to this precise effect.

Of a subsequent date, a petition for the appointment of an interim curator bonis, for the special purpose of insisting in the above application, was presented by a daughter of Mrs Mackenzie, accompanied by a medical certificate that she was incapable of managing her own affairs.

DUNDAS and JAMIESON, W S.—Agents.

WILLIAM MILLER, Pursuer.—*Lord-Advocate M'Neill—Buchanan.*
FRANCIS OLIPHANT, Defender, *Rutherford—Macfarlane.*

No. 53.

Proof—Qualified Admission.—Where a defender had made a qualified judicial admission, circumstances in which the Court held that the qualification did not prevent them looking to the evidence in process, and disposing of the case as one on proof.

SEQUEL of case reported March 7, 1843, ante Vol. V. p. 856, which Jan. 21, 1845.
2D DIVISION.
Ld. Robertson.
T.

By interlocutor of the Court of 7th March 1843 it was found, that the defender Oliphant “cannot be prevented from enquiring into the character and reality of the transaction to which the said deed (the disposition) relates; and that in doing so, he ought not to be restricted to the writ

No. 53. or oath of the pursuer." Oliphant did not avail himself of this judgment by tendering any further evidence, but renounced probation.

Jan. 21, 1845.

Miller v.

Oliphant.

John Miller, the original pursuer of the action, having died, his son William was sisted as a party to the process.

The Lord Ordinary pronounced this interlocutor—"In respect no objection was stated by the defender to the title of William Miller to insist in this action in place of the deceased John Miller, his father, sists the said William Miller as a party, and sustains his title accordingly; and on the merits, both parties having renounced further probation, finds, that the price and value of the subjects was fixed by the disposition granted by the late John Miller to the defender Francis Oliphant, at the sum of £120; finds, that although the said disposition bears that the said price was paid, and discharges the same, yet that the defender admits that no money was advanced by him at the date of the said disposition beyond the sum of £35, and that the whole of his advances, as on 16th March 1842, amounted to the sum of £49 : 0 : 6½; and finds, that he denies that there was any sale, alleging that the said disposition was truly granted as a security for his advances only to the amount foressaid: finds, that the defender took infestment on the said disposition on the 19th of September 1839, and the same was recorded on the 23d of the said month, thereby adopting the said sale, and setting himself forth to the public as proprietor of the said subjects, which became adjudgeable for his debts: finds, that by interlocutor of the Second Division of the Court, the defender was found not to be prevented from enquiring into the character and reality of this transaction, and that in doing so, he ought not to be restricted to the writ or oath of the pursuer; but finds, that the defender having renounced probation, the evidence in process does not establish his allegation, but on the contrary, the said evidence, independent of the terms of the disposition and fact of infestment, and more especially the letters from the defender to his grandfather, the said John Miller, dated 7th January, 14th and 21st December 1841, go to establish an actual sale to the defender, and to show that he, as owner of the property, attempted to sell the same for his own behoof; and therefore decerns for the sum of one hundred and twenty pounds as the price of the subjects sold to the defender, and with interest, under deduction of the foressaid sum of forty-nine pounds and sixpence-halfpenny, with interest from the date of the advances, reserving any objection competent to the pursuer to the amount of the said advances beyond the sum of forty-nine pounds credited in the libel, and allows decree to go out in the mean time to the extent of seventy pounds, and decerns: Finds the pursuer entitled to expenses."

Oliphant reclaimed and argued, That the statements he had made with regard to the transaction, were to be taken either as a whole and with the qualifications adjoined to them, or not at all. While he had admitted that, at the date of the disposition, only £35 had been advanced by him,

he had at the same time stated that no sale had taken place, but that the subjects had merely been disposed to him by the pursuer in security of his advances.

No. 53.

Jan. 21, 1845.

Miller v.
Olipbant.

Miller answered, That he was entitled to take the admission made by the defender without the qualification, in respect that the latter was contradicted by the disposition and by the correspondence between the parties, which instructed that a sale had taken place.

LORD JUSTICE-CLERK.—We formerly allowed the defender to prove the true character of the transaction, but both parties have renounced probation, and how does the case stand? The defender has referred to a class of cases where the only evidence of a fact was an admission on the record, and contends that we cannot take his admission without his qualification. This case, however, is very different from those quoted. The defender says, that the transaction here was not a sale, but only a loan; but when we allowed him to prove this, he did not avail himself of the permission. There is evidence in process which contradicts his qualification. This case is one of *proof*. Both the disposition and the correspondence clearly establish that there was a sale. The question then comes to be, whether the price has been paid, and the defender admits that he did not advance to the pursuer the full sum of £120.

LORD MEDWYN.—I am of the same opinion. I would have had some difficulty on account of the rule that a judicial admission must be taken along with its qualification, had it not been that the correspondence appears to me to establish that there had been a sale.

LORD MONCREIFF.—I concur. We remitted the case back to the Lord Ordinary, to allow the defender to *prove* that the transaction had been merely a loan. But not having done so, I think that the Lord Ordinary's interlocutor is right. I think that the disposition and correspondence clearly establish that a sale had taken place.

LORD COCKBURN concurred.

THE COURT adhered.

JOHN LEISHMAN, W.S.—JOHN HENDERSON, S.S.C.—Agents.

Authorities for Defender.—Carnegie, Feb. 22, 1825, 3 S. & D., p. 566; Gray v. Munro, Dec. 10, 1829, 8 S. & D. 221; Grierson v. Thomson, Jan. 14, 1830, 8 S. & D. 317; Baird, June 21, 1827, 5 S. & D. 820.

No. 54.

G. O. GARDNER, Pursuer.—G. G. Bell—E. S. Gordon.

Jan. 23, 1845.

Gardner v.

Trinity House
of Leith.

TRINITY HOUSE OF LEITH, Defenders.—Rutherford—E. F. Maitland.

Superior and Vassal—Non-entry—Corporation—Title to Pursue.—Certain lands were acquired by an hospital by disposition in 1735 to its office-bearers and their successors in office, in which they were infeft base; after a considerable period (subsequent to the death of the office-bearers in whose name infeftment had passed) the hospital, as a corporation, sold the superiority of the lands, assigning to the purchaser the unexecuted procuratory, and excepting from the conveyance the base infeftment as a right of property belonging to the hospital in its corporate capacity: In a declarator of non-entry brought by the superior,—Held (1.) That the superior was not entitled to challenge the base infeftment as not constituting the hospital the vassal in its corporate capacity, because this right of the hospital to the property in that character was expressly saved and reserved in gremio of the superior's own title; and as the superiority title itself was derived from the hospital as a corporation, the superior could not challenge its right as a corporation under the disposition 1735, without thereby impugning his own title: (2.) That the lands having been disposed to the office-bearers of the hospital and their successors in office, the superior was not entitled, on their decease, to insist for a composition as on the entry of a singular successor.

Jan. 23, 1845.

2D DIVISION.

Lord Ivory.

T.

By disposition, of date 3d January 1735, Mrs Marion Evanson, the proprietrix of certain lands which she held of the Crown, on the narrative that Robert Innes, now present master, Andrew Fowler, now assistant, and Robert Angus, now present treasurer to the Trinity House of Leith, for themselves, and in name and behalf of, and as representing the haill other masters and members of the said House, had made payment to her of a certain price, disposed the lands to and in favour of the “saiids Robert Innes, Andrew Fowler, and Robert Angus, for themselves, and in name and behalf of, and as representing the haill other masters and members of the said Trinity House, and for and to the use and behoof of the poor thereof, and their successors in office, and their heirs and assignees whatsoever.” The disposition contained an obligation “to infeft and seise the saiids Robert Innes, and the other persons before named, for themselves, and in name and behalf of, and for and to the use and behoof foresaid, and their foresaiids, on their own proper charges and expenses, and that by two several infeftments and manners of holding;” with procuratory of resignation in favour of the “said Robert Innes and the other persons before named, for the use and behoof aforesaid, in property and superiority as said is,” and precept of seisin to be given, “by deliverance to the saiids Robert Innes, Andrew Fowler, and Robert Angus, or any of them, or to their attorney, &c., of earth and stone of the grounds of the said lands.” Upon this disposition, seisin, dated January, and recorded March 1735, was given to the “said Andrew Fowler, for himself, and in name and behalf of, and as represent-

ing the haill other masters and members of the said Trinity House, and to the use and behoof thereof." No. 54.

Upon this title the Trinity House possessed the lands for nearly a century. On 26th May 1812, the superiority of the lands was sold by the House to Alexander Young of Harburn, W.S., the disposition being granted by "John Hay, master of the corporation of the Trinity House of Leith, Thomas Grindlay, assistant-master, and Robert Bruce, depute-master of the said Trinity House, for ourselves, and in name and behalf of, and as representing the haill other members of the said House, erected by royal charter into one body, corporate and politick, by the name and style of the Master and Assistants of the Trinity House of Leith, in the county of Edinburgh, and by that name empowered to purchase and acquire, alienate and dispoise, lands, tenements, and other subjects."

Jan. 23, 1844.
Gardner v.
Trinity House
of Leith.

The disposition contained an obligation of warrandice by "the said incorporation," but excepted from the warrandice the seisin of 1735, which infeftment "is still held base of the representatives of the said Marion Evanson, mediate superiors thereof, no resignation having followed in the hands of his Majesty, in virtue of the procuratory of resignation in the said disposition (by Mrs Evanson,) and no confirmation of the said infeftment having been expedite." The disposition further contained this clause of assignation:—"And farther, we the said John Hay, Thomas Grindlay, and Robert Bruce, (over and above the superiority hereby disposed, under which we are to continue to hold the property of the said lands in blench farm, in virtue of the base infeftment above-mentioned in our favour, following on the precept in Marion Evanson's disposition, and excepted from this conveyance, and reserved in our persons,) hereby assign, convey, and make over to, and in favour of the said Alexander Young and his foresaids, as having now right to the superiority above disposed, the blench duties and services payable to the Crown vassal by the foresaid Incorporation of Trinity House, for and on account of the foresaid base infeftment;" and particularly in and to the unexecuted procuratory of resignation contained in the said disposition by the said Marion Evanson, "to the end that the said Alexander Young and his foresaids may in virtue of the said unexecuted procuratory of resignation, more readily obtain from the Crown a charter of resignation of the said lands, under the burden of the foresaid instrument of seisin in our favour."

Mr Young having taken out a Crown charter, disposed, on 27th June 1812, part of this superiority to Alexander Marjoribanks of Marjoribanks, but excepting from the warrandice contained in the disposition, "the instrument of seisin (1735) of the property of the lands above disposed," assigning to Mr Marjoribanks the precept of sasine contained in the charter. On this assigned precept Mr Marjoribanks was infeft, his seisin containing the above exception.

In 1813, Mr Marjoribanks granted a charter of confirmation in favour

No. 54. of "John Hay, then master, Thomas Grindlay, then assistant-master, and Robert Bruce, then depute-master, for themselves, and as representing the haill other masters and members of the corporation of the Trinity House, and their successors in office, and their assignees and disponees," confirming the disposition by Marion Evanson, and the seisin thereon of 1735—the entry of singular successors being therein taxed at double the blench duties.

Jan. 23, 1845.
Gardner v.
Trinity House
of Leith.

In 1817, Mr Marjoribanks conveyed the superiority to himself in life-rent, and his eldest son, Alexander Marjoribanks, junior, in fee, with the exception from the warrandice, "of the whole feu rights and infeftments of property of the foresaid lands, granted by me and my predecessors and authors, to the feuars and vassals thereof;" and a Crown charter and infeftment followed thereon. There were various other transmissions of the right, bringing it at last into the person of Mr Thomas Mansfield, as trustee on the sequestrated estate of Mr Marjoribanks, junior—in all of which titles the subjects were described in the same way.

Mr Mansfield having made up a title, in 1828 sold the superiority to Mr G. O. Gardner, the warrandice clause in the disposition by Mr Mansfield, excepting "the feu rights or infeftments of property of the said lands, granted by me and my predecessors and authors to the different feuars thereof, without prejudice to the said G. O. Gardner to quarrel or impugn the same upon any grounds in law, not inferring warrandice against me and my foresaids." Infeftment followed on this disposition in favour of Mr Gardner, who thereafter expedes a Crown charter of confirmation.

Mr Gardner then, as superior, brought an action of reduction, improbation, and declarator of nonentry, against "the master and assistants of the Trinity House of Leith, and John Smith, master of the corporation of shipmasters in Leith, now known by the name and style of the 'masters and assistants of the Trinity House of Leith,' William Dick, assistant master, and John Cochrane, depute-master, and Joshua Richmond, secretary or clerk of the said corporation, for themselves, and in name of, and as representing the whole other members of the said corporation."

In the action the pursuer called for production, 1st, of the charter of confirmation of 1813, granted by Mr Marjoribanks; and, 2d, The seisin of 1735 in favour of Andrew Fowler. Certain reasons of reduction, in regard to this seisin, which were set forth in the summons, were subsequently passed from by the pursuer, under reservation of "all pleas competent to him with reference to the nature and effect of the said sasine, and all objections to the alleged right of the defenders to hold the said sasine as a sufficient and effectual feudal title in favour of the incorporation of the Trinity House." In regard to the charter of confirmation by Mr Marjoribanks, it was set forth among the reasons of reduction, that it was inept and null, in respect it confirmed "the foresaid instrument of sasine, and that not in favour of the party in whose favour it bears to

have been taken, but in favour of 'John Hay, master, Thomas Grindlay, assistant-master, and Robert Bruce, depute-master, for themselves, and as representing the baill other masters and members of the Corporation of the Trinity House, and their successors in office, and their heirs and disponees.' And, further, that it taxed "the entry of singular successors of the said Trinity House at double the blench duty, the first year of their entry thereto, while the disposition, in virtue of which the defenders, or their predecessors in office, claimed right to the said lands, contained no such taxation of the entry of singular successors." The summons further concluded, that should the defenders produce a title to exclude the pursuer from the right of property, it should be found and declared that the lands "have been in non-entry by and since the death of the vassal or vassals who stood last vest and seised therein, holden of the pursuer or his predecessors, as immediate lawful superiors thereof; and, through the failure of the lawful heirs or purchasers thereof, to obtain themselves served, retoured, entered, and infeft in the same."

No. 54.
Jan. 23, 1845.
Gardner v.
Trinity House
of Leith.

An objection was taken by the defenders to the pursuer's title, which was repelled by the Court, (see Report of Feb. 9, 1841, ante, Vol. III. p. 534,) who remitted to the Lord Ordinary to proceed, "without prejudice to any plea on the merits founded on these objections."

On the merits the pursuer pleaded;—

1. The instrument of seisin expedite in favour of Andrew Fowler, cannot be founded upon as a proper investiture in favour of the defenders as a corporation, in the lands described in the summons: (1.) because, at its date, the members of the Trinity House were not a corporation; and (2.) because, even if they then were a corporation, the precept and instrument of seisin were expressed in favour of Andrew Fowler as an individual, or, at all events, as trustee for the other members, and for behoof of the poor of the Trinity House.

2. The charter of confirmation sought to be reduced is inept and null: 1st, in respect it confirms the said instrument of seisin not in favour of Andrew Fowler, in whose favour it bears to have been taken, but in favour of certain other parties, "for themselves, and as representing the baill other masters and members of the Corporation of the Trinity House of Leith, in the county of Edinburgh, and their successors in office, and their heirs and disponees:" 2d, At least the said charter of confirmation is inept and null, and not binding upon the pursuer as a singular successor of the granter, in respect it taxes the entry of singular successors of the said Trinity House in the dominium utile of said lands at double the blench duty the first year of their entry to the said lands, while there is no such limitation of the superior's right in the other titles constituting the investiture of the superior, or of the vassal in said lands.

3. The lands ought to be declared in non-entry from and since March 1629, (the date of the Crown charter in favour of the pursuer,) being

No. 54. long subsequent to the date of the death of Andrew Fowler, the last vassal infest therein.

Jan. 23, 1845.
Gardner v.
Trinity House
of Leith.

The defender pleaded ;—

1. The pursuer is barred, *personal exceptione*, and by the terms of his own titles, from objecting to the seisin of 1735 as a good infestment in favour of the Trinity House as a corporation ; and also from challenging the charter of confirmation granted by Mr Marjoribanks to the Trinity House in 1813.

2. The defenders are not bound to acknowledge him as superior, except in terms of their agreement with his author, by which they were recognised as vassals infest as a corporation, and were to receive charters of confirmation as such from the superiors.

3. The Trinity House was a legal corporation at the date of the seisin in 1735, and that seisin was a good infestment in their favour as a corporation, by virtue of which they have ever since continued as vassals infest to hold the property of the lands under the parties who have successively acquired the superiority.

4. Although the charter of confirmation in 1813 was superfluous and unnecessary, inasmuch as the corporation had already a base infestment in the property, flowing directly and immediately from Mrs Evanson, the author both of Mr Marjoribanks and the pursuer, it had the effect of curing all objections to the seisin, if any such had existed.

The Lord Ordinary pronounced this interlocutor :—“ Finds, 1mo, That by disposition, dated 3d January 1735, Mrs Marion Evanson, being then vested in the plenum dominium, both property and superiority, of the lands in question, disposed and conveyed the same to and in favour of Robert Innes, therein designed ‘ now present master,’ Andrew Fowler, therein designed ‘ now assistant,’ and Robert Angus, therein designed ‘ now present treasurer to the Trinity House of Leith, for themselves, and in name and behalf of, and as representing the haill other masters and members of the said Trinity House, and for and to the use and behoof of the poor thereof, and their successors in office,’ with obligation to infest ‘ by two several infestments and manners of holding ; the one thereof to be holden of me, the said Marion Evanson, and my heirs and successors, in free blench, for payment of a penny Scots money, &c., and the other, &c., from me and my foresaids, of my immediate lawful superiors thereof,’ &c. ; and the said disposition contained procuratory of resignation and precept of sasine, with other usual and necessary clauses : 2d, That upon the precept contained in said disposition, whereby sasine was authorized and directed to be given ‘ by deliverance to the saids Robert Innes, Andrew Fowler, and Robert Angus, or any of them,’ the said Trinity House took infestment in the said lands, conform to instrument conceived in favour of the said Andrew Fowler, therein designed ‘ present assistant,’ ‘ for himself, and in name and behalf of, and as representing the haill other masters and members of the said Trinity House, and

to the use and behoof thereof;’ and which instrument bears date 8th January and 5th March, and was duly recorded in the particular Register of Sasines at Edinburgh, 7th March 1735: 3d, That by virtue of the foresaid title, whereby the property and superiority of the said lands came to be separated, the latter remaining upon the personal right in the above disposition, the said Trinity House continued in full possession and enjoyment of the whole subject, both property and superiority, down to 26th May 1812, when, by disposition subscribed and executed by John Hay, therein designed ‘master,’ Thomas Grindlay, therein designed ‘assistant master,’ and Robert Bruce, therein designed ‘depute master of the said Trinity House, for themselves, and in name and behalf of, and as representing the haill other members of the said House,’ they sold and disposed to and in favour of Alexander Young, W.S., ‘the right of superiority, or dominium directum,’ of the foresaid lands: 4th, That by the said disposition, the said Trinity House, acting through their office-bearers before named, expressly excepted from the warrandice, and reserved in their own favour, the foresaid instrument of sasine, ‘proceeding upon the precept of sasine contained in the disposition in their favour, made and granted by Marion Evanson;’ which infeftment is therein described as being ‘still held base of the representatives of the said Marion Evanson,’ &c., ‘declaring, that we and our foresaids shall only be bound in absolute warrandice of the superiority of the said lands, so far as the same is holden in capite of the Crown, and no further,—it being expressly provided, that under the superiority ‘hereby disposed, we are to continue to hold the property of the said lands in blench farm; in virtue of the base infeftment in our favour following on the precept in Marion Evanson’s disposition, and excepted from this conveyance, and reserved in our persons;’—and the said Trinity House, by their office-bearers foresaid, accordingly conveyed and assigned to, and in favour of the said Alexander Young, ‘as having now right to the superiority above disposed, the blench duties and services payable to the Crown raised by the foresaid incorporation of Trinity House, for and on account of the foresaid base infeftment, and that from and after the date hereof.’ 5th, That moreover, by the said disposition, the said Trinity House, acting through their office-bearers foresaid, specially assigned to the said Alexander Young ‘the unexecuted procuratory of resignation contained in the foresaid disposition made and granted by the said Marion Evanson,’ &c., ‘to the end that the said Alexander Young and his foresaids may, in virtue of the said unexecuted procuratory of resignation, more readily obtain from the Crown a charter of resignation of the said lands, under the burden of the foresaid instrument of sasine in our favour.’ 6th, That, it was exclusively under and by virtue of this disposition from the Trinity House, and the assignation to the unexecuted procuratory of Marion Evanson, therein contained, and not otherwise, that the said Alexander Young, and the various parties acquiring from him, subse-

No. 54.

Jan. 23, 1845.
Gardner v.
Trinity House
of Leith.

No. 54. quently completed the superiority titles ; and the present pursuer, excepting under the titles so completed, and now come by progress into his person, has never had, and has not at this moment, any ground of right, as superior, to that portion of the lands (originally conveyed by Marion Evanson to the Trinity House) which is here in question : Finds that, in these circumstances, and without now enquiring whether, at the date of the original conveyance by Marion Evanson aforesaid, the said Trinity House was in strictness entitled to the character and privileges, in all points, of a proper body corporate, the pursuer cannot be heard to challenge the property title now vested in the defenders, seeing that the right of said defenders, as corporate vassal in the lands, is not only expressly recognised and saved in græmio of the superiority title on which his own right depends, but that, in truth, the said superiority title itself having been derived solely through the defenders, (who had no other right thereto than what they had acquired, and all along held under Marion Evanson's disposition, as the common root of title both to property and superiority,) he cannot impugn their right to the property without necessarily exposing the right of superiority flowing from them to a corresponding objection, and thereby cutting the branch on which his own right hangs. Separatim, Finds that it would, at any rate, not avail the pursuer, in the present process of reduction and non-entry, so far as he insists in it to the effect of enforcing a claim to composition from the defenders as on the entry of a singular successor, although it were to be held that the property title founded on by them was formerly inept and inhabile as a title to the corporate persona, inasmuch as the investiture completed in Andrew Fowler, as an office-bearer of the corporation, and which the pursuer no longer impugns as having been sufficient originally to fill the fee, was, at all events, a good investiture in himself and his successors in office, for the corporate behoof, and, as such, capable of being, at any time, taken up by the said Andrew Fowler's official successors as being, in that view, quodammodo heirs of provision on the fall of the investiture, and the defenders have stated their willingness, rather than litigate now, to take an entry on this footing, upon payment of the usual relief as heirs, which would—the holding being free blench—amount only to a year's blench duty : Finally, as regards the objection stated in the seventh reason of reduction to the charter of confirmation granted by Alexander Marjoribanks, one of the pursuer's authors, viz. that the same is 'irregular and inept, and not binding upon the pursuer as a singular successor of the said Alexander Marjoribanks, inasmuch as it taxes the entry of singular successors of the said Trinity House at double the blench duty the first year of their entry,' Finds, that in the present case, where no question is yet raised as to the entry of a singular successor, the sole question being whether the Trinity House be itself in non-entry, it is unnecessary at present to pronounce any deliverance ; reserving to the pursuer

Jan. 23, 1845.
Gardner v.
Trinity House
of Leith.

and his successors in the superiority, notwithstanding the said charter, **No. 54.**
 all claims for composition or otherwise on the entry of singular successors, **Jan. 23, 1845.**
 whensoever an occasion for such entry shall occur, and to the said singular successors their defences against the same, as accords: Therefore, **Gardner v.**
 upon the whole matter, repels the reasons of reduction, and assoilzies the **Trinity House**
 defenders simpliciter from all and every the conclusions of the summons, **of Leith.**
 and decerns: Finds expenses due." *

* "NOTE.—1. It was urgently pressed upon the Lord Ordinary, that the former judgment of the Court (9th February 1841,) repelling the objections to the pursuer's title, excluded the main ground of decision, on which the present interlocutor is founded. But the Lord Ordinary cannot think so. The judgment was itself pronounced, expressly 'without prejudice to any plea on the merits founded on those objections.' So that the title was sustained, only to the effect of meeting the preliminary defence, as originally pleaded against satisfying the production, and to the effect of altogether excluding the action, and thus stopping discussion on the threshold.

"2. On the merits, if there be any thing in the pursuer's plea, that the defenders are not duly vested in the property it must equally follow, that neither were they vested in the superiority when they executed the disposition in Mr Young's favour in 1812. For, if Mrs Evanson's disposition of both property and superiority did not operate a conveyance except to the individual office-bearers of the Trinity House therein named, nothing can be clearer than that the office-bearers who, at the distance of nearly a century, disposed to Mr Young, were altogether without title. How could Mr Young, the moment he obtained and accepted of his disposition from those office-bearers, as the recognised official representatives of the defenders, have at once turned round upon its granters, and disputed their title to the property, to the effect now attempted by the pursuer? It seems very clear that he could not. And if he could not, neither can the pursuer, whose superiority title traces back to, and rests wholly upon, the right thus acquired by Mr Young;—that right, indeed, in græmio, recognising the defenders as proprietors of the dominium utile, and expressly saving and reserving their investiture under the base holding, and declaring that the superiority had only been parted with 'under the burden of the instrument of sasine in our favour.'

"3. This is one satisfactory answer to the present action,—both as it concludes for reduction of the defenders' titles, on the ground of their having no right whatever in the property of the lands:—and also as it concludes for declarator of non-entry, on the ground that the defenders are not in the proper feudal sense to be considered as vassals in the subject. The investiture of superiority (in those very titles by which it is itself originated and constituted) so recognizes and deals with the defenders as vassals in the subordinate estate, that no one, at least, depending upon that investiture as the sole ground of his own right, can repudiate or deny effect to the right of the defenders.

"4. At all events it is plain, that even if, in strict feudal form, there should chance to be a flaw in the defenders' investiture—viewing that investiture as one in favour of the corporation—this can never touch the radical right to the estate, which unquestionably belongs to the defenders as a body. Could Mrs Evanson, for example, ever have disputed the right of the Trinity House, as the party entitled under her own disposition to hold the property? When Andrew Fowler went out of office, could she have insisted against the Trinity House, by reduction and non-entry, as if they possessed no right to the subjects? Could she, still more especially, have refused to render public by confirmation in favour of the Trinity House, or, at all events, of their office-bearers for the time, the base right which had been made up in Fowler's person, solely in his official character, and for behoof of the body whose officer he was, and of those who might be his suc-

No. 54. The pursuer reclaimed.

ap. 23, 1845.
Jardner v.
Trinity House
of Leith.

LORD JUSTICE-CLERK.—I agree in opinion with the Lord Ordinary; and I do not think it is possible to read the titles without coming to the same conclusion. Mrs Evanson diapones in favour of the office-bearers of the Trinity House. It is recognised as a corporation in the same way as many other old corporations, without it being possible distinctly to trace their origin. When the Trinity House sell the superiority, no one can purchase it without taking it through the incorporation. The matter is so fully embodied in the Lord Ordinary's interlocutor and note, and as I agree with him in the grounds on which he rests his judgment, I do not consider it necessary for me to state my opinion at length.

cessors in that office? Could she have insisted, in any view, upon an entry—as if by a singular successor, and with a corresponding composition—on every successive annual election of the officers of the Trinity House? The principle which ruled the case of Campbell, 28th June 1843, would at once have afforded an answer to any such extravagant demand. And what is the pursuer now, but a party standing in the precise same relation to the defenders in which Mrs Evanson, if now alive, would have stood? Unless indeed there be this difference, that the pursuer—himself holding under an investiture wholly derived from the defenders—must be still less in condition to deny the character and rights of the body from whom his own title flows.

"5. The Lord Ordinary has thought it unnecessary to decide, whether at the date of Mrs Evanson's disposition in favour of the Trinity House, and of the sasine following thereon, that body was in strictness entitled to the character and privileges of a proper corporation. But if this had been requisite, he should have been strongly disposed, upon the evidence before him, to decide, even in that question, for the defenders. The Trinity House has had persona standi as an hospital, for centuries. Its existence in that capacity is established by the ancient grants from the Crown in its favour—by the enforcement, from the earliest times, of the corporate rights thereby conferred, even in so unfavourable a matter as the taxation of strangers—(see Hospital of Leith v. Town of Kinghorn, 11th January 1576, Mor. 16651)—by decrees of Court in its favour when pursuing by its office-bearers—by its uninterrupted and universal recognition as a public institution—by the more recent charter in its favour confirming and renewing its rights, which proceeds upon an express recital of its immemorial standing as a corporation,—and the statute, 1st Geo. IV., c. 37, wherein it is in so many words acknowledged by the legislature as a body which 'has for time immemorial existed as a body corporate and politic.'

"6. Finally, the Lord Ordinary is not sure but that, if it had been necessary to go into other views of the case, the very shape and terms of the summons at the pursuer's instance would not, per se, have been enough to exclude declarator of non-entry. The pursuer there challenges and seeks reduction of the sasine in Fowler's favour as an instrument which is and has been, ab initio, absolutely null. But if it was thus null, then there has, down to the present day, been no competent separation of the property from the superiority, and the feudal relation of superior and vassal between the pursuer and defenders does not properly subsist. It is true that, to get over this difficulty, the pursuer has minuted his desire to depart from this branch of his summons. But the Lord Ordinary doubts whether a change so radical, and which would go to alter the whole complexion and bearings of the case, can be allowed. He has not, however, to any effect rested his judgment upon this speciality. But it is right to keep it in view. And in the meanwhile, it will be observed, that no amendment or alteration of the libel has been allowed, so as practically to give effect to the change on the shape of the case proposed by the pursuer."

LORD MEDWYN.—I am of the same opinion. I have nothing to add to the Lord Ordinary's judgment. **No. 54.**

LORD MONCREIFF.—I concur in the Lord Ordinary's interlocutor.

LORD COCKBURN. concurred.

Jan. 24, 1845.
Hamilton v.
M'Queen's
Trustees.

THE COURT adhered, "but with the further reservation to the pursuer in any competent action to try the effect of the clause in the defenders' titles taxing the composition on the entry of singular successors."

T. F. EWART, W.S.—**WILLIAM LINDSAY, S.S.C.**—Agents.

Authorities for the Pursuer.—*Leslie v. M'Indoe*, May 21, 1824, (3 Shaw, p. 48;) *Gibson*, July 18, 1710, (M. 5625;) *Stair*, 2, 3, 54; *Dempster v. Seamen of Dundee*, (9 S. & D.; *Campbell v. Orphan Hospital*, June 28, 1843, (ante, Vol. V. p. 1273;) *Castlehill*, (M. 10275;) *Nasmyth*, (ibidem;) *Marshall v. Tulloch*, (2 B. Sep. pp. 70 and 79.)

JAMES HAMILTON and his TRUSTEES, Pursuers.—*Sol.-Gen. Anderson*—**No. 55.**
Deas.

M'QUEEN'S TRUSTEES, Defenders.—*Moncreiff.*

Bankruptcy—Cautioner—Compensation.—A debtor in a certain debt who held counter-claims against his creditor, having for a long period failed to constitute them, the trustees of the creditor (he having become bankrupt) enforced payment of the debt from a party who was cautioner therefor;—Held that the debtor was not entitled to claim from the bankrupt estate the full amount of his counter-claims, on the ground that payment of the debt had been improperly enforced from his cautioner in disregard of these counter-claims, but that he was only entitled to a dividend rateably with the other creditors.

THE late William M'Queen had employed Mr James Hamilton, W.S., as his agent, and had incurred to him certain business accounts during the years from 1804 to 1813. **Jan. 24, 1845.**

The lands of Stoneyburn, the property of Robert M'Queen, (a brother of William,) were purchased by Mr Hamilton at a public sale in the year 1809, and Mr Daniel Hamilton of Gilkerscleugh became cautioner for payment of the price in terms of the conditions of sale.

Mr James Hamilton had found it necessary to bring an action of multiplepinding for the purpose of distributing the price of Stoneyburn amongst the creditors of Robert M'Queen. In this process it was found by the report of an accountant, that William M'Queen was entitled to be preferred as a creditor on the price in Mr Hamilton's hand for the sum of £270. An interim-decree having been issued for £150 of this sum, Mr Hamilton, in January 1815, presented a suspension on the

2d Division.
Lord Ivory.
T.

No. 55. ground of the debt due to him by William M'Queen in the business accounts above mentioned. In answer to this suspension, William M'Queen denied that he had incurred the accounts, and the Court (adhering to a judgment of the Lord Ordinary) refused the bill, in respect that there would still remain in Mr Hamilton's hands, after payment of the sum contained in the interim-decree, more than sufficient to answer all his claims.

Jan. 24, 1845.
Hamilton v.
M'Queen's
Trustees.

Mr Hamilton having then objected to the accountant's report, and made a claim upon his business accounts as against the sum reported to be due to William M'Queen, an interlocutor was pronounced by the Lord Ordinary, on 19th December 1815, finding that the sum of £270 was due to M'Queen's trustees, (he having died in the mean time,) but "reserving to the pursuer the benefit of the claim made by him against the deceased William M'Queen, in the event of his being able to ascertain that it is just."

William M'Queen had died in November 1815 in insolvent circumstances, after having executed a trust-disposition (upon 16th January of that year) for behoof of his creditors. The trustees under that deed paid to his creditors various dividends, amounting in all to 7s. 3d. per pound.

In the year 1826, a reference was entered into by Mr Hamilton and M'Queen's trustees with regard to his accounts and the balance due by the late William M'Queen, but was allowed to expire without any decision having been pronounced, and was not subsequently renewed.

In the year 1832, M'Queen's trustees, after doing diligence against Mr Hamilton, and Mr Daniel Hamilton his cautioner for the price of Stoneyburn, succeeded in recovering from the representatives of the latter the remainder of the sum to which they had been preferred in the multiplepoinding, after deducting what had been paid under the interim-decree. The sum which was thus obtained by the trustees amounted (after deducting the expense of diligence, &c.) to about £185.

Thereafter Mr Hamilton brought an action for the amount of his accounts against M'Queen's trustees.

To obviate an objection which had been taken by the defenders, Mr M'Innes, Mr Hamilton's trustee, sisted himself as a pursuer in the action. Mr M'Innes also appeared in the character of trustee of Mr Daniel Hamilton, the cautioner.

After various discussions had taken place in the process, the Lord Ordinary, on 15th January 1842, found that Mr Hamilton was entitled to decree of constitution, in respect of his accounts, to the extent of £122 : 17 : 3, but reserved inter alia the question, whether Mr Hamilton was entitled to claim from M'Queen's trustees the full amount of this debt—or whether he was only entitled to a rateable and *pari passu* dividend, along with the other creditors of William M'Queen?

Mr Hamilton pleaded on this point,—That the defenders, M'Queen's trustees, having improperly levied from the pursuer or his cautioner the

sums due to William M'Queen out of the price of Stoneyburn, without allowing compensation for the amount due under his accounts, his right to which had been reserved by the Court, they were personally liable to the pursuer for payment of the accounts and repetition of the sums paid to them.

No. 55.

Jan. 24, 1845.
Hamilton v.
M'Queen's
Trustees.

The defenders pleaded,—They were not in any circumstances liable individually; and if the pursuers' claim were to be sustained, he could only be entitled to rank, along with the other creditors of William M'Queen, for the sum that might be found due to him, and draw a dividend from the trust-funds corresponding thereto.

The Lord Ordinary upon this point pronounced the following interlocutor:—"Finds, in respect the pursuer's trustee has now sisted himself as a party, that any objection which may originally have lain to the sufficiency of the title is removed; and on the merits, so far as regards the reserved question, whether the defenders ought to be subjected in a personal liability for the pursuer's entire debt? Finds that there are no grounds for so subjecting them: Finds, on the contrary, that the said defenders, as trustees on the estate of the late William M'Queen, which estate was confessedly bankrupt, and was accordingly made over to them for the express purpose of being administered and distributed for behoof of his whole creditors, are no further liable than to make good to the pursuer, out of the same, a rateable and *pari passu* dividend along with the other creditors effecting to the amount of his debt: Finds, accordingly, that the other creditors having hitherto received payments from the defenders, to the amount in all of 7s. 3d. per pound on their respective debts, as they stood at 16th January 1815, the date of the trust-deed, the defenders will completely discharge all ground of legal demand on the part of the pursuer, by making payment, in the first instance, of an equalizing dividend to the like amount of 7s. 3d. per pound on the pursuer's debt, such as it shall be shown to have stood at the said date of 16th January 1815, with legal interest on this dividend until the same be paid, which (as appears from the admission of the defenders) there are now in their hands sufficient trust-funds for doing, and thereafter ranking the pursuer *pari passu* with the other creditors on whatever balance (if any) may remain over, after meeting all proper expenses of the trust, for further distribution."

Mr Hamilton and his trustee reclaimed, and argued;—Had no payment been made by the cautioner, the pursuer would have been entitled to plead compensation. He had stated this plea in the year 1815, before William M'Queen's bankruptcy; it had then been reserved by the Court, and the plea was equally available to him after M'Queen's death and bankruptcy, as it would have been before these events. But the trustees, while in the knowledge that this plea was asserted by the pursuer, instead of seeking payment from him, had done diligence, and forced payment from his cautioner, and were therefore liable in payment of the full

No. 55. amount of the debt. It was now admitted that the trustees were in possession of £125 of trust-funds, so that in the event of the claim of the pursuer being found to be good, there was a sufficiency of trust-funds to meet it.

—
Jan. 24, 1845.
Hamilton v.
M'Queen's
Trustees.

LORD JUSTICE-CLERK.—I am quite satisfied with this interlocutor, which I think stands upon clear grounds. Before we can sustain what is in effect a plea of compensation, we must be satisfied that the state of the rights of parties admits of it. The facts are, that Mr Hamilton being debtor in a part of the price of Stoneyburn, objects to the claim of William M'Queen, and states a plea of compensation in respect of his accounts. The plea is reserved by the Lord Ordinary, but Mr Hamilton never proceeds to constitute his claims. Years pass, and a submission is entered into, but that is allowed to fall. At length the creditors being tired of waiting, proceed against Daniel Hamilton, who was liable for the sum as cautioner, and recover payment from him. He does not state the plea of compensation; it may be said to have been competent and omitted. It is admitted by the pursuer, that upon this state of the facts a plea of compensation is not admissible; but it is said that the trustees having improperly got payment from the cautioner of what they should not have got, they must be liable in repayment. But a claim of compensation, not timely insisted in, will not found a right of repetition of money regularly and competently drawn under decree. These claims of Mr Hamilton had never been constituted. There had merely been a reservation of them in the multiplepoinding. That they had a cautioner to go against, was one of the advantages which the trustees had, and of which they were entitled to avail themselves. On what ground, then, can the pursuer claim repayment of this sum? As soon as it was paid into the trustees' hands, it merged into the trust-funds. It could not be separately traced. As the pursuer is now proceeding to constitute his claims by an ordinary action, he must proceed in the ordinary way. They say—we will pay you, if a creditor, as we pay the other creditors. It is just the common case of an action for payment against the trustees of an insolvent estate. I see no reason for subjecting them on the ground that they enforced improperly payment from the pursuer's cautioner.

LORD MONCRIEFF.—I am of the same opinion. Mr Hamilton neglected to make good his counter-claims; and now, since a plea of compensation is no longer competent, he must just be placed upon the same footing with the other creditors. He is not entitled to get more.

LORD COCKBURN concurred.

LORD MEDWYN absent.

THE COURT accordingly adhered.

ROBERT MACKAY, W.S.—JOHN GILLESPIE, W.S.—Agents.

LORD BLANTYRE, Petitioner.—*Rutherford—Dundas.*
 WILLIAM DUNN, Respondent.—*Ld.-Adv. M'Neill—G. Bell.*

No. 56.

Jan. 25, 1845.
 Lord Blantyre
 v. Dunn.

Interdict.—Circumstances in which a party was held to have committed a breach of interdict, and ordained at his own expense to restore matters to the state in which they were when the interdict was intimated, and found liable in expenses, but no punishment inflicted.

ON 7th November last, Lord Blantyre obtained an interdict from the Jan. 25, 1845.
 Lord Ordinary on the bills against William Dunn of Duntocher, prohibiting him from “in any way altering, or interfering with,” a certain dam-dyke at Duntocher, forming part of certain subjects, of which he was tenant under his Lordship. On Friday the 8th, Dunn instructed his workmen to remove the dam-dyke in question, and they commenced operations about noon of that day. The interdict was intimated to certain workmen at Duntocher the same day about two o'clock, but not to those engaged at the dam-dyke, as Dunn alleged, by a messenger who read it over to them before witnesses, but did not serve any copy. It was regularly served the same evening at seven o'clock upon Dunn himself at Glasgow, which is nine miles from Duntocher. He took no steps in consequence, because, as he alleged, he understood from certain communications which had been made to him in the course of the afternoon, that the interdict had been previously served at Duntocher upon the workmen employed in removing the dyke, and he relied upon their obedience to it. He went to Duntocher the following afternoon, and finding the workmen still engaged removing the dyke, he immediately ordered them to desist.

1st Division.
 N.

Lord Blantyre, with concurrence of her Majesty's Advocate, presented a petition and complaint for breach of interdict, praying the Court “to grant warrant for serving this petition and complaint upon the said William Dunn, and upon advising the same, with or without answers, to grant warrant for apprehending and bringing him before you for examination; to find that he has been guilty of breach of interdict and contempt of your Lordships' authority; and to inflict upon him such punishment therefor as to your Lordships shall seem just and necessary, so as to deter others from committing the like in time to come; and further, to find the said William Dunn liable to the petitioner in the sum of £50 sterling in name of damages, or such other sum, less or more, as your Lordships may be pleased to modify as the amount thereof, together with the expenses of this complaint, and whole procedure to follow hereon: Or, otherwise, to decern and ordain the said William Dunn to repair and restore the dam-dyke in question to the state in which it was before the

No. 56. commencement of his recent operations now complained of, in terms of the proposal to that effect addressed to him by the petitioner; and to find the said William Dunn liable in the whole expense of such repairs and restoration, together with the expenses incurred by the petitioner in reference to this application."

Jan. 25, 1845.
Lumsden v.
Hamilton.

Dunn gave in answers disclaiming all intentional disrespect to the authority of the Court, and mainly insisting, in justification of his conduct, upon the circumstance of the interdict not having been regularly served upon the persons actually engaged in the work at Duntocher, as he had understood when he judged it unnecessary to send a messenger to stop them, on the interdict being served upon himself in Glasgow.

LORD PRESIDENT.—In the circumstances stated by the respondent himself, and I wish to take the case no higher, I have no doubt that a breach of interdict has been committed. It was his manifest duty immediately on the interdict being intimated to him, to send off a messenger to Duntocher to stop the work; and by neglecting that duty, I have no doubt that he committed a breach of interdict. On the other hand, I am not satisfied that it was done wilfully, to show disrespect to this Court. I think we ought to find that a breach of interdict was committed by the respondent, and ordain him to restore, at his own expense, the dam-dyke to the state in which it stood when the interdict was intimated at Duntocher, and to find him liable in expenses, but to find it unnecessary to go further.

The other Judges concurred, and

THE COURT accordingly pronounced the judgment suggested by the Lord President.

DUNDAS and WILSON, W.S.—W. A. G. and R. ELLIS, W.S.—Agents.

No. 57.

LUMSDEN, Pursuer.—*Inglis*.
HAMILTON, Defender.—*Moncreiff*.

Jan. 25, 1845.
1st Division.

Expenses—Jury Trial.—THE pursuer of a jury cause having been successful, in considering the auditor's report of his account of expenses;—1st, Charge of his Edinburgh agent going to London, to attend examination of witnesses there before a commissioner on adjusted interrogatories, disallowed; and £10 allowed as the expense which would have been incurred by employing a London solicitor, as the opposite party had done. 2d, Charge for precognosing the defender's witnesses, whose names appeared in the proceedings in the cause, and who had actually been examined at the trial, allowed as being necessary for the pursuer's cross-examination, and so part of his proof. 3d, Of the fees to counsel passed by the auditor, only those allowed which had actually been paid.

JAMES BUTLER GALLIE and OTHERS, Claimants and Pursuers.—

No. 58.

Ld.-Adv. M^cNeill.

ALEXANDER WYLIE (Wilson's Trustee,) Claimant and Defender.—

Jan. 25, 1845.

*Monro.*Gallie v.
Wylie.

THOMAS EDMONSTON and SON, and OTHERS, Claimants.—

Sol.-Gen. Anderson—G. G. Bell.

Competing.

Process—Multiplepoinding—Abandonment of Claim—Partnership—Expenses.

1. In a multiplepoinding, in which the question at issue was, whether the fund in medio belonged to a company, or was the property of one of the partners, certain of the company creditors lodged a claim at the commencement of the process, but took no further step in the process: another body of the company creditors having proceeded with the case, and completed a record, in competition with the trustee on the sequestrated estate of the partner, succeeded in establishing, by the verdict of a jury, that the fund was company property and were preferred upon it for the amount of their debts: and, before the trial, asked the first set of creditors if they would join in the trial, which they refused: the former body of creditors having upon this appeared, and claimed to be ranked upon a balance of the fund which remained over;—circumstances in which the Court, holding them to have abandoned their claim, found them not entitled to rank, and preferred the trustee to the balance. 2. Expenses as between agent and client awarded to the successful creditors out of the fund in medio.

On 7th April 1840, the estates of Alexander Wilson, seedsman, iron- Jan. 25, 1845.
monger, and nailmaker in Dalkeith, were sequestrated, Alexander
Wylie being trustee on the sequestrated estate. About the 1st of June 2d Division.
1838, Alexander Wilson had assumed into partnership Mr Robert Watt, Lord Justice-
Clerk.
Jury Cause.
and had thereafter, at least to some extent, carried on his business,
under the firm of Alexander Wilson and Company. A number of the
parties, from whom the goods for carrying on the business were derived,
thereafter invoiced their furnishings to Alexander Wilson and Company,
and received from them acceptances bearing the name of the Company,
and generally transacted with them under that firm.

A question arose between these parties, who claimed as creditors of Alexander Wilson and Company on the one hand, and the trustee upon Wilson's sequestrated estate on the other, as to whether there had been any real or bona fide constitution of a company. It was maintained by the trustee, that there never was in fact a real company of Alexander Wilson and Company, or at least that it was a latent and fraudulent device for the purpose of giving a preference to a certain class of Wilson's creditors; and that the stock in trade and debts of the business were the property of Wilson, and therefore belonged to the trustee in his sequestration. The company creditors on the other hand claimed the stock in trade as belonging to Alexander Wilson and Company.

By agreement the stock in trade and debts were realized by Wilson's trustee, who then brought an action of multiplepoinding, in which they formed the fund in medio. In this process a claim was lodged by the trustee, and another by James Butler Gallie, and certain of the company

No. 52. creditors. After these two claims had been re-revised the record was closed between these parties, and after considerable discussion the following issues, in which Gallie and the others stood as pursuers, and Wilson's trustee as defender, were adjusted on June 21, 1844;—

JAN. 25, 1845.
Gallie v.
Wylie.

“ 1. Whether, on or about 7th April 1840, a partnership existed bearing the name of Alexander Wilson and Company, and of which Alexander Wilson and Robert Watt were the partners, and carried on and transacted business under the said firm, and whether the stock of goods and outstanding debts, the proceeds of which form the fund in medio, or any part thereof, belonged to or were the property and stock in trade of the said partnership? ”

Or,

“ 2. Whether the stock in trade, or part thereof, contained, on 7th April 1840, in the shop in Dalkeith some time occupied by the said Alexander Wilson, was in the ostensible possession and reputed ownership of the said Alexander Wilson; and whether the fund in medio, or any part thereof, belongs or is justly addebted to the trustee on the sequestrated estate of the said Alexander Wilson? ”

At the trial, which took place upon the 7th of August, the jury returned a verdict for the pursuers.

In consequence of this verdict, Gallie and the others obtained a preference upon the fund in medio to the extent of their debts.

Thomas Edmonston and Son and certain others, being another set of the company creditors, had given in a claim in the multiplepinding in February 1841, but had taken no further step in the process. They did not revise their claims, nor close the record; they were not parties to the discussions upon the issues, or the motions for diligences preparatory to the trial; and their names were not inserted in the list of the pursuers in the issues. When requested by the agent for Gallie and the others to concur with them in going on to try the case, they had declined to do so.

After satisfying the preferences of Gallie and others, there still remained a balance of the fund in medio, upon which Edmonston and Son and others now moved the Court to rank and prefer them, *secundo loco*, for the amount of their claim. This balance was also claimed by Wilson's trustee.

Edmonston and Son and others pleaded;—That the result of the verdict of the jury being to establish that the fund in medio was company property, they were entitled, as company creditors, to be preferred upon it.

Wilson's trustee answered;—That the claimants, having refused to try the case, and having taken no steps in the process for such a length of time, must be held to have abandoned their claims; that application was made to them by the other creditors to know if they would concur in the expense of the trial which they refused; that they had dropped out of the competition, and there being thus no other competitor in the field, he was entitled to be preferred upon the balance of the fund in medio.

Edmonston and Son and others replied;—That they were not to be

foreclosed from claiming upon the fund in medio because they had not proceeded with their claim. Their claim had never been dismissed by an interlocutor of Court. It was frequently the case in multiplepointings that the question was tried by one of the claimants only, and it had never been the practice to hold that the other claimants who did not come forward and unite with him thereby abandoned their claims.

No. 58.
Jan. 25, 1845.
Gallie v.
Wylie.

The case was of this date advised.

LORD JUSTICE-CLERK.—It is true that, if we are to look at the mere verdict in this case, this is certainly company funds. But the issue is one in which Gallie and the others were pursuers, and Wylie alone defender. It is an issue adjusted in that *special competition* between these parties, and only between them; and the verdict, which settles that the fund is company property, is one for these pursuers. In a multiplepointing, every party who gives in a claim must timeously insist in it, either individually, or in combination with others. Now, the claims for Edmonston and Son and others were given in in February 1841, and they cannot state either that they have themselves taken any steps since, or that they had conjoined their names with Gallie and others in any way or in any shape. From the time of lodging their claims, Edmonston and Son never moved in the process. They did not obtemper the interlocutor appointing the claims to be revised. They never appeared or joined in any of the motions for diligences. They were not parties to the remit to the issue-clerks. The record was finally adjusted and signed upon the 11th June 1844, after having been three years and a session in the course of adjustment—but it was not closed with them. A question of difficulty arose with regard to the issues which were brought before us, and was settled after considerable discussion. Edmonston and Son and others are not amongst the pursuers in these issues. Can there be any difficulty, then, in holding that a party who has not joined in the proceedings for four years is not now entitled to appear in the Inner-House as a claimant? It appears to me that these creditors must just be held to have abandoned their case. It often happens that the parties to an action may by their conduct be cut out of the benefit of it, when a stranger who has not appeared will not. It seems to have been only by a mistake that these claims were not dismissed. The argument of the Solicitor-General was mainly directed to the point, that the verdict had established the fund to be company property. My answer to that is, that his clients are not entitled to plead that it is company property. Not being parties to the record on which the verdict was obtained, they are not in a situation to make a motion in the case. Upon plain principles of justice, they cannot be allowed to claim this fund. They had ample opportunity of coming forward, but they did not, not even taking the precaution of lodging a minute, protesting that they should be entitled to the benefit of the decision. I think Wilson's trustee was entitled to hold that he was only to try the case with Gallie and the others; had he known that other parties were coming forward, he might not have chosen to try it. But certainly the verdict could not be conclusive in favour of these creditors against Wilson's trustee, and he would at least be enabled to try the question again with them; for they are no parties to the record on which the trial proceeded. That is clear. Indeed, they could only appear in the Outer-House to begin a new record, on which another trial should be placed. But that very consideration shows the more the injustice and irregularity of allowing all these creditors to come forward—it might be one by one,

No. 58. and re-try four or ten times the question already tried with the only parties who chose to complete a record.

Jan. 25, 1845.

Gallie v.

Wylie.

It has been said, that, as no record has been closed, we cannot dismiss Edmonston and Son's claim. I have no difficulty as to this. It is not necessary, in point of form, that we should dismiss their claim; but we can sustain the claim of Wilson's trustee, a party who has a perfect legal title, in respect of there being now no other claimants in the field.

LORD MONCREIFF.—There is one thing clear, had Wilson's trustee gained his case, he would have had no claim against these creditors for his expenses. Whatever doubts I may have had, I am now perfectly satisfied. These parties did not revise their claims, but allowed the record to be closed, and the case to be tried as between the trustee and Gallie. The verdict, I may observe, is not a special finding of a fact, but is a verdict for the pursuers. I think that Edmonston and Son are therefore foreclosed by the forms of Court. I think that it is just the same case as if they had been the only claimants in the field along with the trustee, and had refused to close with him. I agree with your Lordship.

LORD COCKBURN.—I am now satisfied that an opinion which I held at one stage of the case was wrong. I had thought that Edmonston and Son had not stopped till the case was about to be tried, and I knew that it was a practice common in all multipoleindings for one of a body of claimants to step forward for the purpose of trying the case. But I now find that they had remained inactive for a period of four years. They had been ordered to revise their claims, but they disobeyed the order. Had they been in the Outer-House, they would have been met with the objection that they were out of the process. I consider them to be no longer parties to the process.

LORD MEDWYN, who heard the argument, was absent at advising, but the Lord Justice-Clerk intimated that his Lordship concurred with the rest of the Court.

THE COURT accordingly pronounced this interlocutor:—"On advising the motion for Thomas Edmonston and Son and others, refuse the same, and dismiss their claims of ranking in the present process; and, on the motion for the trustee on the sequestrated estate of Alexander Wilson, find him entitled to the balance of the fund in medio, after satisfaction of the preceding decrees of preference, and decern."

By a previous interlocutor, Wilson's trustee had been found liable to Gallie and the others in the expenses of process from the date of lodging their revised condescendence and claim.

Gallie and others now moved the Court to find them entitled to the expenses not found due by that interlocutor, out of the balance of the fund in medio, and to allow the account to be taxed as between agent and client.

They contended,—That they had succeeded in vindicating the fund in medio as the property of the company, a duty which ought to have been performed by the company itself, or by its trustee, had it been sequestrated; they were therefore entitled to reimbursement of their expenses.

LORD JUSTICE-CLERK.—I think that they are entitled to these expenses. The trustee, had the company been sequestrated, would have drawn his expenses out of the fund.

The other Judges concurred, and

No. 58.

Jan. 28, 1845.
Preston v. the
Heirs of Entail
of Valleyfield.

THE COURT granted the motion.

WM. ALEXANDER, W.S.—SCOTT, RYMER, and SCOTT, W.S.—WM. HUNT, W.S.—Agents.

DAME ANN CAMPBELL BAIRD PRESTON, and DR PURCELL'S TRUSTEES, Pursuers.—*Rutherford—Deas.*

No. 59.

THE HEIRS OF ENTAIL OF VALLEYFIELD, &c., Defenders.—*Sol.-Gen. Anderson—Cook—Heriot.*
Conjoined Actions.

Enail.—The three statutory prohibitions of an entail were introduced by the words, "And further providing, as it is hereby expressly provided and declared;" the irritant and resolute clauses, which followed immediately after, were introduced by the words, "which provision immediately above written, if any of the named persons or heirs, male or female, hereby appointed to succeed to the said lands and estate, shall happen to contravene," and they provided that the heirs contravening should forfeit their right of succession, and declared "all such facts, deeds, debts, or obligations, in contravention of the foresaid provision," to be *ipso facto* void and null:—Held, by a majority of the whole Judges, that the irritant and resolute provisions applied to the whole of the three prohibitions, and were not limited to the last of them.

THE question in this case related to the validity of the entail of Valleyfield, and turned upon the terms of the prohibitory, irritant, and resolute clauses. These clauses were as follows:—"And further providing, as it is hereby expressly provided and declared, that it shall not be lawfull to the said George, Robert, John, and William Prestons, or to their said heirs, or to any other of the heirs, male or female, who shall happen to succeed to the said estate, to sell or dispoine the lands, barronys, and others above mentioned, or any part thereof, or to grant infestments of annualrent or liferent, or other burdens out the same, or to set tacks for longer time than nineteen years, and that without diminution of the rent; and in case the saids lands and others cannot be set at the former rent, then the tacks thereof shall only endure for the space of five years, and no longer. And it shall not be lawfull to the said George Preston, or any other of the saids heirs, male or female, above mentioned, to suffer feu-duties or other public burdens, payable out of the said estate, to run

Jan. 28, 1845.
1st DIVISION.
Lord Ivory.
N.

No. 59.
Jan. 28, 1845.
Preston v. the
Heirs of Entail
of Valleyfield.

on and remain unpaid so as to affect the same; nor to contract debts, or do and committ any other fact and deed, civil or criminal, whereby the samen lands and estate may be evicted, adjudged, forfeited, or any otherways affected, in defraud or prejudice of the saids heirs of tailzie and provision, and of this present right of succession to the said estate, or do any deed whatsoever, whereby the foressaid destination and order of succession may be any ways inverted, altered, or prejudged; and *which provision immediately above written*, if any of the forenamed persons or heirs, male or female, hereby appointed to succeed to the said lands and estate, shall happen to contraveen, they shall not only lose and amitt the right of succession thereto, and the samen shall accress and belong to the next heir of tailzie and provision appointed to succeed to the person contraveener, though descended of the contraveener's body, *ipso facto*, without necessity of declarator; but also, all *such* facts, deeds, debts, or obligations, in *contravention of the foressaid provision*, are hereby declared, *ipso facto*, void and null, and shall noways affect the said estate, or be obligator upon the subsequent heirs of tailzie and provision, who are hereby appointed to succeed and have right to enjoy the said estate, free of the burden of all such deeds, debts, and obligations whatsoever."

In 1843, Dame Baird Preston, heiress of entail in possession, being advised that the entail was defective, and left her at liberty to sell and burden the estate, granted a bond and disposition in security over it for £6000, in favour of Dr Purcell's trustees. She at the same time, by missives of sale, sold a portion of the estate for £300 to the Honourable John Kennedy. She then raised an action of declarator against the heirs of entail, in which Mr Kennedy was called for his interest, narrating the said security and sale, and concluding to have it found and declared that the same were valid, and generally that she had power to sell, burden, and dispose of the estate at her pleasure. Dr Purcell's trustees also raised an action of declarator against Dame Baird Preston, and the other heirs of entail, concluding to have it found and declared, that the security which had been granted to them was valid. The record in each of these actions having been closed upon summons and defences, they were conjoined, and cases ordered, with which, when given in, the Lord Ordinary made avizandum to the Court.

The objection urged against the validity of the entail, which formed the subject of discussion in the conjoined actions, was, that the irritant and resolute clauses were not aptly and legally applied to the two statutory prohibitions which stood first in order; viz. those against selling and burdening the lands, but only to the last, which immediately preceded those clauses; viz. that against altering the destination or order of succession. This objection rested upon the manner in which the prohibitory and irritant clauses were introduced by the words, "*and which*

provision immediately above written”—and upon the circumstance that only “such facts, deeds, debts, or obligations, in contravention of the *foresaid provision*,” were declared to be null. No. 59.

Jan. 28, 1845.
Pratt v. the
Heirs of R. tail
of Valleyfield.

The arguments of the parties upon this objection sufficiently appear from the opinions of the judges. The authorities cited will be found at the end of the report. Subjoined is the note of the Lord Ordinary reporting the cause.*

* **NOTE.**—The Lord Ordinary has adopted the above course, partly from the importance of the question, but chiefly because of the difficulty which he feels, from the bearing of the case of *Ardovie*.¹ Had it not been for that decision, his leaning would have been strong to sustain the efficacy of the entails. As it is, it humbly appears to him that there are important considerations which so far distinguish the present case, and render it worthy of the most deliberate attention.

“1. In the case of *Ardovie*, whatever force there may be in the *dicta* of the judges, (and these assuredly are entitled to the deepest respect,) it was not absolutely necessary for the judgment as delivered, that each several prohibition (to sell, contract debt, &c.)—contained in that particular portion of the clause of the entail, which next immediately preceded the words ‘shall act and do in the contrary of the provision above set forth’—should be construed, or dealt with, as itself constituting a substantive ‘provision’ of the deed, in the technical sense of that term. For even although these prohibitions had been massed as all falling within, and making but subordinate, though still constituent, parts of the more general *proviso*, introduced by the words—‘And further providing and declaring’—yet such was the structure of the deed in other respects, and so many other distinct provisions did it contain, apart altogether from any thing included in this subordinate portion of it, that there still would have been more than sufficient vagueness and uncertainty, as regards the question—which of all these provisions the irritant clause was directed against—to warrant and bear out the judgment that was pronounced.

“2. Then there is here what was wanting in *Ardovie*, that farther and more precise specification of the particular provision meant, which Lord Corehouse desiderated, and the occurrence of which he admitted ‘would have produced a material difference on the import of the irritant clause,’ (15 S. and D. 627 :) for the words here are—not, generally, as in that case, ‘the provision above set forth,’ but—‘which provision immediately above written.’ It is true that Lord Mackenzie, *arguendo*, observed, that ‘even if the words had been “contrary to the provision last above set forth,” he must still have held it to be restricted to the last only of the prohibitions in the preceding clause.’ But the important matter is, there was no actual decision on the point. And the case of *Ardovie*, therefore, may stand untouched, and yet a different conclusion be here come to, in respect of this important specialty in the present case.

“3. It is now more authoritatively settled than perhaps it was at the date of the *Ardovie* case, that the entire context of any clause or passage in which disputed words occur, may be read, in order to throw light upon the true construction and real significance of these words, as used and intended by the maker of the deed. This has been strongly exemplified in some recent cases, both in this Court and before the House of Lords. (See, for instance, *Murray*, 26th February 1842; *Dingwall*, 26th February 1842; *Lindsay*, 2d March 1842; but especially the observations made both by Lord Campbell and Lord Brougham in *Lansden*, 2 Bell, Ap. Ca. 104.)

“Now, in the present case, the prohibitory, irritant, and resolute clauses all form but parts of one sentence, each running into the other, and the grammatical

¹ *Speid v. Speid*, Feb. 21, 1837, (15 S. 618.)

No. 59.

Jan. 28, 1845.
*Preston v. the
 Heirs of Entail
 of Valleyfield.*

The Court requested the opinions of the whole judges on the question "whether the objections to the entail of Valleyfield are well founded or not."

The following opinions were returned:—

connexion of all being kept up throughout. It is peculiarly a case, therefore, for letting the context have the fullest weight. The prohibitory portion of the clause sets out with the leading words—'Providing, as it is hereby specially provided and declared.' The irritant correspondingly begins—'Which provision immediately above written.' And the resolute again, in like manner, takes up the matter—'but also all such facts, deeds, debts, or obligations in contravention of the foresaid provision.' All, therefore, distinctly have reference to one and the same provision; and the provision to which all have thus reference, must, moreover, have been one—of which, the 'facts, deeds, debts, or obligations,' mentioned in the resolute clause, could be predicated as a 'contravention.' But this is a result substantially fatal to the whole principle and spirit of the pursuer's reasoning.

"4. In the abstract, therefore, and apart from the Ardvie case as a precedent, the Lord Ordinary is very much disposed to hold, that the most natural, if not the only legitimate and all but necessary reading of the word 'provision,' as it here occurs in the irritant and resolute clauses, is that reading which would extend it to every thing included in the proviso beginning with the words, 'And further providing, as it is hereby expressly provided,' &c. The general frame and structure of the deed supports this. Conveyance is made 'with and under the express reservations, burdens, provisions, conditions, irritancies, and resolute clauses after mentioned'—where the word 'provisions' is evidently used in a larger sense than is at all consistent with a restriction of its meaning to the mere substantive prohibitions pointed at in the statute of entails. And so, accordingly, the deed—following out this general scheme or plan of its structure—proceeds (after a clause of 'reservation,' which embodies a power to 'burden') to give a whole series of 'provisions.' Thus,—

"(1.) 'Providing, as it is hereby specially provided and declared,' that the heirs of tailzie shall pay the entailor's debts, &c.

"(2.) 'And also providing,' that they shall pay certain annuities, &c.

"(3.) 'And providing, as it is hereby specially provided and declared,' that they shall assume and use the family surname and arms.

"(4.) 'And further providing, as it is hereby expressly provided and declared,' that they shall not sell, &c., contract debts, &c., alter the order of succession, &c.

"If it be correct to hold, that the first three of these clauses fall properly within the meaning of the designative word 'provisions,' as that word stands previously used in the clause of conveyance or grant, (which, as already pointed out, is made 'with and under the express reservations, burdens, provisions, &c., after mentioned,) it is not easy to see why the fourth clause should not, of equal necessity, be construed as also falling within the strict and proper scope of the same expression.

"Accordingly, the deed is framed throughout on this express footing, for there are a number of subsequent 'provisions,' viz.—

"(5.) 'And further, it is hereby provided and declared,' that the husbands or wives of heirs shall be excluded from courtesy or terce.

"(6.) 'Providing and declaring alwise, that notwithstanding of the irritant clause immediately above written,' the heirs may secure their husbands, wives, and children in liferent localities and portions, &c.; another bit of context, by the way, which proves that the irritant clause had not, in the conception of the maker, the narrow and restricted construction for which the pursuer contends.

"And so on, in short, the deed proceeds to the end.

"Now, looking to the peculiar cast and frame of this deed, the Lord Ordinary

No. 59.

LORD JUSTICE-CLERK.—I concur with the Lord Ordinary, and only add a few words in consequence of a very singular use made of a passage from my opinion in *Dingwall v. Dingwall*, 26th February 1842. In that case a resolute clause was said to be defective, because it was applicable (it was contended) only to contraventions of the provisions and conditions, whereas in the previous part of the deed the prohibitions had been called limitations, restrictions, and so forth, and in other parts of the deed conditions and provisions were used in describing other things. On that plea, I gave my opinion that, under the statute, provisions and conditions are the proper terms for describing all the burdens, restrictions, or prohibitions, or other clauses of whatever nature, which the maker may impose: and although named by any variety of appellations throughout the deed, yet as they must be all conditions and provisions, the latter was the statutory expression for referring to and designating them, and must therefore include them. “It shall be lawful for the lieges to tailzie their lands with such provisions and conditions as they shall think fit, and to affect the said tailzies with irritant and resolute clauses.” Therefore I stated that all prohibitions, call them throughout the deed what you please, must be provisions and conditions.

But I did not state—and I am greatly surprised to see the opinion so perverted—(1.) That there could be no provision which was not a prohibition—the very opposite view is at the basis of the opinion; or, (2.) That each prohibition must necessarily form a separate provision, so that all the prohibitions cannot be

seen nothing that is in any rational sense incompatible with the principle of strict construction which is applied to entails, in holding that the words—‘which provision immediately above written’—if adjoined to any one of all these several clauses of proviso, would be a perfectly correct and apposite form of expression for covering the whole matters comprehended in the particular proviso to which it might so happen to be adjoined. But if so, there is in point of principle, or as regards the rules of construction, nothing to distinguish, in this respect, the matters contained in the 4th clause of proviso from the rest.

“If, for example, the deed had expressly set forth the various provisos, as was done in the Blairhall entail, (Syme, 27th January 1799, D. 15473,) all severally numbered under so many distinct heads, thus—‘First,’ ‘Second,’ ‘Third,’ &c. &c., it could hardly be disputed that the words, ‘which provision immediately above written,’ as applied to any one of these headings, must have covered every thing embraced in it.

“Or if, as in some other entails, each clause had been distinctly introduced thus—‘With and under this provision,’ &c., ‘And also with and under this other provision,’ &c. &c.—the same thing, it is thought, must just as clearly have followed.

“It does not appear to the Lord Ordinary, that the reading of the present deed is one jot more ambiguous or equivocal, according to any sound rule of construction, than if it had been conceived in either of these ways. The words, ‘And farther provided,’ &c., seem to him to be neither more nor less than a precise equivalent for—‘And further with and under this provision,’ &c. And, so reading the deed, he thinks the expression, ‘which provision immediately above written,’ must have reference to, and must be viewed as comprehending, all and every of the matters contained in the entire clause which constitutes the proviso. Indeed, if the words had been ever so slightly varied—as, for example, if the clause had set out with the words, ‘Declaring always, as it is hereby provided and declared,’ and had concluded with ‘which provision and declaration immediately above written,’ &c.—the thing would seem to have been beyond all contradiction.”

Jan. 28, 1844.
*Preston v. the
Heirs of Entail
of Valleyfield.*

No. 59. made parts of and included under one provision or of one condition—the reverse again is also at the basis of the opinion.

Jan. 28, 1845.
Preston v. the
Heirs of Entail
of Valleyfield.

The same view explained in that opinion, viz. that the whole prohibitions, restrictions, injunctions, obligations, requirements, or other clauses affecting the heirs, introduced into a tailzie, are the provisions and conditions under which the tailzie is made, leads me in this case to the conclusions stated by the Lord Ordinary. I see that the maker of this tailzie inserts a variety of provisions—using this term as designative of each. These provisions contain various injunctions, obligations, and prohibitions. But each new set is introduced by the term “providing, as it is hereby provided and declared,”—and each is followed up by the particular machinery which the entailer thought sufficient and appropriate to enforce each provision respectively. After several of these clauses, the maker begins to set forth his prohibitions under the same head or term—“and further providing, as it is hereby specially provided and declared.” Such provision may consist, as it does in this entail, of as many prohibitions as the maker chose to insert under it. He inserts under this “further provision,” all the usual prohibitions, and then begins the appropriate machinery for enforcing the same, commencing with—“and which provision immediately above written, if any of the forenamed persons or heirs, &c., shall happen to contravene.”

Construing this clause on the principle stated in *Dingwall*—by the express aid and direction of the statute—according to the form and structure of this particular deed—and according to strict legal and grammatical construction, I apprehend it to be perfectly clear that the expression, “and which provision immediately above written,” must apply to all that follows the last provision; for by the term “providing,” the entailer did include and cover all the prohibitions. Hence, therefore, “and which provision immediately above written,” cannot, I think, be limited, but must be co-extensive—that is, the one is the proper antecedent, and the other the appropriate relative. That each prohibition might have been introduced as a separate provision, or that, in the abstract, each prohibition may be said to be a provision, will not afford a sound rule for construing this particular entail, and this clause in this entail, against the plain direction and governing rule afforded by the context. Here is a provision expressing various matters—several prohibitions—and as soon as the enumeration of the things prohibited is ended, the clause goes on, “and which provision immediately above written,” (other provisions having occurred previously, to which this addition could not be applicable;) and on what principle can this most significant relative, “which provision,” be applied to any antecedent than “and further providing,” which introduced the enumeration of the things prohibited, which has just ended as one provision. “And further providing;” then follow the things provided; “and which provision immediately above written,” if any “heir shall contravene”—then on what but a strained and forced construction can it be held, that “which provision” does not apply to “and further providing”—or that contravention of the things so provided against is not directly included?

The mode of enumerating or setting forth the different things included under this proviso; *e. g.* that the words, “and it shall not be lawful,” happen to be repeated in the course of setting forth the prohibitions for the sake of keeping the sentence distinct, cannot, I think, in any degree affect the sound construction of the clause.

Any other construction would be what Lord M'Kenzie, in a recent case, justly termed, not a strict but "a malignant construction." No. 59.

LORD WOOD.—The question submitted for opinion relates to the efficacy of the provisions of resolution and irritancy in the entail of the estate of Valleyfield, as duly fencing the previous prohibitions; and the solution of it turns upon the construction to be put upon the words "and which provision," occurring in a clause containing several prohibitions, and a resolution and irritancy, and introduced in that part of the clause at which the portion of it setting forth the resolution and irritancy commences:—For it is material to observe, that the whole is drawn as one clause, although embracing what might be, and frequently is thrown into separate and distinct clauses, 1st of prohibition; 2d, of resolution of the right of the heir contravening; and 3d, of irritancy of the acts and deeds done and granted in violation of the prohibitions;—just in the same way as the two last of these, which may be, and often are, framed separately, are in many entails bound up together, and wove into one clause, by the whole being expressed in one connected sentence. In the present case the whole matter of prohibition, and the appropriate machinery for enforcing the same, viz. the resolution and irritancy, are thrown into one clause, and form parts of one sentence.

The meaning of the words, "and which provision," is so far determined by those which next follow. That part of the clause runs thus—"and which provision immediately above written, if any of the foresaid persons, or heirs-male or female hereby appointed to succeed to the said lands and estate, shall happen to contravene, they shall," &c. "Which provision" then is thus defined to be, the provision immediately before made. It is the last preceding provision, as contradistinguished from all others. So far there is no ambiguity, and the question is therefore resolved into this—According to the terms of the deed, what is the immediately preceding provision? The immediately preceding provision, be it what it may, is expressly declared to be the provision referred to. Consequently, if there is any uncertainty, it can only be in regard to what is to be held as being the last provision. But it is thought that this is not left in doubt or uncertainty; and that, according to sound construction, the provision immediately above written, or last provision, is the whole matter of provision contained in the preceding part of the clause.

If there were law for maintaining—as has been done by Lady Baird Preston—that the word "provision" in the singular, where it is used, must be taken to be synonymous with prohibition, and that in the construction of entails each prohibition is necessarily to be viewed as a distinct and separate provision; then, looking no further into the deed, "which provision immediately above written" might apply to the prohibition last before made, and the resolution and irritancy would take effect only upon a contravention of that prohibition. But if neither of the above things can be set forth absolutely—which it is conceived they clearly cannot—and if the act last before prohibited is not, by the wording of the deed, made a separate and distinct provision, so as in that way at once to settle the point, I hold it to be quite competent to refer not only to all the immediately preceding portion of the deed containing prohibitions, which is part of the same clause, and to the entire context of the passage in which the disputed words occur, but to the whole deed, and particularly that portion of it containing provisions, although not prohibitions, in determining what is truly the antecedent to the words, "and which provision immediately above written,"—what it is that is referred back to, and

Jan. 28, 1845.
Preston v. the
Heirs of Entail
of Valleyfield.

No. 59.

Jan. 28, 1845.
Preston v. the
Heirs of Entail
of Valleyfield.

which is consequently fenced by the resolution and irritancy to which these words are introductory. No doubt it is settled law, that in a question with third parties, in regard to whether fetters have been validly imposed or not, an entail is to be strictly construed; but I am not aware that there is any authority for contending, that by that rule such reference as I have stated to be competent in the construction of the words used by the entailor is excluded. Certainly it is not to be resorted to in order to control the natural, grammatical, or technical meaning of the words, reading them where they occur, and to rivet the fetters by wresting them from that meaning. But if the meaning, to support which the reference is made, be a meaning which they naturally, technically, and grammatically bear in the connexion in which they are found—although confining observation to the part of the clause in which they occur, or to that particular clause alone, they may also be differently construed—then I apprehend that the reference is perfectly competent in order to clear the sense; and that if by the reference the sense in which the words are used is rendered clear and definite, that sense may be adopted with entire adherence to the rule of strict construction; for not to adopt it, would not be merely to disregard the intention of the entailor, as gathered from the general object and purpose of the deed, (which it may be conceded cannot be legitimately allowed to affect the construction,) but to disregard his intention distinctly expressed in relation to the particular matter in question by the words which he has used, taking these words in a sense which they naturally, grammatically, and technically bear, and which the whole frame and structure of the instrument, or what is to be found within the four corners of it, prove is the sense in which they were used. The rule of strict construction, as explained by the authorities, does not, according to my reading of them, necessitate such a mode of dealing with an entail. If the entailor's meaning is not made clear by the deed, the rule may render it incompetent to supply such defective expression of meaning by inference from intention; but it does not require that, where the question is—what is the meaning of certain words in a particular part of the deed—a sense made clear by the deed should not be adopted, because, closing your eyes to every thing but a certain limited portion of the deed, or portion of a clause of the deed, where the words occur, you may force upon them a different sense, of which they do not truly or seasonably admit. On the contrary, in such a question, I conceive that, with perfect adherence to the rule, reference may be made to the rest of the deed, and the light thereby obtained used in determining the meaning of the words, the import and effect of which is under discussion; and I further conceive, that the present is just one of those cases in which this may be done without violation of the rule; and that were it not done, a sense might be put on the words, “and which provision immediately above written,” directly opposed to that in which, both by what follows and what precedes, it is rendered clear (if otherwise doubtful) that they were not used, and the sense rejected in which it is rendered equally clear they were used.

Accordingly, turning to that portion of the deed of entail where “the reservations, burdens, provisions, conditions, limitation, irritancies,” &c., are set forth under which the estate is expressly conveyed, I find that the whole—after reservation of the entailor's liferent, and power to him to sell, dispone, and contract debts upon the estate, and to alter—is thrown into separate clauses or parts, each beginning with—“and providing, as it is hereby specially provided and declared,” “and also,” or, “and further providing, as it is hereby expressly provided and de-

No. 59.

Jan. 28, 1845.
 Preston v. the
 Heirs of Entail
 of Valleyfield.

clared," or, "and further providing;" or, "and further, it is hereby provided and declared," or, "and providing." Then each of these clauses or parts contain one or more of the conditions, limitations, or prohibitions, each forming a complete clause or part in itself, the entailor having in more than one instance added to each, as a portion of it, the machinery which he considered necessary to give effect to what he had so provided.

The first and second clauses or provisions relate to the entailor's debts and debts, and specially to sums settled, or to be settled, on the children of Sir George Preston, and his spouse, and on Mrs Ann Cochran, the first commencing with the words "and providing, as it is hereby specially provided and declared," and the second by the words "and also providing:"—And in regard to adjudications for which debts, there is, in the after part of the deed, a special provision made, with an appropriate declaration of forfeiture against the heirs of entail, in the event there mentioned. Next comes a clause introduced by the words "and providing, as it is hereby specially provided and declared;" which makes provision in regard to the different heirs of entail, bearing, in the different cases set forth, the surname of Preston, and carrying the arms of the family of Valleyfield, and which also contains an appropriate resolution of the right of any heir contravening in all the before specified cases, the resolution commencing with the words "which condition," of using and bearing the surname and arms, &c., and ending by declaring that the estate "shall devolve upon the next heir appointed to succeed who shall fulfil said condition;" thus using the words "which condition," and "said condition," as designating and applying to all the different cases previously provided for, and not to the last of them only.

It is immediately after this that the deed contains the clause of prohibition, resolution, and irritancy, upon which the question at issue has arisen. The clause commences with, "and further providing, as it is hereby expressly provided and declared;" a form of expression which, or an exactly similar one, it has been seen, had been previously used by the entailor, in introducing or beginning the separate parts into which the preceding portion of the deed containing the reservations, limitations, and conditions is divided, and the use of will be found to be continued in subsequent parts of the instrument. After the above commencement, by which this part of the deed is separated from the previous ones, the clause proceeds in these words, "that it shall not be lawful to the heirs of entail to sell or dispose the lands," or "to grant infeftments of annualrent or liferent, or other burdens, out of the same, or to set tacks for a longer period than nineteen years," &c.; "and it shall not be lawful" to the heirs of entail "to suffer feu-duties, or other public burdens payable out of the said estate, to run on and remain unpaid, so as to affect the same, nor to contract debts, or do or commit any other fact or deed, civil or criminal, whereby the said lands and estate may be evicted, adjudged," &c., or to "do any deed whatsoever whereby the foresaid destination and order of succession may be any ways inverted, altered, or prejudged;" and having so provided, the prohibitions are immediately followed by a resolution and irritancy in these terms—"and which provision immediately above written, if any of the forenamed persons or heirs, male or female, hereby appointed to succeed to the said lands and estate, shall happen to contraveen, they shall not only lose and submit the right of succession thereto, and the same shall accress and belong to the next heir of tailzie and provision appointed to succeed to the person contraveener, though descended of the contraveener's body, *ipso facto*, without necessity

No. 59. of declarator; but also, all such facts, deeds, debts, or obligations, in contravention of the foresaid provision, are hereby declared, *ipso facto*, void and null, and shall no ways affect the said estates, or be obligator upon the subsequent heirs of tailzie and provision, who are hereby appointed to succeed and have right to enjoy the said estate, free of the burden of all such deeds, debts, and obligations whatsoever." The deed then goes on, dividing itself into the several parts into which it is broken by introductory words of the description already pointed out.

Jan. 25, 1845.
Preston v. the
Heirs of Entail
of Valleyfield.

The leading plea of Lady Baird Preston is, that "provision" in the singular number being used, the words "which provision immediately above written," can refer only to one provision, and that each act previously prohibited being a provision, they must, agreeably to the rule of strict construction, be construed as applying to the thing last prohibited, *viz.* an alteration of the order of succession, and cannot be held as applying to any of the acts previously prohibited in the same clause, these not being the "provision immediately above written," but being each a separate and antecedent provision. I think this construction does violence to the terms of the clause, looking to it only, and without going further than the close of the resolute portion of it.

A provision may be of and concerning a single thing, but it may be of and concerning several things, and yet be only one provision. There is nothing to prevent this—and there is nothing in the rule of strict construction which says that the antecedent to "which provision" in the singular, cannot be held to be a provision of the latter description. But if so, attend to the terms of the clause. From the introductory words, "and further providing, as it is hereby provided and declared," the whole runs on continuously, without any interruption, to disconnect the words "and which provision immediately above written," from any part of that which had been so provided and declared. The entailor in this clause provides and declares that it shall not be lawful to the heirs of entail to do certain things, and having so provided and declared, the clause goes on to say, "which provision immediately above written" if any of the heirs shall contravene, they shall not only forfeit, &c. Can this in sound construction mean any thing else than that if the heir shall contravene, by doing any of the things which in the last part of the deed, introduced by "and further providing" it had been provided and declared they should not do, they shall forfeit their right to the estate? I think this the natural and clear meaning; because the clause itself shows, that although there may be various things provided for, they are dealt with as forming one provision. The clause is framed upon that principle. The whole that goes before the words "and which provision," is the matter—be its parts many or few—for further providing for which the clause is inserted, and which it sets out by stating "is hereby expressly provided and declared." The whole, in the language of the clause, is united together, and provided and declared as one provision:—And therefore, when, having exhausted what was to be provided as matter of prohibition, the clause, in order to add the appropriate machinery for enforcing the prohibitions, goes on, "and which provision immediately above written," words are used which are properly designative of all that had been so previously provided, and of nothing more nor less; for the words of reference include the whole of that part of the deed, and exclude all the rest. They include the whole of that part, because, although it may consist of several different prohibitions, they, according to the form of the clause, constitute one provision; so that, with reference to the

form, provision in the singular was the more apt and appropriate word to use than provisions in the plural ; and they exclude the rest of the deed, because if the foregoing part "constitutes"—in the language of the clause—one provision, it necessarily is the last, and the reference is express to the provision immediately above written.

No. 59.

Jan. 28, 1845.
Preston v. the
Heirs of Entail
of Valleyfield.

No doubt it has been said, that there is a break in the clause towards the middle of it, at the words, "and it shall not be lawful to the said George Preston, or any of the said heirs, male or female," and that at all events, the reference back, as expressed in the words "and which provision immediately above written," must stop at that part, which would leave the prohibition against selling, and other prohibitions in the prior part of the clause, unfenced by any resolution of the contractor's right. Now, in the first place, it will be observed, that in this view of the clause, the construction—founded upon each prohibition being a provision, and the word provision in the singular being used—that the reference is limited to one prohibition, which, by the addition of "immediately above written," is fixed to be the immediately preceding prohibition against altering the order of succession, is departed from ; and provision, although in the singular, is made to apply to several prohibitions :—In other words, it is admitted, that "which provision immediately above written," in the sense in which the word provision is there used, means all that is provided in an immediately preceding portion of the deed, to which the words are united, which portion, agreeably to the connexion, is aptly and properly termed a provision, or "which provision," although relating to several things, each of which might otherwise be called a provision. In the second place, according to this view, the question is narrowed to whether there is a break in the clause at the words, "and it shall not be lawful to the said George Preston ;" because, if "which provision" is to be taken in the above sense, the reference back will embrace, and must embrace, the whole preceding part of the clause, unless the portion of it in juxtaposition to the words, "and which provision," is disconnected from that which goes before, and therefore, being so disjoined, forms the provision immediately above written. After a careful consideration of the whole clause, I can see no ground for holding that there is any break at the place referred to. It commences by, "and further providing, as it is hereby expressly provided and declared, that it shall not be lawful to the said George, Robert, John, and William Prestons," and the other heirs ; and then follows a connected series of the things so provided and declared ; and although the words, "and it shall not be lawful to the said George Preston, or any of the said heirs—male or female," introduced towards the middle of the prohibitions, had been repeated at each member of the series, I apprehend that the continuity of the clause would not have been thereby interrupted ;—that the whole would still have formed one provision—and that therefore the whole, and not any portion of the clause, would have formed the provision referred to by the words, "and which provision immediately above written."

But that this is the sound construction is, I apprehend, put beyond all doubt by the general structure of the deed, and the immediate context in the same clause.

It may be true, that each condition, limitation, or prohibition in an entail, may be called in the abstract a provision ; for it is not to be disputed, that whatever is a condition, or limitation, or prohibition, may be termed a provision, and that they may each be made to form a separate provision : Still that cannot preclude the

No. 59.

JAN. 28, 1845.
*Preston v. the
 Heirs of Entail
 of Valleyfield.*

entailer from dividing the portion of the deed appropriated to them into clauses of provision, and throwing two or more of them into a clause, so that each clause, and not each condition or prohibition, shall, by the structure of the deed, be in that way made to constitute one provision. This, it is thought, is exactly what has been done in the present instance. It has been seen, that by the form and cast of the deed throughout, all the portion of it, appropriated to the conditions, limitations, prohibitions, and reservations, &c., under which the lands are conveyed, and are to be enjoyed by the heirs of entail, consists of separate parts or clauses, each of which is dealt with as one provision, being introduced by the words, "and providing," or, "and further providing," or similar expressions; and this whether the provision to follow is simple or complex, containing one, or more than one, of the conditions, limitations, and prohibitions, which it was the entailor's purpose to make or enjoin. Therefore, according to the frame and structure of the deed, each clause, in the view and language of the entailor, forms one provision, whatever may be the number of its parts. In the clause preceding the one more directly under consideration, where various cases, in regard to bearing the name and arms of the family, are provided for, and which concludes with a declaration of forfeiture in case of contravention, that declaration is introduced by the words, "and which condition;" just as in the subsequent clause, which provides, in regard to the various acts to be prohibited, the declarations of forfeiture and irritancy in the event of contravention, by which the clause is concluded, are introduced by the words, "and which provision immediately above written."

When such is the general structure of the deed, and such the form of the particular clause in that part of it which has hitherto been adverted to, it humbly appears to me to be impossible to adopt the construction which would limit the application of the words in question to the act last before prohibited. That act may be a provision, and each prohibition, as well as each of the other conditions, might have been made a separate provision in the deed. But that affords no sound rule of construction in regard to this particular entail, the scheme and cast of which is entirely different. According to it, the provision designated as being referred to by the words, "and which provision immediately above written," is not the act last prohibited, but is all that is provided in the whole preceding part of the clause, although embodying several conditions or prohibitions. By the words used—and used, be it observed, after providing and declaring several prohibitions enumerated in a connected series, and as introductory to the appropriate machinery for enforcing them, the efficacy of which is in question)—the reference is distinctly expressed to be to all the preceding part of the clause, as contradistinguished from prior clauses, and not to the particular act last before prohibited, as contradistinguished from those preceding it in the same clause. That this is the meaning is as clear, as the deed stands, as it would have been had the clause commenced with "and farther, with and under this provision." To confine the reference to a narrower limit, would not be, between two doubtful meanings equally admissible, to choose that which is against the fetters and in favour of liberty—which in that case might be the meaning to be preferred—but of two meanings, to select the one which the terms of the instrument prove not to be that in which the entailor either intended to use, or did use the words, the meaning of which is in dispute, and to reject the other, which the terms of the instrument clearly prove to be the meaning in which the entailor did use them, and by

the adoption of which, therefore, effect would be given to his intention, not ambiguously, but distinctly expressed, which, when so expressed, a Court of law has no right to defeat.

But further, it will be found that, to support the construction contended for by Lady Baird Preston, it is essential that even that part of the clause which, by the context, is grammatically connected with the above words, "and which provision," &c., shall be thrown out of view. This, however, it is thought, cannot possibly be done, and only shows, by exhibiting the length to which the argument would go, that it is not sound, and must be rejected.

The clause commences by enumerating the various prohibitions which are thereby made and provided, and the context is, "And which provision immediately above written, if any of the heirs should contravene, they shall not only lose the right of succession, &c., but also, all such facts, deeds, debts, or obligations, in contravention of the foresaid provision, are hereby declared, *ipso facto*, void and null," and shall not be obligatory upon the subsequent heirs "who are appointed to succeed, and have right to enjoy the estate free of the burden of all such deeds, debts, and obligations whatsoever.

It thus appears that the whole of the concluding portion of the clause setting forth the resolution and irritancy is united together, while that portion again is united with the preceding portion by the words, "and which provision immediately above written," forming the continuation of the sentence, which is not completed till the declarations of resolution and irritancy are closed. Now, in the concluding portion of the clause, "which provision immediately above written," and "the foresaid provision," are clearly and unambiguously set out as one and the same thing, and not as two different things. The "foresaid provision" is the "which provision immediately above written." But while the contravention of the provision referred to by the words, "which provision immediately above written," is to be visited with a forfeiture of the right of the contravener, there is added, as a further consequence, a declaration of nullity of all that shall be done in contravention of the "foresaid provision," which is expressly applied to "all such facts, deeds, debts, or obligations," rendering it clear that the provision referred to by the above words is a provision which relates to facts, deeds, debts, and obligations previously mentioned, and therefore necessarily proving that the words, "which provision immediately above written," do not mean or apply to the single act last before prohibited, which is the alteration of the order of succession. It proves that "provision" is used to designate something much more, and that although each act prohibited may be called a provision, and "provision" in the singular is the term used; yet as used it cannot be limited in its application to a single act, without an absolute disregard of the sense in which the immediate context demonstrates that the entailor uses it.

But if, in construing the words, "and which provision immediately above written," by the rule of strict construction, the immediate context forces you to give them a meaning which carries you back beyond the act last prohibited, then the whole strength of the argument founded upon the word provision being in the singular, is entirely destroyed. Its meaning is at once enlarged. Although in the singular, it is made to embrace more than one prohibited act—that is, to embrace several things which it is said are each of them a provision, but which, in the language of this entail, are designated and referred to as being one provision, or as forming the provision immediately above written. But it being thus impos-

No. 59.

Jan. 28, 1845.

Preston v. the
Heirs of Entail
of Valleyfield.

No. 59.

Jan. 28, 1845.
*Preston v. the
 Heirs of Entall
 of Valleyfield.*

able, in construing "and which provision immediately above written," to limit the reference to the act last before prohibited, to what extent does the reference go? What is the provision immediately above written? The answer seems to me to be very clearly pointed out by the form and structure of the deed; and it is this, that it is every thing which is provided and declared in the preceding part of the clause, which, commencing with "and further providing," does provide in regard to several things, and then adds, "which provision immediately above written," if any of the "heirs shall contravene," and so on. If the reference is not to stop at the act last prohibited, I, as already stated, can see no ground for stopping short of all that is comprehended in the preceding part of the clause.

It will be observed, that any weight to which the remarks which have now been made upon the terms of the immediate context in the irritant portion of the clause may be entitled, would not be at all lessened, although it were true, as has been suggested, that for the words "all such facts, deeds, debts, or obligations," an antecedent can be found in the part of the clause preceding "and which provision," and which comes after the words "and it shall not be lawful to the said George Preston." Holding this to be the case, it may follow that, by the words of the context, you are not, in order to satisfy them, necessitated to go beyond the alleged break at "and it shall be lawful to the said George Preston." But still this assumes that the reference is to carry back at least to that extent, and must do so; and therefore, granting the suggestion to be correct, it does not affect the justice of the conclusion, that, consistently with the context, the words "and which provision," &c., cannot be construed as referring to the act last prohibited, as being the provision immediately above written. Now, it is only to that effect that this part of the context has been adverted to; and that conclusion being thereby and otherwise established, then, for the reasons which have been given, I am of opinion that, without further aid from the terms of the declaration of irritancy, the words "and which provision immediately above written," have, in strict construction, a reference back, and apply to the whole preceding part of the clause, and that, consequently, the whole of its prohibitions are duly fenced by an appropriate resolution and irritancy.

If, indeed, it could be maintained that the terms of the irritancy not only did not compel you, in construing the words "and which provision," &c., to carry the reference back to the whole of the preceding part of the clause, but from there being corresponding words in that portion of it following "and it shall be lawful to the said George Preston," confined the reference to the latter, there might be materiality in the statement, that that portion does contain such corresponding words. But I do not understand this to be maintained, and I apprehend that it cannot be so; for, admitting the accuracy of the statement, it is certain that the words in the irritancy will apply to the whole prohibitions; and if the words "and which provision immediately above written," do not restrict the resolution of the contravener's right to a contravention of a part, or one of the preceding prohibitions, but being designative of the whole matter provided in the preceding part of the clause as forming one provision, apply the resolution to the whole, then the terms of the irritancy occurring in the collocation in which they are found, will not (whatever might have been their effect in a different collocation) restrict the resolution, or the irritancy, to the facts, deeds, debts, or obligations mentioned after the words "and it shall not be lawful to the said George Preston," or to any one of them.

No. 59.

LORD ROBERTSON.—I concur with Lord Wood.

LORD MONCREIFF.—I also entirely concur in Lord Wood's opinion.

LORD COCKBURN.—I agree with the Lord Ordinary, both in his result, and in the reasoning by which he reaches it.

Jan. 28, 1845.
Preston v. the
Heirs of Entail
of Valleyfield.

In construing an entail, it is certainly not the law that we are merely to ascertain the meaning of the entailor, and to give this meaning effect. If this were all that was required, the construction of these deeds would generally be very easy; because it is certain that every entailor wishes his entail to be effectual. We must look to his meaning as legally expressed.

On the other hand, in construing his expressions, though freedom is to be favoured, I cannot admit that the interpretation against fetters is to be so outrageously strict as that any construction, provided only that the words can be made to endure it, must be adopted, however contrary not only to the plain expressed meaning, but to the general and particular structure of the deed, when rationally read.

I admit that there is a construction favourable to the pursuers, which may be forced upon this entail. But the question is, Whether it can be subjected to this construction without the perversion of terms, as virtually defined, and as distinctly employed, by the entailor, and without doing violence to the system of clauses, which he has plainly laid down for himself in the creation of his own deed? I think that it cannot.

He chose to divide his entail into distinct parts, each containing several matters, and each begun and marked by the words, "and providing," or, "and further providing." Each of these portions, though regulating a variety of things, is treated by the entailor as a provision. And then he applies his resolute and irritant clauses to the "provision immediately above written." I think that this reference extends not merely to the last fragment of the immediately preceding provision, but to the whole of it. And this is confirmed by the irritant clause, which voids all such facts, deeds, debts, or "obligements, in contravention of the foresaid provision." I do not see what facts, deeds, debts, and obligations can be referred to, or how these words are to be exhausted, unless the whole matters contained in the last clauses, beginning "and further providing" be taken into view.

In short, it seems to me to be exactly the same as if the entailor had chosen to number his clauses, and, instead of the "provision immediately above written," had said, "the provision, No. 4." I do not think that his meaning would have been more clearly expressed by the use of the figures than it is by the use of the words and clauses that he has employed.

LORD IVORY.—I adhere to the opinion which I formerly expressed, as to the construction of this entail, in my note of 7th December; and I am now more confidently confirmed in that view of the case, that I have had an opportunity of considering the opinions of the other consulted Judges, more especially the elaborate opinion of Lord Wood, in which the question is so fully, and, as it appears to me, with complete success, illustrated in all its bearings.

Even in those opinions which are least favourable to the entail, any such extreme rigour of construction as would confine the operation of the irritant and resolute clause to the very last article of all among the prohibitions embodied in the prohibitory clause, has received no countenance. This is most important; for, in principle, the very strained argument raised in the pleadings upon the case of Ardovie, is not less difficult of reconciliation with the construction which would

No. 59. thus carry back the operation of the word "provision," so as to embrace all the prohibitions which follow the words "and it shall not be lawful," &c., in the middle of the clause, than it is with the other construction, which would carry it still further back, so as to cover the whole prohibitions embodied in the entire clause, commencing with the words "and further providing," &c.

Jan. 28, 1845.
Preston v. the
Heirs of Entail
of Valleyfield.

The principle of construction being therefore fundamentally the same in all the opinions, the only question comes to be—How is that principle to be applied, with reference to the grammatical structure and just reading of the disputed portion of the deed? And on that head—the extreme construction, which would confine consideration exclusively to the last prohibition introduced at the close of the clause, being once got rid of—I really do not feel the case of *Ardovie* so much to press; and I have no hesitation in concluding that, between the two other constructions, there is no alternative but to choose that which lets in and deals with the whole and entire clause as constituting but one "provision."

LORD CUNINGHAME.—There are some rules now so firmly fixed in the construction of deeds of tailzie in Scotland, that they can no longer be questioned in the abstract, whatever difference of opinion may be entertained as to their application in particular cases. Among the leading maxims thus universally admitted, it may be laid down as fixed—(1.) That each clause of an entail is to be subject to the most rigid construction that the words used by the maker allows; (2.) That the probable intention of the entailer to give his deed the most comprehensive interpretation to render the entail effectual, shall not govern or control any clause as it may stand framed; and (3.) That when any clause has been so framed as to admit of different constructions, without violence to the words used, that interpretation shall be adopted most favourable to the freedom of the proprietor in possession.

In the present instance, the deed of entail, after a clause or clauses containing a minute and complete series of prohibitions, in terms of the Act 1685, proceeds with the resolute clause in the following terms:—"And which provision immediately above written, if any of the forenamed persons or heirs, male or female, hereby appointed to succeed to the said lands and estate, shall happen to contravene, they shall not only lose and amitt the right of succession thereto, and the samen shall accress and belong to the next heir of tailzie and provision appointed to succeed to the person contraveener, though descended of the contraveener's body, *ipso facto*, without necessity of declarator; but also, all such facts, deeds, debts, or obligations, in contravention of the foresaid provision, are hereby declared, *ipso facto*, void and null, and shall noways affect the said estate, or be obligator upon the subsequent heirs of tailzie and provision who are hereby appointed to succeed and have right to enjoy the said estate, free of the burden of all such deeds, debts, and obligations whatsoever."

The forfeiture thus described being declared applicable to those who shall contravene "the provision" immediately above written, (in the singular number,) the question is, what shall be held "the provision last above written?" &c.

We have little aid from authority in the consideration of this point. The phraseology used is uncommon. There is only one analogous case on record, (that of *Speid*,) where a resolute clause in the singular number occurred; and therefore the weight due to the present clause must be determined without much aid from precedent.

If the term "provision" were always to be held synonymous with "prohibi-

tion," the ground of the pursuer's challenge would of course be insuperable. But that proposition is plainly untenable. The term "provision" is notoriously a word of varying and flexible signification, meaning both in legal and popular language what is provided. Hence it may mean "prohibition," if what is provided is a thing forbidden—or it may mean an active right, if the thing provided is a privilege—or it may mean a clause or enactment, if the antecedent words are sufficient to define, with clearness and certainty, the limits of the provision. No. 59.
Jan. 28, 1845.
Preston v. the
Heirs of Entail
of Valleyfield.

In that view, however, the entailor, by making the resolving clause here depend on a word of fluctuating meaning, and by confining the forfeiture to one provision only, has, it is apprehended, laid the foundation of a formidable objection to the efficacy of the tailzie. Without any greater strictness of interpretation than the great bulk of our precedents on this branch of the law amply justify, the resolutive clause here admits of two constructions, either of which will satisfy the whole words employed in the resolutive and irritant clause, as combined in the deed of tailzie.

1. The "provision immediately above written," must be held in general to apply to what is provided in the immediately preceding appointment of the deed. In this sense, "provision" will be synonymous with "prohibition," because the thing last provided in the portion of the tailzie anterior to the resolutive clause, is the doing "of any deed whatsoever, whereby the foreshaid destination and order of succession may be any ways inverted, altered, or prejudged." And this construction would probably have been the sound one, if the resolutive provision in this entail—which is connected and inseparably joined with the irritant provision, so as to make one clause—did not only resolve the right of the contravener, but add that "all such facts, deeds, debts, or obligations, in contravention of the foreshaid provision, are hereby declared, *ipso facto*, void and null, and shall noways affect the said estate."

Giving due effect to these words, as part of the combined resolutive and irritant clause, they will be exhausted by holding that the "facts, deeds, debts, or obligations," irritated for contravention of the provision "immediately above mentioned," comprehend those restraints in the antecedent clause, whereby it is declared that—"It shall not be lawfull to the said George Preston, or any other of the saids heirs, male or female, above mentioned, to suffer feu duties or other public burdens, payable out of the said estate, to run on and remain unpaid so as to affect the same; nor to contract debts, or do and committ any other fact and deed, civil and criminal, whereby the samen lands and estate may be evicted, adjudged, forfeited or any otherways affected, in defraud or prejudice of the saids heirs of tailzie and provision, and of this present right of succession to the said estate, or do any deed whatsoever, whereby the foreshaid destination and order of succession may be any ways inverted, altered, or prejudged."

These prohibitions, being those last above written, are sufficient to explain the "facts, deeds, debts, and obligations," which are irritated. The "facts and deeds" have been understood in numerous cases, such as the case of Tillycountry and others, (where a more extended construction was not necessarily called for,) as the legal phrases for those acts that lead to forfeiture and eviction—and the "debts and obligations" are the debts already constituted, or obligations in reference to the same. This construction is manifestly sufficient to exhaust the clause as it stands. But,

2. If it were admissible to give a larger and more extensive interpretation to

N^o. 59. the term "provision," consistent with the presumed meaning of all entails, then unquestionably the term "provision" in the present entail, may be held as synonymous with "clause" or "enactment;" and of course, as no deeds can depend on punctuation, it might reach back to as many of the antecedent prohibitions as a reasonable view of the extent of the clause could justify. In that view, certainly, the resolute clause might be drawn back to the whole preceding branch of the tailzie commencing with "providing and declaring," a series of prohibitions against sales and alienations, down to the commencement of the resolute clause.

Jan. 28, 1845.
Preston v. the
Heirs of Entail
of Valleyfield.

But as this is not the necessary construction of the resolute clause as framed—as that clause may with equal consistency, and with due regard to all the words used, be read as applicable solely to the latter branch of prohibitions, that do not comprehend sales—I conceive that the Court is called on to adopt the construction of the clause most favourable to the liberation of the proprietor from restraint, on the ground explained by Lord Brougham in the *Overton* case, that "if there are two modes of construing any given clause, one of which leaves him (the heir) free, and the other fetters him, the construction to be given to that clause is in favour of leaving him free, just as much as if there was only one construction, and that construction in his favour."

On these grounds, I am of opinion that decree of declarator should be pronounced in terms of the first declaratory conclusions of the libel, in respect the heirs are not excluded by an apt and effectual resolute clause from selling the lands. The other declaratory conclusions do not appear to me to be well founded; and from them, therefore, the defenders should be absolved.

LORD MEDWYN.—I arrive at the same conclusion as Lord Cuninghame has done, that decree of declarator in terms of the first declaratory conclusion of the summons should be pronounced, and that the defenders should be absolved from the other conclusions.

LORD MURRAY.—I agree entirely with Lord Cuninghame's opinion.

The strict construction to which entails in Scotland have been subjected, arose from the conveyance being framed so as to leave the heir in possession of the fee. The estate was therefore, at common law, subject to his debts and onerous obligations, whatever prohibitions were contained in the deed.

It appears from Hope's *Minor Practicks*, tit. 16, sec. 10, &c., that irritant and resolute clauses were introduced in his time, in order to make such deeds effectual against the rights of lawful creditors. A deed so framed was necessarily subjected to a strict construction; and Lord Stair has, in the 1st book of his *Institute*, tit. 14, sec. 6, and in the 2d book, tit. 3, secs. 43, 58, 59, shown that was the view which the law of Scotland necessarily took of them; and in his 4th book, he gives as the ground of his opinion, that irritant clauses "are against the common course of law, and therefore are odious."

The statute 1685 confirmed—if it did not establish—the right of all persons to entail their lands with such provisions and conditions as they should think fit, and to affect their entails with irritant and resolute clauses; declaring all such deeds to be in themselves null and void, and that the next heir of entail may pursue declarators of contravention, and serve himself heir to the last who died infest in the fee, and did not contravene. The statute requires that the original entail should be judicially produced and recorded, and inserted in the conveyances of the estate. It then declares such entails, so completed, effectual against creditors;

but that, if the conditions and irritant clauses shall not be repeated in the subsequent conveyances, they shall not affect creditors.

This statute gave proprietors a power of framing their entails in any words they thought fit to use, provided the entails contained irritant and resolute clauses. It was on these conditions that proprietors obtained the privilege of placing their estates in this peculiar condition; but they have not complied with the provisions of the Act unless they have made it perfectly clear, so that no creditor or singular successor can misunderstand what provisions have been affected with irritant and resolute clauses. If they have not done so, they have not complied with the evident intention of the statute.

On that ground, the Duntreath case was decided in strict conformity with the opinions of Lord Stair.

Lord Cuninghame has shown, that, according to one construction of this deed, the entail is not effectual. Another construction may no doubt be adopted, and may be more accordant with the views of the entailor; but he has left the matter ambiguous, and therefore he has not complied with the enactments of the statute, which make it imperative that there should be no room for ambiguity or reasonable doubt as to the cases to which the irritant and resolute clauses apply.

The case was this day finally advised.

Lord JUSTICE-GENERAL.—Considering the great weight that was ascribed by the pursuer to the decision in the case of Ardvie, as well as the general nature of the question raised under this entail, we thought it right to allow additional cases in reference to the *viva voce* discussion that took place on the report, and for the purpose of taking the opinions of the other Judges, as had lately been done in a variety of other entail questions. We have now received those opinions, and, on reconsideration of the case, I have formed an opinion in conformity with that of the majority of the consulted Judges, that the objections taken to this entail cannot be sustained, on any application of the rules of construction relative to this department of our law, and that the decision in the case of Ardvie is not a conclusive precedent for the determination of the present. The judgment pronounced by the majority of the Judges in that case, no doubt, bore,—“That the words of the irritant clause of the deed of entail executed by Robert Speid, Esq., on 10th October 1791, can neither be extended to comprehend the whole three prohibitions against sale, the contraction of debt, and the alteration of the succession, nor applied to any one of these prohibitions in particular: Find that the prohibitions are not therefore guarded in terms of the statute 1685, c. 22, so as to constitute a valid and effectual entail: Therefore, repel the defences, and find, decern, and declare, in terms of the conclusions of the libel: Find no expenses due to the pursuer, &c. But in that case the Lord President dissented from the judgment. Lord Corehouse expressly held, in delivering his opinion, that the entail was a blundered deed; and that, had the irritant clause referred to “the provision last above mentioned,” there would have been a material difference produced on the import of the irritant clause. His Lordship’s opinion, and also those of the two other Judges who concurred with him, were delivered with considerable hesitation; and Lord Gillies, in particular, is reported to have said—“I have seldom found it more difficult to form one” (an opinion) “upon grounds satisfactory to myself.” Therefore I cannot but hesitate, with all due

Jan. 28, 1845.
Preston v. the
Heirs of Entail
of Valleyfield.

No. 59. deference, in holding that that case of *Ardovie* has settled any point in the law of entails, as it never was affirmed by the House of Lords. But even if it were held to be a well decided case, in reference to Mr *Speid's* entail—which was one of a very particular nature—I cannot, for one, pronounce that this entail of *Valleyfield* is a blundered one, but, on the contrary, I must consider it as one prepared with very considerable care and attention. Although its structure may appear more anxiously and elaborately framed in some particular respects, yet, in regard to the three essential requisites for the completion of an effectual entail, guarded by the use of proper irritant and resolute clauses, there does not appear to be any defect whatever in that instrument; for it surely cannot be seriously disputed that it is perfectly legal, and, in conformity with the strictest rules of construction applicable to entails, to embrace in one clear, distinct, and unambiguous clause or sentence, the whole three main prohibitions of a valid entail. If this is followed up by an irritant and resolute clause immediately subjoined thereto, or so directly connected therewith, as to leave no room to doubt of their application, nothing more can be required. Now, that this is done in the entail at present under our consideration, seems manifest to me, on attending to the words of the clause in question, which commences with the words, “and further providing, as it is hereby expressly provided and declared, that it shall not be lawful,” &c., and terminates with the last words of the resolute part of the clause. It will accordingly be found, that the prohibitory clause in the *Roxburghe* entail is framed in terms very closely resembling that now before us, as embracing the whole three main ingredients of a valid entail. It is in these words—“And sicklike it is specially provided, that it sall not be lawful to the persons before designat, and the heirs-male of their bodies, nor to the others heirs of tailzie above written, to make or grant any alienation, disposition, or other right or security whatsoever, of the said lands, lordship, baronys, estates and living, above specified, nor of no part thereof, nather to contract debts, nor do any other deeds quairby the samen, or any part thereof, may be apprizit, adjudgit, or evicted fra them, nor zitt to do any other thing in hurt or prejudice of thir presents, and of the foresaid tailzie in hail or in part: All quilk deeds scea to be don by them are by these presents declairit to be null, and of nane avail, force, nor effect.” This clause was followed by some reservations and powers, and the general irritant clause is subjoined in a subsequent part of the deed, and made applicable to the contravention of the whole provisions, restrictions, and conditions above named. The clause in the *Valleyfield* entail must be read, and have full effect according to its plain, grammatical, and technical terms, as it does not require any construction resting on inference or implication. All, then, that is introduced by the words, “it is hereby expressly provided and declared,” and in the whole sequel of its contents there being no repetition of those same introductory words referring to any thing else, may not only be reasonably denominated a provision, but can in fact be properly described by no other appropriate term. But as it is one expressly directed against selling, contracting debt, and altering the order of succession, and is immediately followed by the irritant and resolute clause, commencing with these words—“and which provision immediately above written,” &c., (reads whole clause,) there in reality exists no room for any reasonable doubt of the perfect sufficiency both of the prohibitory and irritant and resolute clauses of this entail, which are in fact combined and riveted together as a whole. I have, however, really said more than was at all

Jan. 28, 1845.
Preston v. the
Heirs of Entail
of Valleyfield.

necessary for the expression of my opinion in this case, because it so happens that, after an attentive consideration of it, I find that my views of it are so very fully and distinctly announced in the very clear and satisfactory opinion of my Lord Wood, that I have nothing more to add, than that I concur entirely in his Lordship's opinion, which may be viewed as in fact also sanctioned by those of all the other consulted Judges who compose the majority.

No. 59.

JAN. 28, 1845.
PRESTON v. the
Heirs of Entail
of Valleyfield.

LORD MACKENZIE.—It is admitted that there is no material difference between the two entails in this case; and I may therefore refer to the first, *i. e.*, the entail 1736, as exhibiting the terms of both in reference to the present question. By this entail, then, it is provided, “and which provision immediately above written, if any of the forenamed persons” (*i. e.*, heirs of entail,) “shall contraveen,” then the irritant and resolute clauses shall apply. We are, then, under the rule of strict construction, to enquire what is the provision immediately above written. We have to look backwards, and as soon as we have found a provision—one provision—we are to stop. That is the extent to which the irritant and resolute clauses are to reach. There may be a hundred other provisions, but these are not reached by the irritant and resolute clauses. Looking back, then, how soon do we find a provision? Now, we find a clause immediately joined to the irritant and resolute, which is in these words:—“And it shall not be lawfull to the said George Preston, or any other of the saids heirs, male or female, above mentioned, to suffer feu-duties or other public burdens, payable out of the said estate, to run on and remain unpaid so as to affect the same; nor to contract debts, or do and commit any other fact and deed, civil or criminal, whereby the samen lands and estate may be evicted, adjudged, forfeited, or any otherways affected, in defraud or prejudice of the saids heirs of tailzie and provision, and of this present right of succession to the said estate, or do any deed whatsoever, whereby the forsaid destination and order of succession may be any ways inverted, altered, or prejudged.” Now, I feel bound to say, that it appears to me that this is a provision. It is a distinct and complete thing in itself, and it is distinctly provided, which is all that seems necessary to make a provision. But it is said that this is not a provision, but only a part of a provision; and that, in order to find a complete or whole provision, we must go back in the deed until we come to the words “providing, as it is hereby expressly provided and declared.” It is said that the clause in question respecting feu-duties and other debts must connect with these words; and therefore, that as all that connects with these words must be one provision, so this can only be part of a provision. I think I see two errors in that. I do not think the clause does necessarily connect with the words “providing,” &c., as are stated. There is a general clause, that the disposition of entail is under all the reservations, conditions, provisions, &c., following, which sufficiently connects with the prohibition of debts, &c., to make that prohibition completely effectual as a condition or provision of the entail, without the application of the word “providing” to it at all. The words, “and it shall not be lawful,” are quite sufficient to mark it as a condition or provision of the deed falling under the general clause.

Secondly, there is no ground for holding that all the different things ordered and under the word “providing,” and connecting with that word, as used in the entail, must and shall form only one provision. After such a use of the word “providing,” what follows and connects with it might form one hundred provisions. It might be numbered 1, 2, up to 100. It is true, that if the words used

No. 59.

JAN. 28, 1845.

Preston v. the

Heirs of Ennall

of Valleyfield.

were, "but under this provision, that," &c., then it might be argued that all matters connected with that word were to be held one provision. But that would be because provision is in the singular number. And yet there might be difficulty even in that case, if the things provided were grossly distinct things. But that is not the present case at all, where the word "provision" in the singular is no more used than the word "provisions" in the plural, but where there is used the indefinite word "providing," which is just equally applicable to a hundred provisions following and connecting with it as to one. When that is the word used, then, to know whether it be followed by one or by more provisions, we must look entirely to the things that are provided, whether they be only one or a plurality of distinct things. The mere word "providing" gives us no help in that enquiry.

Reverting again to the clause of prohibition of debt which I quoted, I ask why shall we hold it not to be a provision, since it is certainly a matter provided, and is also a distinct matter both in substance and expression? If we look to this part of the deed only, from the word "providing" to the end of the passage now in question, there seems absolutely no appearance at all of reason for denying this clause of prohibition to be a provision, and therefore the immediately above written provision. But it is said that, if we look through the whole deed, the word "provision," as here used, has in it a peculiar meaning; that it means not one distinct thing provided, but the whole matter of provision that follows after one use of the word "providing," until the same word comes to be used again. If the deed had used this word "providing" only once, or twice, or three times, such a plea never could have been attempted. But it is observed that the word is repeated pretty frequently in this entail, and from that the inference seems to be drawn that the word was so used with the view of dividing the deed into portions, and making each part be held as one simple provision, however many distinct matters it may contain.

Now, (1.) I do not well see why, if an entailer may use the word "providing" once, or twice, or thrice, in stating the whole conditions of an entail, without an idea of making the whole into one, or two, or three provisions, he may not in like manner use it six, or seven, or a dozen times, without any such idea. It being clear that the word "providing" itself implies no unity in what follows and connects with it, but is equally applicable to one, or two, or twelve distinct provisions, intended to be each of them a distinct provision, yet all following and connecting with this one word "providing," how can we with safety infer that the use of this word must be intended to have the effect of making all that follows and connects with it be viewed as one provision, merely because it is repeated a good many times in a deed of entail? If it be said that, in all the other clauses of this entail, the word "providing" is used to introduce only one provision, in the first place I am not able to admit the fact. This may be seen in the very clause before that containing the provision to sell, &c. One portion of the deed, also, seems check-mate to the idea of always going from "providing" to "providing," to find one whole provision, and is the very portion of the deed containing the prohibitions and the irritant and resolute clauses, which is all between one "providing" and another "providing;" and yet, certainly, it is more than one provision, since it states a provision as above written to the irritant and resolute clause. Now, whatever be said to constitute this provision, at least it is impossible to say that it extends from "providing" to "providing."

No. 59.

(2) Supposing that, by an examination of the whole, *i. e.*, all the rest of the deed of entail, we might conjecture or infer that such was the entailor's meaning, is such conjecture or inference admissible after the case of Duntreath, and the other decisions, establishing the strict interpretation of entails. To me, it seems to be just in the teeth of the case of Duntreath. An entailor uses the word "providing," which may introduce a plurality of provisions just as well as one, and then he follows this word by stating a plurality of things, each of which statements is in itself a distinct matter, *i. e.*, a distinct provision. Yet we are to infer, from what we find in other parts of the deed, that he considered all these as one, and designated them all as "the immediately above written provision." Is not this using at least as much freedom of interpretation as that disallowed by the House of Lords in the Duntreath case? It is said that the entailor has used the word in a signification which he fixes for himself, by the use of it in the language of the entail. I admit that may be done by an entailor. But why is that said here? Where, even in one single instance, can it be said with any certainty that this entailor uses the word "provision" in this peculiar sense? I see not one such instance in the deed, from beginning to end, where this can even be argued, except in the clause to which the present question relates—and there the statement is certainly erroneous, as has been shown. The argument never can stand on any peculiar use of language defined or discovered by the entailor; for there is no such language in regard to this word "provision." The party here must have recourse to conjectures of intention from other parts of the deed to correct or supply the irritant clause, just as in the case of Duntreath was unsuccessfully attempted. It will be observed that I do not rest at all on the decision in the case of Speid. That case did not require, and did not receive a decision that is in point in this present case. I place no weight on it. I do not think what I said there was *obiter*. It was to meet one view of the case, *i. e.*, that "the aforesaid" meant technically "the immediately aforesaid." But it is enough that it was not concurred in by the other Judges, or held necessary, even by me, for the decision.

On the whole, however, though with all the doubt arising from the adverse opinion of so many of the Court, I am of opinion, with Lords Cuninghame, Medwyn, and Murray, that decree should be pronounced in terms of the first declaratory conclusion.

LORD FULLERTON.—The question here lies within a very narrow compass, and is really confined to as pure a point of verbal criticism as can well be supposed to arise, even in the most hypercritical department of our practice.

The operation of the combined irritant and resolute clause of this entail is limited to the case of the contravention of the "provision immediately above written."

This relieves us of one difficulty which was raised in the case of Speid, on the ground that the word "provision" might, when read without any qualification, be held to apply to the whole previous tenor of the prohibitory part of the deed.

Here the expression is qualified by the words "immediately above written;" so we must hold it to be limited to one provision, and that the one provision immediately preceding the resolute and irritant clause. But that does not carry us far, because there then arises the question what that one provision is, and the solution of that will depend on the particular test which we apply to determine the unity of a provision in such a deed.

Jan. 28, 1845.
Preston v. the
Heirs of Entail
of Valleyfield.

No. 59.

Jan. 28, 1844.
 Preston v. the
 Heirs of Entail
 of Valleyfield.

The pursuer's argument really comes to this, that the unity of a provision depends on the unity or separate individual character of the act which it provides for, from which he infers that the "provision immediately above written" cannot go beyond that part of the complex clause which relates to the alteration of the order of succession—that being the last in order of enumeration. On the other hand, the defenders, the heirs of entail, contend, that the unity of the provision must be tested by the form of words in which it is expressed; and that, if an entailor frames a complex clause, providing that the heirs shall neither sell nor contract debt, nor alter the order of succession, the whole of it is, in a case of this kind, to be read as one provision, as the acts prohibited, though distinct, are in form included in one prohibitory sentence.

Now, if, in the present case, this question occurred pure, *i. e.* if we had nothing in the immediate context of the deed to guide us, I confess I should have great difficulty in adopting the construction maintained by the heirs of entail. In truth, both interpretations are quite admissible, and quite legitimate, according to the ordinary use of language. A prohibition of, or provision concerning, three acts, in their nature totally distinct, may be correctly said to be either one, by referring to the form of expression, or three, by referring to the subject of prohibition or provision. Now, if we had nothing in the context ascertaining in which sense the entailor employed the expression, there would truly be a case of ambiguity, which of course would, by the fixed rule of interpretation, operate against the extension of the fetters beyond those acts which were unambiguously expressed.

Indeed, the case of Speid not only determined, and I think most justly, that where one provision only was alluded to in the irritant clause, and where it was a matter of doubt which of two provisions was alluded to, the irritant clause could not receive effect. It went a great deal further; for it determined that, in a complex prohibitory clause like that occurring here, the unity of the provision was to be determined by the unity or individual character of the act prohibited. The judgment of the Court found, that "the words of the irritant clause can neither be extended to comprehend both of the provisions or prohibitions against sale or contraction of debt, nor applied to either of them in particular." Now, as the entail there unquestionably united the two acts of sale and contraction of debt under one form or expression of prohibition, the judgment expressly determined that that was not the proper test, but that it was the nature of the act prohibited which distinguished the individuality of the prohibitions or provisions. It is not to be overlooked, however, that, in the case of Speid, there was nothing in the context to guide the Court in ascertaining the sense in which the word "provision" was used by the entailor. The irritant clause merely declared, that if the heirs "should act or do in the contrary of the provision above set forth, all and every one of such acts and deeds" should be void and null. There could in that case be no inference from the description of the things annulled in regard to the extent of the provision of which the contravention was contemplated. That description, "the acts and deeds," just answered to the supposition of the event, "if the heirs should act or do contrary to the above provision;" so that those questions still remained quite general what that provision truly was, or rather must be held in law to be, while the deed itself gave no information on the subject.

But the present case does, I think, differ most materially from the case of Speid in that important particular. Here it is declared that, if the heirs contravene the "provision immediately above written," not only shall the contravener forfeit his

No. 59.

Jan. 28, 1845.

Preston v. the
Heirs of Entail
of Valleyfield.

right; but "all such facts, deeds, debts, or obligations, in contravention of the former provision," shall be "void and null." It appears to me that these expressions necessarily drive us to the rejection of the test of unity maintained by the pursuer. By that test, the "provision immediately above written" is the prohibition against altering the order of succession; but then the enumeration in the conjoined irritant clause, of the things which may be done in contravention, contain not only facts and deeds which may be applicable to an alteration of the order of succession, but debts and obligations, which, particularly the first, clearly are not. So that, in this particular case, I rather think we are excluded from the construction of the irritant clause maintained by the pursuer. We are compelled by the context to let in a reference to some provision which regards debts and obligations, which we cannot do if we hold that the one provision above written is necessarily limited, by the identity or individuality of the act prohibited, to the last member of the complex prohibitory clause.

So far, then, I agree with the majority of the consulted Judges. I think, in this case, in judging of the special identity of the one provision above written, we are entitled to look not only at the act prohibited, in the member of the sentence "immediately above written," but to go further back, in order to get at the one provision necessarily referred to in the irritant clause; or that one provision with which the entailor has chosen to combine certain prohibitions which he might have kept separate. But there is another and remaining point—viz. how far we are entitled to go back. And on this I confess I am obliged to differ from them, and to agree with the minority.

It being once held, that the proper test for deciding on the unity of the "provision above written," is not the unity of the act prohibited, but the unity in the form of expression adopted by the entailor, I cannot conceive a case in which strict construction is more indispensable and less objectionable (putting entail law out of the question) than in determining whether a certain passage in a deed involves or forms two provisions or one. It is nothing but a question of form of expression, with which the intention of the granter of the deed has no concern. If two things are effectually prohibited or provided for, it is a matter of absolute indifference to him whether the words expressing his intention are split into two provisions or held to be combined into one. It becomes of importance in this case, only because the effect of certain fetters depends on the extent to which the limits of the one provision can be carried, which is only an additional reason for applying that strict interpretation which the very nature of the point itself would at any rate require and justify. Now, what is the form of expression adopted in this entail? By the original entail 1736, which is the standing entail, (as the deed 1767 was only a purveying of the succession,) the lands are made over to a certain series of persons, under the express reservations, burdens, provisions, conditions, irritancies, &c., after mentioned, &c. Then follow various provisions and declarations; and at the top of page 12, the deed proceeds:—(Reads from beginning of prohibitory clause to the words, "and it shall not be lawfull," &c.) Here there is an entire stop, I mean not only in the punctuation, but an absolute break in the entail form of expression, which renders it quite impossible to combine what follows with what goes before. The beginning of the passage provides, "as it is hereby expressly provided and declared, that it shall not be lawfull to the said George, Robert, John, and William Prestons, or to their said heirs, or to any other of the heirs, male or female, who shall happen to succeed to the said estate, to sell," &c. But the

No. 59.

Jan. 28, 1845.
*Preston v. the
 Heirs of Entail
 of Valleyfield.*

sequel of the passage containing the prohibition of the contraction of debt, and other acts, commences not only with a new sentence, but with a new and different description of the persons prohibited:—"And it shall not be lawful to the said George Preston, or any of the other heirs, male or female, above mentioned, to suffer feu-duties to accumulate, or to contract debt," &c. Now, here there is a very good prohibition against contracting debt, and the other things there enumerated. But can this last prohibition be combined in form with the preceding passage regarding sales, so as to make the whole only one provision in form, and thus to render the irritant clause confessedly operative only on the one provision immediately above written, applicable to the whole passage beginning with the words, "and further providing, &c.?" I agree with the minority of the consulted Judges in thinking that there is no ground for such an extension. The defenders, resting their case exclusively on the form of expression as distinguished from the subject of the provision, are bound to make out that, by the form of expression, the whole passage back to the words "further providing," is only one provision. That is their whole case. Now, have they made it out when, by the form of expression, the part of the passage containing one set of prohibitions does not admit of being combined, even in form, with that which contains the other? The circumstance of the passage commencing with the words "further providing," I consider to be of no importance. These words are mere surplusage. There cannot be a doubt, particularly after the general reference at the outset to the provisions, restrictions, &c., after mentioned, that a clause beginning, "and it shall not be lawful for the heirs to do certain things," is a perfectly good separate provision or prohibition in itself, and must be so dealt with when any thing turns upon its individuality.

An entailor may begin one clause with the words providing and declaring, and then insert any number of valid prohibitions under the form, "it shall not be lawful for the heirs to do so and so;" and if, in such a case, he limited the irritant clause to the "provision immediately above written," I cannot help thinking that it would not only be a liberal but a most lax interpretation to carry back the operation of the irritant and resolute clause to the employment of the words "providing and declaring," and thus to combine a whole series of provisions, distinct both in expression and subject, into one, in order to give a wider effect to that irritant and resolute clause. Now, that is the very principle which is maintained here by the heirs of entail. Though it is not necessary for their purpose to carry its operation farther back than the sentence or provision immediately preceding, still the same question arises, as the irritant clause applies only to the "provision immediately above written." The question is, what that one provision is? And the argument of the heirs of entail really is, that the last part of the disputed passage must be held to be united with the former, so as to make one provision, though in the subject they are confessedly distinct, and in grammatical form do not admit of being conjoined. Now, I can conceive no better ground for deciding that they truly form two provisions, and not one; and that, consequently, the effect of the irritant clause is limited to the prohibition of allowing the feu-duties to accumulate, and of the contraction of debt; a construction, too, which removes all inconsistency between the prohibition and the enumeration of the different acts of contravention contemplated in the irritant clause. In short, it appears to me that this is not only the strict interpretation, but is the fair and reasonable interpretation; and that the argument of the heirs of entail truly rests on the supposed impossibility of an entailor effectually prohibiting the contraction of debts, while

he leaves the power to sell free, a consideration to which of course we cannot listen in a case of this kind. And therefore I agree with the minority of the consulted Judges in thinking, that the operation of the resolutive and irritant clauses cannot be held to apply to any thing beyond the acts prohibited in the sentence beginning, "and it shall not be lawful."

No. 59.

Jan. 28, 1845.
Preston v. the
Heirs of Entail
of Valleyfield.

I think, then, that the pursuer is entitled to judgment in terms of the first declaratory conclusion of the libel; but I should think we must, in compliance with the principle of that opinion, go a little further, and also sustain the third conclusion of the libel, which regards the letting of tacks, an act which is not covered by the irritant and resolutive clauses, according to the construction which I think the correct one.

LORD JEFFREY.—I concur in the opinion of the majority of the consulted Judges, and generally in the grounds assigned for that opinion; and considering how clearly these grounds are set forth in the prints now before us, it might perhaps be enough for me thus to intimate my concurrence. But, looking to the nature and extent of the differences which still exist among us, and especially to what has now fallen from two of your Lordships, I cannot but feel some anxiety that the views on which I rest my judgment should be distinctly understood.

I think the case is of some nicety; but yet attended with less difficulty than usual that have been recently decided, on the same principle by which I conceive that this must now be determined. And this much I wish to say at the outset, that if I had any notion that the judgment we are about to pronounce (and which must now be the judgment of the Court, whatever might be my opinion,) would trench on the true principle of strict construction, or carry the limitations to which it is necessarily subjected further than they have been already said, I certainly should not have been found among those who assented to that judgment.

I may begin, however, by saying, that I can by no means recognise it as a just amplification of that principle, to hold that, in determining the true meaning of the fettering clauses of an entail, we should never be permitted to go beyond the words of those clauses themselves; or even that we should always confine ourselves to the immediate context, or to words occurring in the same sentence, or sentence. On the contrary, I held that it is undoubtedly competent to go, for the purpose, to all the words and clauses of the deed which relate to the same matters; and especially to such of them as bear directly upon the words we are called upon to interpret—though always, no doubt, under this qualification or proviso, that the meaning so to be made out must be made out clearly and unequivocally; and that the result of the whole taken together must be something more than a mere preponderance of probability, or even a moral conviction that fetters and restraint were intended. The intention to fetter, in short, and to fetter in a particular manner, must always be clearly made out from the expressions actually used in the body of the deed. But if it is once so made out, it is not, as I think, to be defeated, either by a strained and unnatural interpretation of the operative words themselves, or by sticking obstinately to them as they actually stand, and refusing to look at the other clauses or expressions in the deed, which may unequivocally the sense truly put on them by the entailor.

Therefore, I believe, all persons looking judicially at the subject will now be found to agree; and yet it is difficult to say even as much as this, without feeling that, if the rule of interpretation is only to be found in the distinction between a forced

No. 59.

Jan. 28, 1845.
 Preston v. the
 Heirs of Entail
 of Vall-yfield.

and unnatural, and a merely improbable construction, or by settling the degree of clearness with which an intention to fetter must be expressed in order to be effectual, we shall soon find ourselves embarked in subtleties of the most perilous description, and driven into a sort of debatable land, within the confines of which the most cautious and conscientious—as witness our disagreement to-day—may unwittingly go astray. I shall immediately endeavour to show, that if we confine ourselves to our safer and more immediate duty of interpreting words, instead of hunting after indications of general intention, a good part of this perplexity may be avoided, and the rule of strict construction reconciled both to substantial justice and to all the highest authorities. But, in the mean time, it is something to be able to say, that, without going in the very face of those authorities, or a series of determinations in the court of last resort, it is quite impossible to maintain, (as the pursuer, however, still professes to do here,) that wherever an expression in a deed of this description at all admits of more than one meaning, that which defeats the purpose to fetter must in every case be preferred. I refer more particularly to such cases as that of *Stobbs*, where a judgment of this Court (of March 1811.) finding that the prohibition to dispoise in that entail was not equivalent to a prohibition to alienate, and did not strike at the granting of long leases, was reversed in the House of Lords in March 1821: when it was solemnly adjudicated—1st, That the prohibition to dispoise was sufficiently fenced by an irritant clause directed only against alienations; and 2d, That such irritancy was effectual against a lease for the period of seventy-seven years; and also to the several recent cases in which the same high tribunal has found, that the word “deeds,” in the fettering clauses of an entail, was to be taken in the sense which most supported the restrictions—though occurring in a connexion which, beyond all question, admitted of another sense; and even of a sense, looking only at the passage in which it occurred, scarcely less probable and natural than the other.

But though the subject is thus intrinsically full of difficulty, and probably will always give rise to differences of opinion, I cannot but think that the range, and even the risk, of such differences might be considerably narrowed, if it were always kept in mind that it is a very different thing to seek for the meaning of really ambiguous or flexible expressions, by references to other passages of the same deed which may really indicate no more than the general intention, or even the anxiety, of the entailer to make his deed effectual in all its material clauses; and to refer to such passages for the narrower and more legitimate purpose of merely ascertaining the sense in which the words in question have actually been used. And some confusion, I think, has been introduced into the argument (and even into the views of the Judges) in this as well as other cases, by applying judicial *dicta* which truly referred only to attempts of the first description, to the latter. The first I readily admit to be for the most part incompetent, and in very many cases inept and unnecessary; since, without any such reference, it may generally be assumed that it must have been the intention of an entailer to do effectually that which he had undoubtedly attempted; or, in other words, that it could not have been his wish or intention that his obvious, and even expressed object should be frustrated by casual omission, or palpable blunder or defect of expression. It could require no reference to other parts of the deed to satisfy the Court, in the *Hoddam* case for example, that it could never have been intended that a line should be dropped out in extending the completed instrument; and it may well be held to have been sufficiently clear in the *Duntreath* case, that the entailer intended the institute as

No. 59.

Jan. 28, 1845.
*Preston v. the
 Heirs of Entail
 of Valleyfield.*

well as the heirs to be subjected to the provisions of his entail. But the most complete conviction on these points was rightly held to be incapable either of supplying the missing line in the one case, or of changing the settled meaning and effect of a known technical word in the other. In a strict view of the matter, indeed, I should be inclined to say, that the flaw in the Duntreath case was truly as much a flaw of omission as that in Hoddam; the blunder being, that the word institute (or some word capable of describing the institute) was not added to the word heirs—which had quite another meaning, and another purpose to satisfy. If the word, however, had been truly ambiguous or flexible in its own nature, a reference to other passages in the deed might have been competently made to fix the meaning in which it was actually used. Nay, if any of these passages had contained a perfectly clear declaration of the sense actually affixed to it, however improperly, by the entailor, I should have no doubt that they would control (or rather vary) the meaning even of a strictly technical word; and so give efficacy or application to fetters that might be otherwise inoperative. In the Duntreath case itself, for example, if the entailor had, any where within the body of the instrument—at its outset or at its close—set forth in distinct terms, that throughout that deed, and especially in its fettering clauses, he meant under the word heirs to include the institute also, and provided and declared that these clauses should receive effect as if he had been specially mentioned, I see no reason to doubt that this would have been perfectly effectual. But it would have been so effectual, not because there were found in other passages sufficient proofs of the entailor's general purpose to fetter the institute as well as the heirs; but because they were found to contain a precise reference to the very words under consideration; and the maker's own key to the cipher they might otherwise have presented.

In cases of the former description, where an ambiguous expression is not explained by any thing in other parts of the deed bearing directly on that expression, it must, for the most part, be inadmissible to refer to what merely renders it probable that it was used in a sense unfavourable to freedom. The phrase itself being still left, in spite of any such probable inference, in all its original ambiguity; and the settled and wholesome rule, of requiring clear and unambiguous expression to give effect to restraints upon property, however clear the purpose may appear, must take its course, and decide for the construction most favourable to freedom. But in the other class of cases, the reference to the context or other parts of the deed is obviously far safer and entirely justifiable. The entailor having here used, as I assume, a word or phrase undoubtedly apt and proper to express a fettering purpose, but possibly admitting of a meaning which would defeat it, the context and the rest of the deed may be legitimately looked at, though not to prove the purpose, yet to show, either by other words immediately adjoined to and connected with those in question, and unequivocally restricting them to a fettering meaning, or from parallel passages, or, still more conclusively, from its whole structure, and the system of diction which it embodies throughout, that no other meaning could be affixed to them, without not merely the most violent improbability, but manifest inconsistency and contradiction.

The distinction, in short, between the two classes of cases appears to me to be nothing less than this, that the admissible references must always bear directly on the words to be interpreted, and settle the meaning of the entailor only by fixing the meaning of the words he has actually used; while those which are inadmissible will be found, almost invariably, to throw no direct light but on the pre-

No. 59.

Jan. 28, 1845.
*Preston v. the
 Heirs of Entail
 of Valleyfield.*

sumable purpose of the entailor, and seek to fix the meaning of the words only by inferences from that purpose; forgetting that, to impose fetters, unequivocal expression is as necessary as deliberate purpose; and that this branch of the law is full of examples where such an admitted purpose has been defeated by the want of such expression; and the result embodied in the familiar though technical adage—*quod voluit non fecit*.

That it is clearly competent, for this last purpose of fixing the sense in which the words in question were truly used, to refer to other passages of the same deed, which contain or refer to those very words, seems to me not only implied in the narrowest and most rigorous conception of the duty of judicial interpretation, but to have been explicitly recognized in many recent decisions of the highest possible authority. For my present purpose, I need not go farther back than to the case of Blairball (or Ronaldson Dickson,) decided in this Court in 1799, and affirmed on appeal in 1803. The question there turned entirely on the meaning to be given to the words "person or persons, heirs of tailzie contravening," which occurred in the resolute clause of the entail; and as to which it was disputed whether they effectually comprehended the institute under the word "person." In order to ascertain this, the words of the destination clauses, and of all the prohibitory; as well as of the irritant, were referred to, with the assent of all parties; and solely on the ground of the light afforded by those other passages, though there was an admitted ambiguity in the phrase as taken by itself, it was found that the institute was included, and the resolute clause operative against him. The same course was followed in the subsequent case of Steel of Baldastard, in 1817, where the question again turned on the meaning to be affixed to the words "heirs and members of tailzie," in the entails of these lands; and was, whether the institute was properly included under the last of these words. Lord Eldon went very anxiously into the whole structure of the instrument; and the ground of his decision expressly was, that, looking to its general tenor, and to the several clauses in which this expression occurred, there was not sufficient ground for holding that it was meant to include the institute under the word member. The word as used in the fettering clauses, his lordship observed, does not necessarily indicate that it was so intended; "and it appears to me that other passages in the instrument lead to the same conclusion." And, accordingly, he sums up his very cautious and well-considered judgment by stating, that, "under the particular circumstances of this case, and advertng to the whole of these circumstances as they appear in this deed," (I am anxious to have these words inserted,) "the word 'members,' as used in this particular deed, does not include the institute." The decision there was no doubt against the fetters; but the principle of looking to the whole of the deed to ascertain whether they were to be applied or not, was most clearly asserted. And, accordingly, in the subsequent and analogous case of Dugaldston, (Glassford,) of 10th June 1825—which had an opposite issue—Lord Gifford rested his judgment almost entirely on that principle, as laid down by Lord Eldon in the case last referred to; observing that it had been there conclusively fixed that, in construing the fettering clauses of an entail, it was not only competent, "but necessary, to look (to use the expression of the Lord Chancellor in the case of Baldastard) at all which is to be found within the four corners of the instrument; and to consider the fair legitimate construction to be applied to the whole." And upon this principle, and after a most minute analysis of all the relative clauses of the deed, he found, that the words "every heir or person so

contravening," in the resolutive clause, though undoubtedly in themselves ambiguous, did, in that particular instrument, include and were effectual against the institute as well as the heirs. I shall only refer further upon this point to the very recent cases of *Lumsden*, (*Auchindoir*), affirmed in August 1843, and *Murray*, (*Cockspow*), decided in the same way, so lately as September 1844. Both these cases related to the meaning to be put on the word "deeds," in the irritant clauses of these entails; and in both it was found that, though obviously equivocal and ambiguous, if these clauses alone were to be looked at, it was well made out, by reference to other clauses, that it must have been meant to carry the irritancy to all the acts of contravention. The admirable judgments of Lord Campbell and Lord Brougham, in the former of these cases, appear to me to contain the most guarded, and at the same time the most explicit recognition of the principle which I have been endeavouring to explain, that I have yet seen in any book of authority; and though I feel that I could in no way present my own views of the subject so advantageously as in the words of these judgments, I shall not now detain your lordships by reciting them, but refer merely to what may be found at pages 113, 114, and 121, (and afterwards page 123, for Lord Brougham,) of the second volume of Mr S. Bell's Reports of Cases in the House of Lords. The same doctrines are resumed more succinctly in the *Cockspow* case, at pages 122 and 123 of the third volume. In both cases, I may observe, the judgments of this Court were affirmed; that in the *Cockspow* case having proceeded on a consultation of the whole Court, when an elaborate opinion of Lord Moncreiff was unanimously adopted.

Holding it, then, to be indisputably settled, that it is competent to fix the meaning of any word or expression in the fettering clauses of an entail, by reference to other clauses connected with or bearing on these expressions, I shall now proceed, very shortly, to point out the passages in the context and other parts of the deed now before us, which do seem to me, as they have done to the majority of the Judges, to settle the meaning of the disputed word in a way quite inconsistent with the views of the pursuer.

The question is as to the meaning of the word "provision," in that part of the resolutive clause of the Valleyfield entail which subjects to forfeiture such of the heirs "as shall happen to contravene the provision immediately above written." And this leads at once to the other and more immediate question, Whether, in order to ascertain to what this declaration of forfeiture should extend, we are entitled (or rather required) to go back to the immediately preceding section or division of the deed, which sets out with the words "and further providing," and to reckon as parts of that "provision immediately above written" all that intervenes after these words; or whether we should go back only to the last of the special prohibitions included in that section, or to a certain number of them, following the words "and it shall not be lawful," which occur about the middle of it?

Now, in order to solve these questions, I think it necessary, in the first place, to look to the general plan and system on which this deed of entail is constructed and arranged; and to the occasions on which this important word "provision" is used in it—where there is no doubt or ambiguity about its meaning. And the first material remark that occurs on such an examination is, that, on going over the different parts of the instrument, it appears that all the conditions, injunctions, permissions, and prohibitions of the entail, are uniformly introduced by the words

No. 59.

Jan. 28, 1845.
*Preston v. the
 Heirs of Entail
 of Valleyfield.*

No. 59. "providing and declaring," or, "and further providing and declaring;" and that none of these are introduced under any other heading, title, or denomination; and, second, that all that follows or intervenes between any such heading or title, and the next recurrence or iteration of the same marking words, of "providing and declaring," is contained substantially in one sentence, and (except in the case now in dispute) refers exclusively to the matter or thing first specified after these words of introduction.

Jan. 28, 1845.
Preston v. the
Heirs of Entail
of Valleyfield.

The provisions themselves, all prefaced and introduced by these leading words, are eight in number; and contain, as I have already observed, all the conditions of the entail. Taken in their order, they are substantially as follows:—The first is, providing and declaring that the heirs shall pay all the debts, legacies, and bonds of provision that may be left by the entailer: The second, that they shall pay certain annuities and jointures to certain of his relatives and their widows: The third, that they shall all bear the name and arms of Preston of Valleyfield; and to this there is adjoined (there being nothing to which an irritancy could attach) a special resolutive clause, forfeiting the rights of those who should not comply with the injunction: The fourth is that now under consideration—and (assuming for the present that it includes, like the rest, all that is set down before the next repetition of "providing and declaring") it contains all the prohibitions of the deed, viz. those against selling—against burdening with annualrents, &c.—against granting leases for more than nineteen years, or with diminution of the rental—against letting feu-duties or public burdens run into arrear—against contracting debt—and against altering the order of succession: And this enumeration is immediately followed up by the resolutive and irritant clauses now in dispute—in the first place expressly forfeiting the right of all who might contravene the "provision immediately above written," and then declaring void and null "all facts, deeds, debts, and obligations, made or granted in contravention of the foregoing provision:" The fifth is, that the heirs in possession may burden the estate to a certain extent and in the ways specified, for their wives and younger children: The sixth, that they shall not allow adjudications to be led for debts affecting the estate, or at all events shall redeem them within seven years; and this too, is followed by a special resolutive clause (there being no room for an irritancy) in the event of neglect or disobedience: The seventh is, that they shall pay certain bonds of provision to the children of the entailer: And the eighth and last is, that they shall all possess on the title of the entail, and on no other title and engross its whole provisions in their infeftments. Such is the structure, style and tenor of this disputed instrument.

Now, the next remark I would make upon this survey of its contents is, that all the provisions (or sections headed by the words providing and declaring) which precede or follow that now in dispute, consist only of injunctions, permissions, and directions; and that all the prohibitions of the entail are included and massed together in the passage which follows this fourth repetition of these important words; and in fact fill up the whole space which intervenes between them and the resolutive and irritant clauses—the one forfeiting all contraveners of the "provision immediately above written," and the other annulling "all facts, deeds, debts, and obligations," done in contravention of it. There is thus, therefore, an obvious unity in the substance and tenor of this passage, as well as in its collocation; and reading these fettering clauses (which are equally applicable to every part of it, and can apply to no other parts of the deed) as belonging to an

forming its sequel, it will be found to extend, (like all the other sections beginning with the words "providing," &c.,) in one unbroken tenor, down to the next, or fifth recurrence of these marked words of introduction.

No. 59.
Jan. 28, 1845
Preston v. the
Heirs of Entail
of Vallyfield.

Having these characteristics of the instrument generally in view, I must here be permitted to observe, that it appears to me to be in no respect a blundered, slovenly, or ill constructed entail; but, on the contrary, a singularly correct and well considered instrument. The conditions it contains are, as is usual in such deeds, of three several descriptions: 1st, commands or injunctions of things to be done; 2d, prohibitions of what is to be avoided; and, 3d, permissions or partial relaxations of what had been generally prohibited. Now, while the permissions evidently neither required nor admitted of any irritant or resolute clauses, it is equally plain that the prohibitions necessarily required the protection of both; while the injunctions (which could only be contravened by omission) could in no case admit of an irritant clause, and would only require the aid of a resolute when they were of a certain description. Now, it will be seen that the deed before us has been very accurately adjusted, with a clear sense of the value of these distinctions. To the injunctions which are for the benefit of third parties—such as those requiring payment of debts, legacies, jointures, &c.—no resolute or other fencing clause is adjoined; these being felt to be sufficiently secured by being made conditions of the heir's right to the lands, and safely left to be enforced by those in whose favour they are imposed. But to other injunctions, which raised no such right in third parties, and went only to protect the estate, or to gratify the family pride of the entailer, it was plainly necessary to adjoin a resolute clause, as the only compulsion for their due observance of which the case admitted. And, accordingly, while those of the former class are left to the care of those having interest in them, those which enjoin the bearing the name and arms, or the redemption of real diligence of the estate within seven years, are severally and correctly secured by a special resolute clause, attaching the penalty of forfeiture to each condition. And then, to complete the security of the whole conditions in proper form, there is a regular combined irritant and resolute clause, subjoined immediately to that section of the deed which contains the whole prohibitions, and fills indeed the entire space between these clauses and the last preceding introduction of the words "providing and declaring"—the express declaration in the body of these conjoined clauses being, that they shall apply to "the provision immediately before written."

Now, on a full consideration of the structure and tenor of this particular instrument as now brought into view, I must say that I think the word "provision," in these fettering clauses, is as clearly and unequivocally proved to include the prohibitions following the last recurrence of the words "providing and declaring," as if this had been stated to have been its meaning in express terms; and that the evidence, legitimately derived from the other parts of the deed to sustain that meaning, is decidedly stronger than was found sufficient to bring the estate under the fetters, by a large construction of the words "persons coming," in either of the cases of Blairhall or Dugaldston; and immeasurably stronger than that on which the House of Lords solemnly determined, in the case of Abbs, that the meaning of the word "dispone" did, in that entail, extend to granting of long leases.

The main ground of this opinion, no doubt, is my clear conviction that, in using

No. 59.
 Jan. 28, 1845.
 Preston v. the
 Heirs of Entail
 of Valleyfield.

the particular word "provision" in these fettering clauses, the entailor had plain and manifest reference to the cognate and analogous word "providing" at the beginning of the intervening enumeration; and must, consequently, have intended to include the whole of that intervening passage under the name of the provision last above written. The whole of the Judges, I think, are now agreed that provision is in itself an apt and fit enough word for expressing such a purpose; and it does appear to me that the whole context and structure of the deed demonstrate that it was used for that purpose. It has been observed, however, by one of your Lordships, who dissents from this construction, that if, instead of the words "and further providing," at the head of this enumeration, the expression had been, "and with this further provision," it would have been unobjectionable; inasmuch as the noun substantive "provision," being unequivocally in the singular number, might well enough pass for the denominator of a whole class or congeries of prohibitions; while the participle "providing," being equally applicable to singular or plural, could give no similar warrant for an integration of what was to follow. I must confess, however, that to me the two forms of expression appear to be strictly synonymous. If the noun provision, in the singular, may fitly denote a series of prohibitions where the context shows that this was intended, why should not the participle providing, which is as much plural as singular, do this at least as well?—the context being, of course, as serviceable to the one as to the other. I profess, in short, not to see how the observation bears at all on the matter at issue; unless, indeed, it is meant to be said that the word provision in the fettering clauses, not being identically the same with the word providing at the beginning of the enumeration, it must be held that the one had truly no sort of connexion with the other; and that the last had been introduced, accidentally as it were, and without the least reference to their common origin and close relationship—exactly, in short, as it would have been if the sentence had begun with words of an entirely different family. If I could persuade myself to adopt these premises, I probably should not shrink from the conclusion. But I cannot possibly adopt them; nor divest myself of the conviction, that provision and providing are correlative and substantially synonymous terms. For, after all, what is a provision but that which is provided? And if reference is made in the end of a sentence to the "immediately preceding provision," what can we do but go back to the last place where any thing is expressly provided? And if we find that term used at the beginning of the same sentence, must we not conclude that it was to it that the reference was made? The word provision, in short, is here used plainly as a relative, and must be referred to some antecedent; and where can we possibly find its antecedent but in the word providing, which stands out so conspicuously in that character? I despair of making this plainer.

But though my own opinion rests mainly on this view of the case, I fear I have now dwelt upon it with needless anxiety; since I now understand the dissent of the minority of the Judges to proceed upon a much narrower distinction. The pursuer, indeed, still relies on the argument, that "the provision last above written" can mean only the last special prohibition in the preceding enumeration—which is that against altering the order of succession. But none of the Judges, I think, now adopt that view; the whole of those in the minority concurring in the opinion that the provision in question does include all the prohibitions that come after what they represent as a break in the continuity of the sentence which begins with "providing and declaring," but cannot go back beyond that break; or the

No. 59.

words, "and it shall not be lawful," which occur about the middle of the sentence. According to this view, the fencing clauses would be good as against contracting debt—doing deeds exposing to eviction—and altering the order of succession; but not good as against selling or disposing—burdening with annualrents, &c.—or letting on leases for more than nineteen years, or with diminution of rental.

Jan. 28, 1845.
Preston v. the
Heirs of Entail
of Vall-yfield.

The ground on which I rely, of course excludes both these views. But of the two, I confess I think that of the party more maintainable than that of the Judges. There was plainly a certain plausibility in saying that every separate prohibition might be considered as a provision; and as it is certain that only one (or the last mentioned) provision is adequately fenced, so this, on a strict construction, should only apply to the last prohibition that had been specified. But this plausibility is at once lost, and the best vantage ground of strict construction abandoned, as soon as it is admitted that the one provision of the fettering clauses may (and must here) be held to comprehend three or four of the separate prohibitions which are set forth immediately before. The whole difficulty of the defenders' case, it appears to me, is got over, when it is conceded that the singular noun "provision" does not, in this resolute clause, truly mean one only of the preceding prohibitions, but several of them; since, after that concession, it is difficult to see what room can be left for strict construction; and impossible (as I think) to stop short of the whole, or refuse going back from the relative "provision" in that clause, to the correlative "providing" at the head of the enumeration.

It will easily be understood, however, that I am far enough from quarrelling with this extending the sense of provision beyond the last preceding prohibition; or, indeed, with the grounds on which the dissentient Judges have adopted it. These grounds, as most luminously stated to us to-day by Lord Fullerton, are, that any other construction would be obviously inconsistent with the terms of the irritant clause, (which is here combined with the resolute into one sentence,) which distinctly annuls "all facts, deeds, debts, and obligations, in contravention of the foresaid provision;" whereas the separate prohibition immediately before written, being only against altering the order of succession, could never be contravened by contracting debt or granting obligations; and that it was therefore necessary to read the word provision as extending beyond the prohibition last mentioned, and as including some at least of those that went before. Now, in this view of the matter, in so far as it goes, I cordially concur. The reasoning, I think, is unanswerable; and my only regret is, that it is not followed out to what I must humbly think its legitimate conclusion. The meaning of provision must be carried past the immediately preceding prohibition. But the reasons which necessitate this, seem to afford no warrant for stopping short at the first additional words by which they may appear to be satisfied. The "facts, deeds, debts, and obligations," in the irritant clause, are undoubtedly sufficient to cover all the prohibitions in the deed; and apply just as well to those that come before as against contracting debt as those that come after. And, therefore, the whole question comes now to be, whether the alleged pause or break in the enumeration of these prohibitions, and the insertion of the words "and it shall not be lawful" before the last three of them, be sufficient (upon any principle of construction) to prevent the reference back to the word providing at the beginning; and thus not only to stultify and defeat the plain object of the fettering clauses as they stand, but to cut off and intercept a grammatical and substantive connexion, which would otherwise be indisputable.

No. 59.

Jan. 28, 1845.
*Preston v. the
 Heirs of Rutail
 of Valleyfield.*

It is to be regretted, certainly, that there should be so much contrariety in our views upon this part of the question. But as the opinions from which I dissent have now been expressed in very decided terms, I am bound in my turn to state that I am unable, for my own part, to see even a plausible reason for going into these opinions. In the first place, the words, "and it shall not be lawful," are not used in any other part of this deed to introduce any new or separate provision or condition of the entail. In the next place, they are not fitted to serve such a purpose—not being in themselves words initiative or of introduction, but copulative or of connexion only; and, finally, the words invariably used for this purpose by this entailer are the words "providing," or "providing and declaring," which accordingly appear a little further back, and at the head of the same substantial enumeration.

It is also very material to observe, that the introduction of these words, in the particular place they occupy, does appear to me to be sufficiently accounted for by the tenor of the passage to which they are immediately subjoined. By that passage, it is provided that it shall not be lawful to sell or dispose the lauds, or to grant infeftments, &c., over them, or to set tacks for more than nineteen years, or with diminution of the rental—all palpably as parts of one sentence, under the government of the word "providing" at its head. But here there is unluckily introduced a long parenthetical qualification of this last prohibition about leasing—to the effect that, if the former rents could by no means be obtained, then the lands might be let for lower rents, provided that, in that case, the leases should not be for more than five years—by the introduction of which detail, the structure of the sentence was so embarrassed, and the syntax so long suspended, as not only to make it exceedingly awkward, but really hazardous, in respect of perspicuity to have recurred at once to the use of the brief connecting particles of "or" or "nor," as in the first part of the passage; and therefore, carefully avoiding the use of "providing and declaring," or of any other words ever used in the deed at head sentences, or introduce new or separate provisions, the entailer, merely to complete and connect the inchoate list of prohibitions, goes on to say, "and it shall not be lawful" to let feu-duties run in arrear, or to contract debt, or to alter the order of succession; and then immediately subjoins to this completed and true unbroken enumeration, the resolute and only irritant clause which the deed contains, directed, the one against all contraveners of "the provision immediately above written," and the other against all facts, deeds, debts, and obligations, in contravention of the same.

Taking the whole passage, then, together, from providing at the beginning to the provision at the end, I must say that I see nothing in the intermediate occurrence of the words, "and it shall not be lawful," to break the substantive continuity of the list of prohibitions, (which is certainly broken by nothing else,) and, as if by the interposition of a non-conducting body, to prevent the natural coalescence of the related words, which stand out in such prominent relief and visible correspondence at its two extremities. Nor, indeed, would it be easy for me to imagine any more flagrant example—not of a strict, but of a capricious and palpably unnatural construction—than that which would thus divide an unbroken enumeration of six prohibitions (for, indisputably, there is nothing but prohibitions in the whole passage) into two separate provisions; the first beginning with the word providing and containing three of the prohibitions, but followed up (on this view) by no declaration or sanction with regard to them; and the other (containing the other

three) having no such words of introduction as invariably precede the mention of separate provisions in this instrument, but followed up by fettering clauses directed generally against "the provision" last above written, and describing the deeds to be annulled in terms amply sufficient to comprehend violation of the whole six prohibitions specified after the word "providing." And therefore, and on the whole, adhering strictly to the rule of looking to the context and relative passages of the deed, only for ascertaining the sense in which the particular fettering words are actually used, and not for indications merely of a purpose to fetter, I cannot hesitate in concurring with the majority of the consulted Judges.

After what has been observed by your Lordship at the beginning of this day's advising, I need scarcely say that I do not feel that we are in the least embarrassed in the course we are about to adopt by the decision in the case of Ardovie. The question which we are now to determine neither did nor could arise in that case; as there were there not only five or six separate provisions in the deed (the fettering clauses being clearly limited to one only,) without any means of ascertaining which was intended—whether the last, the first, or the midst; but the prohibitions themselves were arranged under three several groups or classes, each introduced by the appropriate words "providing" or "declaring." One Judge, indeed, took occasion to express an opinion upon such a case as has now occurred; but this was *obiter* only, and hypothetically; and to that opinion, at least in so far as it might have applied to the present case, I do not understand that he now adheres.

THE COURT pronounced the following interlocutor:—"In conformity with the opinions of the majority of the consulted Judges, sustain the defences, annul the defenders from the whole conclusions of the conjoined actions, and decern; find the defenders entitled to expenses."

ALEX. SMITH, W.S.—W. and J. COOK, W.S.—JAMES CARNEGIE, JUN., W.S.—Agents.

Pursuer's Authorities.—Speid v. Speid, Feb. 21, 1837, (15 S. 618,) (Ardovie Case;) Morehead v. Morehead, March 31, 1835, (1 S. & M'L. ;) Lang v. Lang, Aug. 16, 1839, (M'L. & R. p. 871, Lord Brougham's Opinion;) Lockhart v. Lockhart, May 20, 1841, (ante, Vol. III. p. 904, Lord Jeffrey's Note;) Sinclair v. Sinclair, Feb. 26, 1841, (ante, Vol. III. p. 636, Lord Cockburn's Note;) Murray, March 19, 1833, (House of Lords;) Brown v. Murray Macgregor, March 11, 1837, (15 S. 837, and S. & M'L. 4;) Barclay v. Adam, May 18, 1821, (1 S. Ap. Cases, 24;) Sharpe v. Sharpe, April 18, 1835, (1 S. & M'L. 594;) Horne v. Rennie, March 13, 1838, (3 S. & M'L. 142;) Thomson v. Boswell, Feb. 27, 1839, (ante, Vol. I. p. 592.)

Defenders' Authorities.—Sandford on Entails, 2d Edit. p. 103; Monypenny v. Campbell, Aug. 16, 1839, (M'L. & R. 898;) Barclay v. Adam, Morehead v. Morehead, and Speid v. Speid, *ut sup.*

No. 59.

Jan. 28, 1845.
Preston v. the
Heirs of Entail
of Valleyfield.

No. 60.

Jan. 28, 1845.
Davidson v.
Magistrates, &c.
of Anstruther
Easter.

JAMES DAVIDSON, Advocate.—*Rutherford—Deas.*
MAGISTRATES AND TOWN-COUNCIL OF ANSTRUTHER EASTER,
Respondents.—*Sol.-Gen. Anderson—Cook.*

Burgh Property—Clause—Proof.—1. Where a subject was disposed as bounded by “the harbour, with the pier intervening, upon the west;” and the extent of the “pier” was disputed: proof allowed, to ascertain what was the extent of the “pier.” 2. Where a portion of burgh property was sold by public roup, under 3 Geo. IV. c. 91, and pursuant to advertisement as required by that Act; and the advertisement was referred to in the articles of roup and the disposition:—Held, in the circumstances, that it was competent to refer to the advertisement, to explain an ambiguity in the terms used for describing the boundaries of the subject in the disposition to the purchaser.

Jan. 28, 1845.*

1st Division.
Lord Wood.
B.

By 3 Geo. IV. c. 91, it is enacted, (§ 3,) that the magistrates and council of royal burghs shall give public notice of all intended sales of property belonging to the common good of the burgh, and shall proceed in the same by public roup, in manner specified in § 6 of the statute. By § 8 it is enacted, *inter alia*, that all “feus, alienations, leases, or tacks made otherwise than by public roup, as before directed, shall be altogether void and null,” &c.

In September 1837, the Magistrates and Council of the burgh of Anstruther Easter, in the county of Fife, resolved to sell a subject situated at the harbour or shore of the burgh; and, in terms of the above statute, they caused the following advertisement of the intended sale to be inserted in the newspapers published in the county of Fife, and to be affixed to the doors of the parish church of the burgh:—“To be sold by public roup, &c., those premises called the Fish-yard, consisting of counting-room, salt-cellar, curing-house, smoking-house, and large yard, all enclosed by a high wall. The property is most conveniently situated for carrying on the fish-curing business in all its branches, being close to the eastern pier of Anstruther.—Upset price £90.”

Thereafter, articles of roup were prepared in which this subject was described as “all and whole the houses, sheds, and yard, called the Fish-yard, situated at the shore of the burgh of Anstruther Easter, bounded by the sea on the south, the harbour, with the pier intervening, upon the west, the house belonging to Mr George Rogers, Kilconquhar Mains, upon the north, and the sea, a bulwark or road intervening, on the east parts.” The articles bore that the sale of the subjects was to take place “in terms of the Act 3 Geo. IV. c. 91.”

James Davidson, fish-curer in Dundee, was preferred as purchaser.

* Decided 25th November 1843.

the roup. Thereafter, a disposition was granted to him by the Magistrates, No. 60. which narrated the previous resolution by the Council "to dispose of the subjects after described by public roup;" and that "the said subjects were exposed to public roup and sale in pursuance of previous advertisements," in terms of the statute, and also in terms of the articles of roup. The disposition then conveyed the subjects to Davidson by a description in the terms quoted above from the articles of roup.

Jan. 28, 1845.
Davidson v.
Magistrates, &c.
of Anstruther
Easter.

The harbour of the burgh was bounded on the east by a pier, projecting into the sea. Where the pier left the land, there was a neck of ground jutting out into the sea, on which there was a public road; also some boat-building ground; the Fish-yard sold to Davidson, &c. The pier ran along the whole western face of this neck of ground; and if the "pier" was not of variable breadth, but was as narrow at the neck of land as it was after having passed on into the sea, then there was a small vacant space of ground between the west wall of the Fish-yard proper and the pier proper.

Davidson claimed this vacant space, as comprehended in the disposition to him. The Magistrates, holding the claim unfounded, let the subject to one Methven as a fishing station, from Martinmas 1839 till Martinmas 1840.

In a plan of the premises afterwards made, and referred to in the subsequent judicial procedure, the space of ground thus let to Methven was marked A, and coloured yellow; the Fish-yard proper was marked B. It also appeared from this plan, that "the house belonging to Mr George Rogers"—which was described both in the disposition and the articles of roup as bounding Davidson's subjects "upon the north"—did not extend westwards beyond the Fish-yard proper.

Davidson presented a petition to the Sheriff of Fife, to ordain the Magistrates to remove from the disputed ground, and concluding for violent injuries and damages. The Sheriff, after allowing both parties a proof of their averments respecting the situation of the ground in relation to the pier and Fish-yard, assoilzied the Magistrates from the conclusions of the petition.

Davidson advocated, and pleaded;—That the western boundary of the subject conveyed to him by the Magistrates was expressly stated in his disposition from them to be "the harbour, with the pier intervening;" but that he had been instructed by the proof, that the ground in dispute was no part of the proper pier; and that it therefore followed that it belonged to him. He further contended, that the import of the terms of the disposition could not be legally controlled by reference to any advertisement of the subjects for sale, which might have preceded the disposition.

The Magistrates pleaded that the terms of the disposition to Davidson were ambiguous, in so far as they did not specify the extent of the "pier" intervening betwixt the harbour and the subject conveyed to him; that it could not, therefore, contradict its terms to hold, either that

No. 60.
 Jan. 28, 1845.
 Davidson v.
 Magistrates, &c.
 of Anstruther
 Easter.

the ground in dispute was or was not part of the "pier;" that the previous advertisement of the subjects being referred to, both in the articles of roup and in the disposition, and being by statute a necessary part of the transaction between Davidson and the respondents, might be competently looked at to explain the terms of the disposition; and that, taken along with the other proof in the case, it clearly showed that the ground in dispute neither was *de facto* part of the subject sold to Davidson, nor was it understood by either of the parties at the date of the sale to be so.

The Magistrates further pleaded, that as the house of Rogers was specified in the disposition as the northern boundary of the subjects disposed; and as that house was only the northern boundary of the Fish-yard proper; this was decisive that only the Fish-yard proper was contained in the disposition.

The Lord Ordinary pronounced this interlocutor:—"Advocates the cause, and recalls the interlocutors of 14th July, 15th September, and 1st November 1842, complained of, being the only interlocutors for a recall or alteration of which the complainer now insists; and finds, that by disposition dated the 31st day of October 1837, there was disposed and conveyed to the complainer, by the Magistrates and Council of the Burgh of Anstruther Easter—'All and Whole the houses, sheds, and yard, called the Fish-yard, situated at the shore of the burgh of Anstruther Easter, bounded by the sea on the south—the harbour with the pier intervening upon the west—the house belonging to Mr George Rogers Kilconquhar Mains, upon the north—and the sea, a bulwark or road intervening on the east parts, with free fish and entry thereto; and all and sundry privileges and pertinents thereof, together with all right, title and interest which the said Magistrates and Town-Council, and their predecessors and authors, or successors in office, had, have, or can pretend to the property of the subjects above disposed, in all time coming: Finds that the respondents—holding that the ground marked A, and coloured yellow on the plan, No. 46 of process, and lying to the west of the wall of the ground marked B on said plan, and between that wall and the wall of the pier, as the line thereof is delineated on said plan, was not conveyed to the complainer by the foresaid disposition in his favour—but the same in October 1839 to a person of the name of Methven, for his exclusive occupation; and thereafter, notwithstanding the assertion by the complainer of his right to the ground, removed from it certain quantities of wood belonging to him, then lying upon it: Finds, that in consequence of this, the complainer presented to the Sheriff of Fifeshire petition, (the proceedings and interlocutors in which form the subject of the present application.) praying for the removal of the respondents and their tenants from the said ground, and for interdict, the complainer contending that the said ground was sold and conveyed to him by the foresaid disposition: Finds, that it has not been instructed by the proof a

duced, that the said ground, the right to which is thus in dispute between the parties, forms a portion of the pier, or is part and parcel of it; and, therefore, finds that it lies to the east of the west boundary given by the disposition to the subject thereby conveyed, and is consequently conveyed to the complainer by the terms of the dispositive clause of that deed: Finds, that although the advertisement which preceded the sale to the complainer, and the prior act of Council, are referred to in the said disposition, it is not competent to the respondents to found on either of them, in order to control and limit the legal effect of the disposition, by excluding from it any ground which, by the terms of the dispositive clause, is conveyed to the complainer: Finds, upon the whole matter, that in virtue of said disposition, the ground in dispute belongs to the complainer, and that by it and the sasine thereon the complainer had a good title to insist in the foresaid application to the Sheriff; and therefore decerns and ordains, and prohibits and interdicts, as therein craved, with the exception of that part of the prayer thereof which prays for an order upon the respondents, 'at their own expense, conjunctly and severally, to bring back and replace the wood before mentioned; and failing which, to decern against them for the full value thereof, and violent profits as in a spulzie;' as to which, it appears to be now unnecessary to pronounce any deliverance: Finds the respondents liable in expenses," &c.*

No. 60.

Jan. 28, 1845.

Davidson v.

Magistrates &c.

of Anstruther

Easter.

* NOTE.—“The point at issue between the parties, is the right to a piece of ground which, on the plan produced, is marked A, and coloured yellow, lying to the west of the wall of the ground marked B, and between it and the wall of the pier, which, at the letter O on the plan, is four feet four inches high, and the foundation of which is continued in the same line. There is likewise another piece of ground marked α on the plan, to the north of what is marked causeway, and to which, although not directly embraced by the depending proceedings, the proof which has been led partly relates, it having been admitted that it stands in the same situation as respects the rights of parties as the ground A, so that the proof in regard to the one is relevant matter in regard to the other also. The ground marked B was confessedly sold and conveyed to the complainer by the magistrates of Anstruther Easter. The complainer contends that the disputed ground A was also sold and conveyed to him by the disposition in his favour; and that therefore the respondents ought, under the circumstances stated in his petition to the Sheriff, to be ordained to remove themselves and their tenants therefrom, and ought to be prohibited and interdicted from entering thereon, troubling or molesting the complainer in the peaceable use and possession thereof, in all time coming. The respondents, while they deny the complainer's statement, and the demand rested upon it, admit (although apparently somewhat inconsistently with the statements which they have adduced proof in order to establish) that the ground A belonged to the magistrates of Anstruther Easter in absolute property, and that, therefore, they had as complete power to sell it to the complainer as to sell to him the ground B.

“There is no question raised in the present case founded upon an allegation of error in *substantialibus* in the contract, or of the contract having been induced by fraud or misrepresentation. The claim of the complainer is not either for damages

No. 60. The Magistrates reclaimed.

Jan. 28, 1845.
 Davidson v.
 Magistrates, &c.
 of Anstruther
 Easter.

LORD JEFFREY.—I have gone carefully over the case, and the result of a tho-

or a *restitutio in integrum*. It is that the disposition executed by the Magistrates in favour of the complainer, in implement of their contract with him, shall be given effect to. The respondents do not dispute that the disposition must be given effect to; but they maintain, that in doing so the complainer has no right to the foresaid ground marked A on the plan. The question therefore is, what is the legal import and effect of the disposition, and whether this must be decided on the terms of the disposition alone, or whether any, and if any, what evidence is admissible to explain, or qualify, or control its terms?

"It is the settled doctrine of the law of Scotland, as a general rule, that prior communings and correspondence resulting in regular title-deeds, are to be considered as superseded by the regular deeds; that the Court cannot look beyond the terms of the deeds, or resort to such communings or correspondence, or to other extrinsic evidence, so as thereby to qualify, and still less to overturn or control, or construe the agreement or transaction of parties as evidenced by the deeds, which themselves become the measure of their respective rights. This doctrine applies equally to missives, advertisements, and all communications between the parties prior in date to the regular and formal deeds by which the transaction is closed, and which form the permanent instruments of evidence of its nature and import.

"Such is the general rule. There no doubt are cases in which, in determining the legal effect of formal deeds, a reference to prior writ, or the admission of other extrinsic evidence, is not incompetent. To enumerate these cases is unnecessary for the present purpose. But, as an instance, the case may be taken where a particular writ is referred to in the deed, and where there is ambiguity on the face of the deed in an important portion of it. There the writ may be receivable as explanatory of the terms used. Or again, extraneous evidence may be admissible, although the words of the deed are clear in themselves, if there be a latent ambiguity arising from extrinsic facts; as, for example, from a particular thing being mentioned generally, without defining its position or extent, and which, in consequence of their being disputed, require ascertainment. Accordingly, if, in describing the boundaries of a subject conveyed, it is set forth as being bounded by another subject—the precise extent or line of boundary of which subject is itself disputed—then evidence may be received in order to ascertain the latter boundary, and so determine the boundary and extent in that quarter of the subject conveyed. The ambiguity in the case put, arises not on the face of the deed, but from extrinsic facts and circumstances; and extrinsic evidence is admitted, not in order to alter or vary, or in any respect to supersede the words of the deed, but to give the deed effect, in conformity to its terms.

"For the reason last adverted to, it is thought that, in the circumstances of the present case, the proof allowed (and which does not appear to have been objected to by the complainer) was competently admitted, in order to show how far the pier, or what was to be considered as part and parcel of it, extended eastward in the direction of the subject sold to the complainer,—that subject being described in the disposition as bounded on the west by 'the harbour, with the pier intervening,' whereby the pier is given as the west boundary; and parties not being agreed as to what was pier or ground forming properly a part and parcel of it, the extent and position of which might be correctly stated, so that there was at least a latent ambiguity in the terms of the disposition, rendering extraneous evidence necessary and competent.

"Now, disposing of the case upon that footing, the Lord Ordinary is of opinion that it must be found that the ground in question was conveyed to the complainer.

"It is true that the disposition (which is in precisely the same terms as the

ough investigation has been, that notwithstanding certain perplexities in the documents, I have come at last to the opinion, that the original judgment of the Sheriff

No. 60.

Jan. 28, 1845.
Davidson v.
Magistrates, &c.
of Anstruther
Easter.

articles of roup) conveys 'the houses, sheds, and yard called the Fish-yard, situated at the shore of the burgh of Anstruther;' and had the disposition stopt there, then—as it is proved that the space enclosed by a wall erected some twenty-five or thirty years ago, within which are the houses and sheds, is what has been generally called the Fish-yard—there might be good ground for maintaining that all that was conveyed was the said space. But the disposition goes on to describe the subject conveyed by its boundaries. It does not leave the matter upon the general designation of the Fish-yard, but it goes on to explain that the Fish-yard which had been purchased, and which was to be conveyed to the purchaser, and is by the deed conveyed, is a subject bounded in the particular manner set forth. The subject is defined by its boundaries; and all within the boundaries set down in, by the terms of the dispositive clause, made over to the purchaser. With such a description, it seems impossible to maintain that the words 'the yard called the Fish-yard' can be viewed as taxative, as it were, of the subject disposed—limiting it to the enclosed ground, and controlling the subsequent ampler and more particular description by the boundaries. There being the additional special statement of the boundaries, it is apprehended that the extent of the subject conveyed must be regulated by that statement. The boundaries must control and be given effect to. In the case of Ure (26th February 1834, 12 Shaw, 494) it was so held, even where there was also a description of the subject by measurement, and notwithstanding the admission that by the boundaries, as contended for, the disponee would get more ground than the quantity contained in the measurement. Accordingly, assume that the precise line or position of the things set forth as forming the boundaries of the subject conveyed on its different sides were perfectly clear and fixed, there would appear to be no room for dispute, that all within these lines would belong to the complainer, although it comprehended ground lying outside the wall of the enclosure made at a prior period.

But the case not so standing, inasmuch as parties were at issue as to the position of the line of the assigned west boundary, the respondents averring that the pier—or what was truly, from its uses, to be considered as a part of the pier—came up to the west wall of the enclosure, so that the additional statement of the boundaries was truly only another and more special description of the ground enclosed by a wall, and which had previously been generally described as the yard called the Fish-yard, there was enough, in these special circumstances, to warrant going beyond the terms of the disposition, so far as necessary to fix, by proper enquiry, the position of the line of the west boundary—the object of that enquiry, it will be observed, not being to overturn or to control the terms of the disposition, or to withhold from the disponee any ground lying within the assigned boundaries, but only to fix the line of these boundaries, and to give effect to these boundaries, and to the disposition in conformity to its terms.

While, however, the proof allowed might be competent, in the circumstances, the Lord Ordinary thinks that, to be of any avail to the respondents, by excluding from the disposition to the complainer any ground as not lying within the boundaries, it would, in the most favourable view of the case for them, be necessary that it should be thereby established, in the clearest manner, that such ground, if not forming in the strictest sense the pier, is at least so intimately connected with it, and so entirely used for similar purposes, that in an ordinary and general sense it might be called the pier, and was understood to be part and parcel of it.

It would extend this note to an inconvenient length to go into the details of the proof. The Lord Ordinary shall therefore only say, that upon a careful consideration of it, and attending both to that part of it which relates to the particular piece of ground to which the petition to the Sheriff applies, and to that which

No. 60. is right. The question depends on what is the "pier," and comes to be one of construction. The question is, whether by the disposition there was bought and

Jan. 28, 1845.
Davidson v.
Magistrates, &c.
of Anstruther
Easter.

relates to the piece of ground marked *a* on the plan, (which, although not yet taken exclusive possession of by the respondents, the parties, as already noticed, are agreed, stands, as regards the question of their respective rights, in the same situation as the other,) it appears to him that no facts are thereby established which can be held as by any means satisfying the above requirement. It is true that (as was strongly relied on by the respondents, and is therefore here specially noticed) it is in evidence that there has always been a road through the ground to the shore or beach on the south; but that may very well be the case without the ground having formed part of the pier, and the question here is not to what rights of road the ground may be subject, to whomsoever the property of it may belong, but simply to whom the property does belong.

"The proof adduced, and to which the Lord Ordinary has referred, consists of a considerable body of parole evidence. He did not understand, at the debate, that the advertisement by which the sale to the complainer was preceded, was seriously founded on by the respondents in relation to this part of the case. Indeed, it could hardly be so, because there seems to be no room for maintaining that its terms could throw any light upon the question of what was or was not pier, or assist in defining the west boundary of the subject disposed, in so far as depending upon the solution of that question. It is unnecessary, therefore, to enquire whether or not the advertisement—if it had mentioned the pier as the west boundary, and had been so expressed as to be explanatory of what was to be understood under the designation of the pier—might, in the circumstances, have been admitted as evidence against the respondents, especially seeing that it is referred to in the disposition ultimately executed in his favour. The advertisement, when founded on by the respondents, was appealed to upon an entirely different footing, and for a quite different purpose—the object being to control and limit by it what, according to the terms of the disposition, would be the legal effect of that instrument, supposing it to be fixed that the west boundary, as there described, is the east wall of the pier. The case of the respondents, as rested on the advertisement, is, that seeing by it, as they say, all that was advertised to be sold was the 'fish-curing yard enclosed by a high wall,' it may be referred to, in order to explain and limit the terms of the disposition, and to confine the right of the complainer, under the disposition, to the ground within the enclosure, although his right otherwise, and apart from the advertisement, would extend over the ground in dispute.

"The Lord Ordinary would only further remark, with reference to the proof adduced in regard to the extent of the pier,—

"1st, That the very fact that, in October 1839, the respondents, as the absolute proprietors of it, let the disputed ground, with the exception of a free cart-road to the sea, describing it as "ground at head of East Pier," to Mr Methven, for his exclusive occupation as a fish-curing ground or stance, (it having, from particular circumstances, come to have a value very different, as it is said, from its worth at the date of the respondent's purchase,) and that, in a relative memorandum, it is described by them as bounded by the 'parapet wall of the East Pier on the west'—is any thing but consistent with the idea that it was considered by the respondents, or understood by the community, to form a part of the pier—or with the plea that it was not included in the sale to the complainer, the disposition in whose favour describes the west boundary of the subject conveyed as being 'the harbour, with the pier intervening.'

"2dly, That, as it strikes the Lord Ordinary, the evidence in regard to the state of possession subsequent to the sale to the complainer, is of little importance either way. On the one hand, it was not exclusive by the complainer, to the total prevention of the other uses to which it had commonly been previously put.

sold, beyond the Fish-yard, an area or space adjoining? Whether this, tota re No. 60.
perfecta, must be held to have been intended? For all questions of construction,

Jan. 28, 1845.
 Davidson v.
 Magistrates, &c.
 of Anstruther
 Easter.

On the other hand, it would appear that the complainer took all the use of it he required for his own purposes; and, as it was not enclosed, it might have been troublesome, and he might have no inclination to stop others resorting to it, if not to his individual inconvenience. Certain it is, that whenever he found that the respondents were attempting to claim a property in the ground, he asserted his right under the disposition in his favour.

"3dly, That, considering the terms of the first part of the dispositive clause in the disposition, the complainer can derive no material aid, if any, from the clause of privileges and pertinents, because his claim must be maintained upon the footing of the ground being within the assigned boundaries. If that is established, he does not require to found on the clause of privileges and pertinents. If it is not, the clause could not avail to give him a right to it.

"Taking the case, then, as being to be decided upon the terms of the disposition and the proof, the Lord Ordinary is of opinion that the west boundary of the ground disposed to the complainer must be held to be the wall of the pier, as marked upon the plan; that, therefore, the right to the disputed ground A is in the complainer, and that his application to the Sheriff was well founded.

"But it remains for consideration, whether, as was contended for by the respondents, the advertisement which preceded the sale to the complainer can be looked at to control or limit the terms of the disposition. The Lord Ordinary has already expressed his opinion, that, in the general case, this is incompetent; but its competency in the present instance has been urged on different grounds.

"1. It is said that there is ambiguity or uncertainty in the terms of the dispositive clause of the disposition. The only uncertainty which can be alleged to exist, is in regard to the extent and position of what is given as the west boundary of the subjects disposed. Referring to the previous remarks upon this point, the Lord Ordinary holds that it can be carried no further than to support the admission of evidence to show what was to be taken as forming a part of the pier, and for which it cannot be pretended that the advertisement could be of any use. The object of founding on the advertisement is altogether different, and has been already explained.

"2. It is said that the advertisement is referred to in the disposition. But assuming the terms of the disposition to be explicit on the face of the deed, and the only alleged latent ambiguity to be removed by the evidence competently allowed for that purpose, it is thought that reference in the disposition to the prior advertisement is not sufficient to warrant a departure from the general rule, and to admit the advertisement to be founded on for the purpose proposed by the respondents—viz. to exclude from the conveyance ground which, in determining the competency of its being admitted, it must be assumed would otherwise be carried to the complainer. It will be remarked that the disposition not only refers to the advertisement, but to articles and conditions of roup. It was upon the articles and conditions of roup that the sale more immediately took place. They profess to contain a full and accurate description of the subjects to be sold. If, therefore, any reference could be made either to the advertisement or the articles of roup, to explain and control the disposition in respect of being therein referred to, it would seem that it must be to the latter, not to the former. But the latter correspond in all respects with the solemn deed by which the transaction between the parties was finally settled.

"3. It is said that the sale was one made under the 3 Geo. IV. c. 91, and the argument seemed to be, that looking to the provisions of that statute, the complainer must be presumed to have known the terms of the advertisement, and to have purchased in reference to its terms, as fixing the subject sold, and as forming part of his title.

No. 60. where a flexible term is used, come to be questions of intention merely; and here, *ex concessis*, there is flexibility or ambiguity requiring to be explained by proof.

Jan. 28, 1845.
Davidson v.
Magistrates, &c.
of Anstruther
Easter.

"Now, it is not clear that the want of an advertisement would nullify a sale by the magistrates of a burgh; and it is less clear that a nullity could be declared, in respect of there having, in the sale of the property, been more included in the description given in the articles of roup, and in the disposition in favour of the purchaser, than might be held to be comprehended by the words used in the advertisement. But be that as it may, the question here is, not whether the respondents contravened the statute, if by the disposition they conveyed more to the complainer than fell within the terms of the advertisement; but only, what is the extent of ground which that disposition does by its terms convey, which it is admitted must, in the present proceedings, be given effect to? Unless, therefore, it could be contended that there is an absolute presumption that the respondents neither sold nor disposed any thing beyond that which can be shown to have been distinctly advertised to be sold, it is not apparent upon what principle the advertisement can be appealed to, to explain and control the disposition. If it were to be so, then it follows, that in such sales the disposition is entirely superseded by the advertisement, which, and not the disposition, would substantially come to be the writ evidencing the extent of the subject bought and conveyed. The Lord Ordinary cannot go into that view. He, on the contrary, thinks, that in the question of what is the subject conveyed, the terms of the disposition supersede the advertisement; and that however relevant it might be to refer to the advertisement in a reduction of the disposition, as conveying more than was advertised to be sold, it cannot be founded on when it is admitted that the disposition is to be given effect to; and the only question is what, by its terms, the disposition does convey. If by its terms the ground in dispute is conveyed to the complainer, it is apprehended that it cannot, in the present case, be held not to be included in the disposition, or conveyed by it, because it is not included in the advertisement, any more than it could be so held in a sale made in the ordinary case, and not under such a statute. But taking it to have been a sale in the ordinary case, the disposition in favour of the complainer could not have been affected by the advertisement, although referred to in it, and although it were assumed that its terms were known to the purchaser.

"With regard to the present case as being that of a sale under the statute, it is further to be kept in view, that, as already noticed, the disposition refers to the articles of roup prepared for the more complete information of parties, and upon which the sale actually took place, and with the terms of which those of the disposition entirely tally. If, then, the terms of the disposition are explicit, and comprehend the disputed ground, but it is alleged that it was not sold or intended to be conveyed, upon what principle shall the advertisement be preferred as affording the evidence of what was sold? It would rather appear, that from the nature of the thing, the writ to be appealed to is the articles and conditions of roup.

"It may be proper to notice, that the disposition further refers to the act of Council which preceded the advertisement. But although it was alluded to, the respondents did not seem to insist that it could competently be founded on. The Lord Ordinary, however, thought right, in the preparation of the case, to appoint it to be produced, which had not been done in the inferior court.

"Upon the whole, the Lord Ordinary is of opinion that, in the circumstances, the complainer was entitled to hold, and must be presumed to have held, that the ground in dispute formed part of the subject which was sold to him, and conveyed by the disposition granted in his favour; and that, therefore, the petition to the Sheriff was well-founded as a necessary step for the vindication of the complainer's legal rights."

In ascertaining the intention of the parties, there is one class of circumstances which is the first thing to be looked to—I mean that class referred to in the judgment of the House of Lords in the case of Furlong, showing with what knowledge of circumstances the parties approached the transaction. This doctrine is well known in the law, and is given effect to in family settlements, and even in deeds of entail. The presumption then arises from the position of the parties, and the relation in which they stood to each other.

No. 60.

Jan. 28, 1845.
Davidson v.
Magistrates, &c.
of Anstruther
Easter.

In this case, looking to the facts disclosed in evidence, I hold it to be proved, that for thirty years the area now claimed exhibited no visible building of any kind, but that the whole had been open, without limit or mark of distinction, equally accessible with any other part of the common property of the burgh. Another circumstance clearly established is this, that there is what has been admitted to be a right of public road. Now, though that has been the name given to the right, I do not see that it is properly a right of road. Such a right is always limited to a convenient space, while here the whole area has been used in every part of it. We must always have in view, that this is the pier of a very small burgh. It appears that the greatest part of the traffic is on the west pier, and that the east is chiefly used for fishing. It is proved that during the fishing season the whole space in question is covered with carts, and that from the brink of the breastwork up to the wall of the Fish-yard, the whole has been, when occasion required, used as public property. There is not the least appearance of any one having ever claimed a right of private property in it. It is proved, that for thirty years back it had never been let as part of the Fish-yard, or so held by any of the persons having leases. These are circumstances plainly in the knowledge of the parties, which render it very improbable that it was intended by the transaction in question and by the use of ambiguous words to convey this area.

We must look to the words of the dispositive clause, and I confess that, while there is an ambiguity requiring the consideration of the context and the manner in which they are introduced, my impression as to the intention of the parties is confirmed by them. I first find that what is expressly deponed, is denominated "the Fish-yard" and houses thereto belonging. That, in common parlance, imports an enclosure which is in its own nature a bounding conveyance. When we proceed to the boundaries, we must bear in mind that they are the boundaries of a fish-yard, and that all that was meant was to describe accurately where the yard was actually situated. It is conveyed with all title which the disponents have to the property. I think that is very strong. Then, on the face of the instrument, it is stated that the sale was under the authority of a public statute, and with reference to an advertisement required by the statute in which the subject was described. It is also said that the subject is bounded on the north by the house belonging to George Rogers. Without dwelling on all of those circumstances, which however are not to be lost sight of, I am inclined to think that the two last are sufficient *per se* to settle the question—especially the advertisement. I think it is perfectly precise, excluding every thing without the wall of the yard. This advertisement was required by the statute under which the sale took place, and it seems clear that the penalty of the want of advertisement is a nullity of the whole procedure. We have nothing to do with the liability of the magistrates. We only look to the statute, which says that if a burgh property is sold without proper advertisement the sale is null. On that ground

No. 60. alone I think there is a complete bar to the advocator's claim, there being an insuperable presumption that it was not intended to give the ground against the statute.

Jan. 28, 1845.
Davidson v.
Magistrates, &c.
of Anstruther
Easter.

With regard to all voluntary communings prior to a contract entered into by parties who have it in their power to act as they please, there can be no doubt that such will not be allowed to control the words or terms of the subsequent written contract. But what is the reason of that? Why, that the parties had power to do as they chose, and alter the original terms. But where we come to deal with a preliminary which is an obligation imposed by statute, it would be an extraordinary extension of the maxim referred to, to hold that such a case fell under it. If, therefore, the disposition had in express terms conveyed the subject in dispute, it not being specified in the advertisement, which was a necessary statutory preliminary, I should have held that the party could found no claim thereon.

Then I come to the northern boundary. No property can be claimed under this disposition, which has not Rogers's house on the north. This of itself is sufficient to overrule any ambiguity in the other boundaries. It is said, however, that the claim is not excluded by the description of the west boundary. Now, I think it is plain that, after the erection of the Fish-yard, if there was any pier at all between it and the harbour, the whole intervening space was that pier, and was not improperly so denominated. It is said that by digging down there was found the remains of an old line of building, (a sort of fossil wall,) and that this was the boundary of the pier, which had been made before the embankment forming the area in dispute. Now, if the embankment had been made first, there would have been no such wall on the landward side; and I look upon the embankment as a mere addition to the pier. Carts do not get the whole way down the pier; only part. I do not think that the circumstance of the Magistrates having let this area to Methven shows that it was part of the pier. I attribute that circumstance entirely to the *res angusta* of the burgh, and a wish of its office-bearers to turn every thing to account. I do not know that it is beyond the jurisdiction of the Magistrates, in regard to such a harbour, to let the area, under proper restrictions and limitations. They may enlarge or diminish the pier, according to the necessities of the trade, for any thing I can see. Then it will be observed, that the pursuer buys the whole subjects for £115, while the area would let for £15 per annum.

I may add, in general, that, on the whole proof, I am satisfied that the area or embankment in question was just an extension of the pier, and part and parcel of it.

LORD MACKENZIE.—I concur. There might have been a question, if the ground had been conveyed, whether the disposition to that extent was null; and if so, whether, in a reduction, it fell to be set aside *in toto*. But I think that is not before us. It appears to me that the object of mentioning the pier was to show the boundary of the Fish-yard, and not to include any thing else beyond the wall, which was part of the subject disposed;—just as if there were a conveyance of a house in Leith, bounded by the pier. This could have given nothing but the house. I cannot think it was intended to give this area of ground besides the Fish-yard.

LORD PRESIDENT.—As I understand there is a difference of opinion, I think it

right to state the grounds on which I proceed. I soon saw from the pleadings of the parties, that it was necessary here to resort to the proof to solve an ambiguity, and it does occur to me, that when we attend to the whole documents and proof, the result is as stated by Lord Jeffrey. The disposition, *ex facie*, refers to the articles of roup and advertisement. The statute is a most salutary act to prevent abuses as to burgh property. I agree that it not only requires advertisement, but that if the sale be not proceeded with by articles of roup, in reference to that advertisement, the sale will be null. This point, however, I at the same agree, is not before your lordships. But still, it is material to look at the statutory advertisement and articles of roup, as elements in the construction of the boundary. The advertisement is unequivocal as to what was to be sold. It is there described as "these premises called the Fish-yard," consisting of counting-room, &c., "all enclosed by a high wall." This was a warning to all concerned that nothing else was to be sold. Then the articles of roup bear, "all and whole, the houses, &c., called the Fish-yard, situated, &c., bounded, &c.," (reads;) and the disposition is in the same terms. I think that the Fish-yard is a definite subject, which excludes this piece of ground. The yard is a definite and limited subject in itself. If the pursuer claims any thing more, he must demonstrate that it is included in his disposition. Taking this in connection with the fact, which made a great impression on my mind, that Rogers's house is the northern boundary, and does not cover any part of the ground in dispute, there appears to me no room for doubt. I am of opinion that, considering the narrow space this ground occupies, the proof is not sufficient to show that it is not part of the pier. It is truly the back of the pier. It is proved to have been recently embanked, and always to have afforded a road to the sea-beach. There is no reservation of this roadway in the pursuer's disposition, and the evidence satisfies me that the ground in question is just a part of the pier. Bauldie says he has seen the tide rushing over the ground into the harbour, which shows the use of embanking it to protect the pier. I think it formed no part of the property advertised or disposed.

LORD FULLERTON.—I still retain the opinion which I had originally formed, that the interlocutor of the Lord Ordinary is well founded. The mode in which the case has been treated, involves important questions on the construction of written documents.

The sole question is the construction which is to be put upon the terms of the disposition. There is no question raised as to the right of the respondents to survey the subject in dispute. In the first place, it is important to keep in view that this is in terms a bounding grant. A general description of the Fish-yard and houses is followed by the mention of precise boundaries. The one is descriptive, and the other is alone to be looked to for the limits of the subject. Boundaries cannot be limited by a general description. The only boundary much in dispute is that on the west, viz. the "pier." The question is, what is the pier? There may, no doubt, be proof to show what the pier is in reality, but I think it difficult to give any other meaning to the word than that contended for by the advocate. Looking at the plan, and the interpretation it has received from the evidence, I think the obvious meaning of the word "pier" is that artificial structure of stone, which runs from the north wall of Rogers's house to the sea. I don't mean that proof should be excluded as to the meaning of the word "pier" as here used, but I think the *onus* should lie on the party putting so singular a construction upon

No. 60. it as the Magistrates do. I think the proof corroborates the advocator's view. You may have a pier of various materials, but it must be an artificial structure. The ground in dispute might perhaps be called a pier, but the question is in construing a written instrument what the designation "pier" is meant to apply to. Looking to the terms of the disposition, with the plan and the proof, I think the case pretty clear on this point.

Jan. 28, 1845.
Davidson v.
Magistrates, &c.
of Anstruther
Easter.

We then come to what is the important part of the Magistrates' case. It is said that the north boundary is described, but that the boundary on the east is incomplete. To say, that in order to complete the imperfect one you are to give to the definite boundary a construction which it could not otherwise receive, is, I think, extravagant.

We next come to the question about the advertisement, without which, I apprehend, the Magistrates have no case at all. Some views are taken of this, which I own are startling to me. I do not say, that where there is ambiguity in a disposition it is incompetent to look to previous writings to clear it up. That was done in Furlong's case. But supposing the principle sound, it would be necessary to show ambiguity first. But how do you raise the question here? The party must say this—I understood the word "pier" in a particular sense, and I will prove this by the advertisement which preceded the sale. That would be a very singular use of an advertisement. An advertisement is a mere public notice. The purchaser here denies that he ever saw it. The articles of roup alone are looked to by purchasers, and, to allow an advertisement to explain them, would be reversing the ordinary rule. Besides, the advertisement here does not make the matter any clearer. It does not show that the pier was understood in Anstruther Easter to come up to the Fish-yard wall. You cannot thereby prove any thing as to the intention of parties. Even if the purchaser had seen the advertisement, does it show more than that the Fish-yard is close to the eastern pier of Anstruther Easter? The terms are merely descriptive of its having the advantage of being near it. It is a different question whether it actually touches it. Advertisements do not receive a strict interpretation. The advertisement, in this case, gives only a general description, and no conclusion can be drawn from it as to the meaning of the word "pier."

There is another point, and that is the most important. It is said that the advertisement is referred to in the disposition, and must therefore be taken as a part of it. That would be a very dangerous doctrine. The advertisement forms no part of the dispositive clause, and I do not think we can give any such effect as that contended for to a mere reference to it. It is a statement merely, which the seller is bound to warrant; that he is entitled to sell the subjects in terms of the advertisement. The disponee is not bound to go and see if this has been done, if he is satisfied with the warrandice. Take the ordinary case of heirs of entail having certain power to sell on advertisement; could it be objected to the disposition, by the heir who granted it, that he had not advertised? The buyer may take it on his statement, though sometimes he may prefer to go and enquire. The advertisement is a very good measure of what has been done before the sale, but, as to the extent of the sale itself, you must look to the dispositive clause alone. It is unsound to say that you must construe it with reference to the advertisement. I know no principle or authority for holding that nothing more is conveyed in the disposition than was advertised in the paper; and even if a reduction was brought of the sale, it might be found that the general advertisement would be enough to

sanify the statute. The disposition must, on the other hand, rule the terms of the advertisement, so far as these are doubtful. The question is, what was done, and that from the terms of the disposition does not admit of construction. But I think the advertisement does agree with the description in the disposition, for the words, "up to the pier," are merely descriptive. This question would be raised in a reduction of the sale, on the ground that there was no proper advertisement. I do not think it is raised here; and, what I go upon is this, that in a disposition of this kind a statement of powers to sell in the narrative can never raise a question as to the extent of the grant. I think here "pier" means the stone building between the harbour where the vessels lie, and the Fish-yard; and, therefore, I am of opinion that the interlocutor of the Lord Ordinary was well founded.

No. 60.

Jan. 28, 1845.
Galloway v.
Scrivens.

THE COURT altered the interlocutor, and found that "the boundary clause of the said disposition ought not to be held to extend to the Fish-yard disposed beyond the walls enclosing it on the west, or so as to include the ground in question, and that the complainer has failed to instruct that the ground in question was sold to him by the respondents in the advocacy, or that he has any property therein, or any other right to the use or occupation thereof, than may belong to him as a burghess or inhabitant of the burgh, or an adjoining proprietor: And therefore, and in respect that his original petition proceeds entirely on the assumption of his having acquired an exclusive right by virtue of his disposition to the Fish-yard, refuse the desire of the said petition, and assolvie the respondents from the conclusions thereof, and decern:—"Find the complainer, James Davidson, liable in expenses of process, both in this Court and in the inferior court."

BROWN and MILLER, W.S.—T. and B. LANDALE, S.S.C.—Agents.

WILLIAM GALLOWAY, Reclaimer.—*Maitland*.

EDWARD SCRIVENS, Respondent.—*Pattison*.

No. 61.

Process—Cessio—Stat. 6 and 7 Will. IV. c. 56—A.S. 24th December 1838.
—Where a reclaiming note from a judgment of the Sheriff in a cessio, which had come before the Lord Ordinary on the bills during recess, and had not been disposed of by him before the commencement of the session, was not boxed to the Judges for a fortnight after the sitting of the Court,—Objection repelled in the circumstances of the case, that it was too late under the Act of Sederunt, which provides that it shall be boxed "on the meeting of the Court."

By § 10 of 6 and 7 Will. IV. c. 56, it is enacted, in reference to re-claiming notes from judgments of the Sheriff refusing or granting decree of cessio, which come before the Lord Ordinary on the bills during vacation or recess, that "if the proceedings (under the reclaiming note) have not been brought to a termination before the Lord Ordinary on the

Jan. 28, 1845.
2d Division.
T.

No. 61. bills at the commencement of the ensuing session, the cause shall be re-transmitted and enrolled before the Inner-House." The relative Act of Sederunt, of 24th December 1838, enacts, § 14—"Copies of reclaiming notes from inferior courts, lodged during vacation or recess, and not finally disposed of by the Lord Ordinary on the bills at the commencement of the ensuing session, shall be boxed to the Judges on the meeting of the Court."

Jan. 28, 1845.
Galloway v.
Scrivens.

William Galloway presented a reclaiming note against a judgment of the Sheriff, finding Edward Scrivens entitled to the benefit of cessio. This reclaiming note came before the Lord Ordinary on the bills during the recess, but not having been disposed of by him before the session recommenced, was boxed to the Court.

Pattison, for the respondent, objected that the reclaiming note was not in time, not having been boxed for a fortnight after the sitting of the Court, while the Act of Sederunt required that this should be done "on the meeting of the Court."

Maitland, for the reclainer, answered, that there was no specific time laid down, either in the Act of Parliament or the Act of Sederunt; and that the reclainer had not been able to have his appendix prepared sooner.

LORD JUSTICE-CLERK.—I am always averse to depart from forms when they are laid down; but there is here a want of preciseness both in the Act of Parliament and Act of Sederunt. The former merely says that the cause "shall be re-transmitted and enrolled before the Inner-House," while the Act of Sederunt says that the reclaiming note shall be boxed to the Judges "on the meeting of the Court." The reclainer says he could not prepare his appendix sooner. I do not see that there has been here a specific departure from any established form.

LORD MONCREIFF.—It is evident that the Act of Sederunt requires to be made more specific. It is not so definite as to oblige us to refuse this note on the ground of departure from its provisions.

LORD COCKBURN concurred.

LORD MEDWYN was absent.

THE COURT repelled the objection.

WM. WOTHERSPOON, S.S.C.—CAIRNS and MORFAT, S.S.C.—Agents.

WILLIAM GORDON, Pursuer and Respondent.—*Moir.*

No. 62.

CHARLES GORDON and OTHERS, and HON. CAPTAIN WILLIAM GORDON, Jan. 29, 1845.
Defenders and Suspenders.—*Sol.-Gen. Anderson—Neaves.*
Gordon v.
Gordon.

Process—Abandonment of Action.—In an action where the record had been closed, and the Lord Ordinary had reported the cause to the Court upon cases, the pursuer and all the parties who had entered appearance having craved leave to abandon the case, the Court refused to allow a party who had been called as a defender, but had not originally appeared, to enter appearance.

WILLIAM GORDON of Fyvie brought a declarator of his right to sell Jan. 29, 1845.
his entailed lands of Mains of Maryculter against Charles Gordon, who
was the next heir of entail, failing heirs of the body of the pursuer and 2d Division.
the other heirs of entail. There was also conjoined with this process a Lord Wood.
suspension by the Hon. Captain William Gordon of a threatened charge, R.
proceeding upon a minute of sale of these lands. No appearance had
been made in the action for Charles Gordon; but one of the other substi-
tute heirs having appeared, a record was made up before Lord Wood,
and the cause was reported by his Lordship to the Court upon cases.
When the case came before the Court, it was thought right to delay pro-
nouncing judgment till the case of Carrick Buchanan, which was then
under appeal, and which was considered to be similar in its nature, should
be decided by the House of Lords. Upon the judgment in that case
being pronounced upon 5th September 1844, the pursuer and the whole
parties who had made appearance in the conjoined actions resolved to
abandon the case, and of this date presented a joint note to the Court for
leave to that effect.

A note was then presented by Charles Gordon, stating that he had not
thought it necessary to give in defences, as he had reason to believe that
the validity of the entail would be supported by the other parties, and a
judgment of the Court obtained on it; but as they now sought to abandon
the case, he craved leave to appear as a defender, and adopt the pleadings
of parties, that a judgment might be pronounced.

THE COURT granted the prayer of the joint note, craving leave to
abandon the action; and refused to allow Charles Gordon to
appear as a defender.

JAMES ROSS, S.S.C.—WALTER DUTHIE, W.S.—MACKENZIE and SHARPE, W.S.—Agents.

No. 63. MAJOR-GENERAL JOHN MUNRO, Pursuer.—*Sol.-Gen. Anderson—
E. S. Gordon.*

Jan. 31, 1845.
Munro v.
Munro.

MRS CATHERINE MUNRO or ROSS, and HUSBAND, Defenders.—
Rutherford—Milne.

Property—River—Fishings—Title to Pursue—Process—Amendment of Libel—Expenses.—Question, 1. Whether a party had a title to complain of the erection of a dam-dyke in a river in which he had no property, in respect of being proprietor of stell-fishings in the sea at the mouth of it, which were thereby injured?—2. Whether it was competent to found upon the Act 1696, c. 33, (requiring slaps for the passage of fish to be made in all dam-dykes in rivers,) said Act not being libelled on? The Court, to avoid this last question, allowed an amendment of the libel introducing the Act, but found the pursuer liable in the expenses of a previous discussion thereby rendered unnecessary, and of such alterations in the defences and record as might in consequence be necessary.

Jan. 31, 1845.

1st Division.
Lord Cuning-
hame.
W.

MAJOR-GENERAL JOHN MUNRO, proprietor of the stell-fishings of Ardmore, in the Cromarty Frith, at the mouth of the river Alness, raised action against Mrs Catherine Munro or Ross, and her husband, for erecting a weir or intake in the bed of that river, whereby a portion of the water was led out of it for the purpose of driving a mill, and carried to the sea without being returned. The summons set forth, that the weir so erected had “seriously injured, and almost destroyed, the pursuer’s said stell-fishings of Ardmore, in the mouth of the river, by withdrawing the supply of fresh water, which induced the salmon to resort to the pursuer’s fishing stations of Ardmore—by preventing their access to the upper waters to spawn, excepting rarely in time of flood, by obstructing the passage of the salmon-fry up and down the river to the Frith,” &c. The summons further set forth, that there was an old weir in the river, but of a different size and structure, which did not obstruct the current of the main body of the river, or the passage of salmon or fry, to which the defenders had right, and which they had used till that complained of was erected within the years of prescription. The main conclusion was for declarator, “That the defenders had no right to build or to keep up a bulwark or weir in the river Alness, at the place where the present bulwark erected by them is situated, or of larger size or more solid structure than the old weir: and that they are bound to have slaps or openings of a proper size, so as to admit of the free passage of salmon up and down the said river.”

A record was made up and issues prepared.

The pursuer admitted that the defenders had right to withdraw a certain portion of water from the river at the old weir; and one of the issues sent to trial was, Whether they had withdrawn a larger quantity? But

the issue, on which the only question of importance arose, was the fourth, No. 63. which was in these terms :—

Jan. 31, 1845.
Munro v.
Munro.

“ Whether the defenders have right to a weir or intake in the bed of the said river Alness, with proper and sufficient slaps or openings for the passage of fish, at the place situated 145 feet or thereby on the west bank, and 250 feet or thereby on the east bank of the said river, below the present weir or intake—and, Whether the defenders, or their predecessors and authors, have, within the last forty years, wrongfully erected, or caused to be erected, a weir or intake higher up the said river, without such proper and sufficient slaps or openings as aforesaid, to the loss, injury, and damage of the pursuer’s fishings ?”

In opposing this issue, the defenders maintained that the pursuer, however apparent his interest might be in respect of his fishings in the sea at the mouth of the river, yet having no property in the river itself, had no legal title to complain of any erection in it, without at all events founding his action either upon its illegality at common law, or under the Act 1696, c. 33.*

The pursuer answered, that all weirs in rivers, without slaps for the passage of fish, being contrary to the public law, any one interested was entitled to complain of them ; that the weir complained of was averred to be of this description, and the pursuer’s interest was undoubted. He was not precluded from founding on the Act 1696, c. 33, in support of his plea that the erection was illegal, by not having libelled on it.

The Lord Ordinary found that the issue was relevant, and ought to be admitted. †

* This Act requires, under certain penalties, slaps for the passage of fish to be made in all dam-dykes in rivers. Bell’s Princes., § 112 ; Thomson, June 24, 1830, (8 S. 966.)

† “ NOTE.—It is objected for the defenders, that the pursuer is not entitled to raise any question as to the want of slaps in the weir, because this particular objection to the weir is not set forth in the summons ; and because the ancient Scots law, enjoining slaps to be made in all weirs, is not libelled on. That plea has not received effect, because it is thought that the summons is quite sufficient to let the pursuer into the allegation, that the weir is injurious and illegal in its construction. The summons not only sets forth (p. 6) that the operations of the defenders ‘ have seriously injured, and almost destroyed, the pursuer’s said stellings of Ardmore, in the mouth of the river, by withdrawing the supply of fresh water, which induced the salmon to resort to the pursuer’s fishing stations of Ardmore, by preventing their access to the upper waters to spawn, excepting rarely a time of flood—by obstructing the passage of the salmon-fry up and down the river to the Frith,’ &c. ; but it subsumes, (p. 7,) that ‘ the pursuer has several times interrupted these illegal proceedings, encroachments, and innovations, under arm of instrument and otherwise ;’ and it specially concludes, *inter alia*, (p. 8,) That the defenders have no right to build, or to keep up a bulwark or weir in the river Alness, at the place where the present bulwark erected by them is situa-

No. 63.

Jan. 31, 1845.
Munro v.
Munro.

The pursuer moved the Court to recal this judgment, and counsel were fully heard upon the general question of title raised. Without indicating any opinion, the Court, before answer, appointed the pursuer to give in an amendment of his summons, reserving all questions of expenses. The object of this was to allow the Act 1696 to be libelled on. An amendment was accordingly given in, setting forth that the weir complained of "obstructed the passage of salmon in said river; and, further, did not contain a constant slap or slaps, as required by the Act passed in the year 1696, cap. 33, for the protection of salmon-fishings within Scotland; and the said weir was erected, and is maintained by the defenders, in contravention of the provisions of said Act, and of the other acts on that behalf made."

When this amendment was moved, the defenders objected to it as being an entire change of the basis and nature of the action.¹ If allowed, they could not abide by their record.

The pursuer answered, that the Court had not held it necessary to libel on the statute; and the amendment was allowed only to avoid the question. It was not requisite to libel on a public statute where penalties were not concluded for.

LORD PRESIDENT.—I think the amendment ought to be received. I am not sure that it was necessary to refer to the statute in the summons. I am inclined to think that the party may simply appeal to the general law, and then refer to the statute afterwards.

LORD MACKENZIE.—I also think the amendment ought to be received. But any amendment of the defences or record that may be necessary must be allowed, and any expenses thereby incurred.

The other Judges concurred.

Rutherford, for the defenders, moved for the expenses hitherto incurred in the discussion of the fourth issue, as well as those which might be occasioned by altering the defences and record.

LORD PRESIDENT.—When the Court is doubtful as to the necessity of an

ted, or of larger size or more solid structure than the old weir; and that they are bound to leave slaps or openings of a proper size, so as to admit of the free passage of salmon up and down the said river."

"Under a summons as so libelled, the Lord Ordinary is of opinion that the fourth issue is relevant and competent. He does not conceive that the pursuer is precluded from founding on the ancient statute, to show the legal obligation of the defender to leave slaps, because that Act was not libelled on. As the pursuer did not conclude for penalties, he had no occasion to libel on the statute; but it is competent to refer to it as an authority, to show the illegal construction of the weir without proper slaps."

¹ Gilchrist, Nov. 17, 1838, (ante, Vol. I. p. 37.)

amendment, but advises the pursuer to avoid question by making it, I should doubt whether he ought to be found liable in expenses. No. 63.

LORD MACKENZIE.—I have the same doubt. I thought the amendment necessary, and in that view should have no difficulty; but the Court thought differently. I cannot think that the record admitted the statute, and therefore I must still think that the amendment was necessary, and that the expense of discussing the fourth issue should be paid by the pursuer. Jan. 31, 1845. Mackenzie.

LORD FULLERTON.—I must say, that I think the expense of this discussion part of the expense rendered unnecessary by the amendment.

LORD JEFFREY concurred.

THE COURT pronounced the following interlocutor:—"Find that the amendment of the summons is competent, and that the same ought to be received: Find that the defenders ought to be allowed to make such alterations on their defences; and that both parties ought to be allowed to make such alterations on the record as may be necessary in consequence of the said amendment of the summons: Find the pursuer liable in the expenses hitherto incurred in discussing the fourth issue, and also in the expenses of the alterations in the defences and record rendered necessary by the said amendment of the summons; and remit the case to the Lord Ordinary, in order that he may receive the said amendment of the summons; Allow the alterations on the defences and record aforesaid," &c.

JOHN A. MACRAE, W.S.—SANG and ADAM, W.S.—Agents.

GEORGE MACKENZIE, Petitioner.—J. T. Gordon.

No. 64.

Judicial Factor—Discharge.—In an application for the discharge of a factor loco absentis, where the factor's principal, who was the only party having interest, had examined and docqueted his accounts, and was satisfied with their accuracy, the Lord Ordinary reported to the Court to that effect, without making a remit to an accountant to examine them.

GEORGE MACKENZIE presented a petition to the Court for discharge from the office of factor loco absentis. The party for whom Mr Mackenzie had been factor had examined and docqueted his accounts, and had declared himself satisfied with their accuracy. Jan. 31, 1845. 2^d Division. Ld. Robertson. R.

LORD ROBERTSON, to whom the case was remitted, in reporting it to the Court, stated, that in this case, as the only person having interest was satisfied with the factor's intromissions, he had not thought it necessary to make a remit to an accountant to examine his accounts, which had been held, in a case in the First Division,¹ to be the proper

¹ Christie, Feb. 16, 1844, ante, Vol. VI., p. 681.

No. 64. course, wherever it was not certain that all the parties interested appeared and concurred in the discharge.

Jan. 31, 1845.
Allardice v.
Lautour.

THE COURT granted the prayer of the petition.

GORDON, STUART, and CHEVNE, W.S.—Agents.

No. 65.

ROBERT BARCLAY ALLARDICE, Nominal Raiser.—*Handyside*.
COLONEL PETER AUGUSTUS LAUTOUR and MANDATORY, Claimants.—
Rutherford—Macfarlane.

Provision—Vesting—Clause—Delivery.—A party, in fulfilment of a bargain between him and his former wife, from whom he had been separated by divorce, and as a part of the consideration for her having conveyed certain lands belonging to her, to him and the children of the marriage in their order, granted a bond of provision to the younger children of the marriage nominatim, binding himself to make payment to them equally among them and the heirs of their respective bodies, and the survivors and survivor of them, of £4000, at the first term after the decease of the longest liver of him and his said former wife: the bond further bore to have been instantly delivered for the use and benefit of the grantees: the father having died, and having been survived by the mother of the children,—Held, on a construction of the above, and other provisions and clauses contained in the bond, that the children's interest in the bond had vested in them at their father's death.

Jan. 31, 1845.

2D DIVISION.
Lord Cuning-
hame.

R.

THE deceased Robert Barclay Allardice was married to Sarah Ann Allardice of Allardice, and was subsequently separated from her by divorce. Of date 24th August 1795, Mr Barclay Allardice granted a bond of provision in favour of the younger children of this marriage. This bond bore to be "in terms and in part fulfilment of the bargain between me and Mrs Sarah Ann Allardice of Allardice, formerly my spouse, respecting her conveying to me and the children of the marriage between us, in their order, the lands and barony of Allardice," &c., belonging to her. And as a part of the consideration for this conveyance, and what Mr Barclay and his family acquired thereby, as well as for other causes and considerations, he bound himself, his heirs, executors, and successors, under the provisions, conditions, and declarations therein set forth, "to make payment to James Allardice Barclay, second lawful son of the marriage between me and the said Mrs Sarah Ann Allardice; David Stuart Barclay, third and youngest lawful son of the said marriage; and to Une Cameron Barclay, Margaret Barclay, Mary Barclay, and Rodney Barclay, lawful daughters of the said marriage between me and the said Mrs Sarah Ann Allardice, equally among them and the heirs of their respective bodies, and the survivors and survivor of them, of the sum of £4000 sterling, and that at and against the first term of Whitsunday or Martinmas that should happen after the decease of the longest liver of me and the said Mrs Sarah Ann Allardice, together with the interest of the said principal sum, at the highest legal rate, from and

after the term of Candlemas, Whitsunday, Lammas, or Martinmas, which shall happen immediately preceding the death of the said Mrs Sarah Ann Allardice, yearly, termly, and proportionally thereafter, until the said principal sum is paid, with the sum of £800 in name of liquidate penalty and expenses in case of failure: Providing always, as it is hereby provided and declared, that as the said principal sum of £4000 is hereby made to carry interest from the term preceding the decease of the said Mrs Sarah Ann Allardice, when the annuity I have become bound to pay to her by a separate deed will cease, though the said principal sum may not be then payable in respect of my surviving her, the said interest shall in that case be applied by me for the maintenance and education of my children above named, or any of them, in such way and by such proportions as I may think proper: And further providing, as it is hereby provided and declared, that in case any of my said children herein before named shall succeed to my lands and estate, either as my heir or by conveyance from me, then the share and proportion in the said sum of £4000, and interest thereof, of the child so succeeding shall devolve and accrue to the survivors or survivor, the sums hereby made payable being intended and hereby declared to be as a provision for the younger children of the marriage between me and the said Mrs Sarah Ann Allardice, other than the heir succeeding to or taking my lands and estates: And further providing and declaring, as it is hereby expressly provided and declared, that it shall be in the power of me, the said Robert Barclay Allardice, by any deed, will, or writing, duly made and executed by me, at any time of my life, to divide and apportion the said sum of £4000 among my said children herein named, in such way and manner as I shall think proper, by giving more to one and less to another; but at the same time, so as the capital shall be shared among the said children, according to the true intent and meaning thereof, and of the agreement between me and the said Mrs Sarah Ann Allardice; and failing of such division made by me as aforesaid, that then the said capital shall belong equally to my said younger children, share and share alike; and I have instantly delivered these presents to James Chalmers of Abingdon Street, Westminster, Esq., for the use and benefit of my said younger children, and to be put upon record in the books of session, as soon as can be done conveniently; and I consent to the registration hereof in the books of council and session, or in any other judge's books competent in Scotland, that letters of horning on a single charge of six days, and all other execution necessary, may pass upon a decret of registration to be interponed hereto in usual form."

Mr Barclay Allardice died in 1797, survived by all the children named in the bond. He did not exercise the power of apportioning the provision amongst his children. He was succeeded in his estates by his son Robert Barclay Allardice, who became the debtor in the bond.

Une Cameron Barclay, one of the children named in the bond, married

No. 65.

Jan. 31, 1845.

Allardice v.

L'autour.

No. 65. the deceased John Innes of Cowie. She died in the year 1817, leaving three daughters, one of whom, Une Cameron Barclay Innes, was married to Colonel Peter Augustus Lautour. Mrs Innes had predeceased her mother Mrs Sarah Ann Allardice, who survived till the year 1833.

Jan. 31, 1845.
Allardice v.
Lautour.

Mrs Innes, by her marriage contract, had assigned her interest in the bond of provision to her husband John Innes of Cowie, in consideration of certain settlements therein made in favour of herself and her children. John Innes, by a subsequent deed, assigned this right under the bond to William Innes of Raemoir, who by deed of translation transferred it to the trustees in the marriage contracts of the two sisters of Mrs Lautour. To these parties Mr Barclay Allardice, in the year 1840, paid the above share of the bond, and received from them a discharge.

In June 1841, Colonel Lautour raised an action of multiplepoinding in name of Mr Barclay Allardice, narrating the bond and the death of Mrs Sarah Ann Allardice, and setting forth, that at the date of her death all the younger children named in the bond were dead except two; that they had all died unmarried, with the exception of Mrs Innes, who had left three daughters, of whom Mrs Lautour was one; that in terms of the substitution contained in the bond of provision, the three children of Mrs Innes having survived the liferenter, succeeded to the share which would have vested in their mother had she survived to that period; that the pursuer (Mr Barclay Allardice) was ready and willing to pay the portion of the provision in the bond, to which Mrs Lautour, or those in right of her, claimed right through the decease of her mother, being a third share of a third of £4000, or about the sum of £444, 8s. 10d., with interest from the first term of Candlemas preceeding the death of the liferentrix; that, however, a claim had been set up to the said share on the part of William Innes of Raemoir, as assignee of the deceased John Innes; that on the other hand the said demand was resisted by Colonel Lautour, as in right of his wife, who contended that Mrs Innes never had any vested or assignable interest under the bond of provision, and that the sum therein contained did not vest till the death of the liferentrix, when, in virtue of the substitution, the share which would have fallen to the mother had she been alive, became vested in the lawful issue of her body; and that the pursuer was willing to pay whatever sum could competently be demanded under the bond, to those who might be entitled to come in place of the deceased Mrs Innes, but was interpellated by the conflicting claims of Mr William Innes and Colonel Lautour.

Objections were stated by Mr Barclay Allardice, the nominal raiser, to the competency of the multiplepoinding. He contended that the allegation in the summons, that a claim had been made by Mr William Innes, which was resisted by Colonel Lautour, was inconsistent with the fact, and that there was no double distress; and that the further statement, that he was ready and willing to pay the share in the bond to the party

entitled thereto, was also unfounded, as he had already paid and held a regular discharge for it. No. 65.

The Lord Ordinary, before answer as to the objections of the nominal raiser, appointed condescendence and answers to be given in upon the question of the competency of the action. This record was, by a subsequent minute for the parties, held as the record upon the merits as well as on the question of competency.

Jan. 31, 1845.
Allardice v.
Lautour.

On the merits, Colonel Lautour pleaded;—That, by the terms of the bond, the provision did not vest till the death of Mrs Sarah Ann Allardice, the widow of the granter, and Mrs Innes having predeceased her, there was no assignable interest under the bond in her, which could be carried by her marriage contract. That the share, therefore, which would have accrued to her, in the event of survivance, devolved, in virtue of the substitution, to her daughters, not as representing her, but as heirs of provision of Mrs Allardice.¹

Mr Barclay Allardice pleaded;—That the provision in the bond, vested on the death of the granter in the children surviving him.

The Lord Ordinary pronounced the following interlocutor:—"In respect it is now established, to the satisfaction of the Lord Ordinary, by the record and discussions which have taken place thereon, that Colonel Lautour, the real raiser of this process, has no legal title to any share of the provision set forth on record as the fund in medio, but that the same, when demanded extrajudicially some time before this action was commenced, was rightly paid by Mr Barclay of Ury, the nominal raiser, to Mr William Innes, the assignee of the party legally entitled to receive and discharge the same: Finds, under these circumstances, that Colonel Lautour had no good ground for raising the present action, and that the same ought not now to be entertained: Therefore dismisses the process, and finds Mr Barclay Allardice entitled to expenses." *

¹ Provan, Jan. 14, 1840; Wright, July 9, 1840, (F. C., and ante, II. 1367.)

* NOTE.—This process has been raised by Colonel Lautour, as husband of one of the daughters of the deceased Mrs Innes of Cowie, in name of Mr Barclay Allardice, brother of Mrs Innes, to compel him to account judicially, and pay over to the real raiser, the share of a certain bond of provision granted by his father, the deceased Mr Barclay of Ury, to Mrs Innes and his other younger children, and alleged to have been extrajudicially and erroneously paid by Mr Barclay to Mr William Innes, now of Cowie, as assignee of his brother John, the husband of the grantee.

* This action was resisted by Mr Barclay on two grounds:—1. He objected to the process as an incompetent form of calling him to account for any payment made by him, even if erroneous; and 2dly, He denied the error, and maintained that the payment was made by him to the right party in title of the bond of provision, and competent to discharge Mrs Innes's share of it. It appeared to the Lord Ordinary that the competency of the process depended in considerable measure on the validity of the voluntary payment by Mr Barclay to Mr Innes, and therefore he directed a record to me made up on the objection, before giving final judgment. The full information thus obtained now affords ample materials for the disposal of the case.

No. 65. Colonel Lautour reclaimed,

Jan. 31, 1845.
Allardice v.
Lautour.

The objection to the competency of the multiplepounding was withdrawn by Mr Barclay Allardice at the bar.

“ With respect to the objection to the competency of the action, it is unnecessary now to enter on that point as a separate and abstract question. It now appears clear that there is no fund here which the real raiser is entitled to demand. As the case was first stated by the real raiser, however, the Lord Ordinary could not throw the case out of Court in limine. Colonel Lautour alleged that a sum fairly debatable between him and another claimant was still legally due and in the hands of the nominal raiser; that if the original debtor had brought the usual action of competition, voluntarily calling into the field the parties who had fair claims to it, the competency of the process would have been indisputable, and that he could not oust a party from a legal remedy or process, otherwise competent to him, by a payment privately or extrajudicially made to a wrong party not entitled to discharge it. The Lord Ordinary was not prepared at once to repel that plea. If he had been of opinion that Colonel Lautour's claim under the bond of provision was well founded, he should not have refused to sustain it on the ground that the action was incompetent. Although there was no double diligence, to use words of Lord Moncreiff, approved of by the Court in the case of Miller and Ure, (16 Shaw, 23d June 1838,) there was a fund in which more than one party had interest which could best be adjusted by one process of competition. But these considerations will not apply, if there be truly no debt to be the subject of competition.

“ This leads to the consideration of the claim made by Colonel Lautour on the bond of provision founded on by him, which depends entirely on the question,—at what period the provision vested in the grantees? As Mrs Innes survived her father, and was married some years after his death, Mr Barclay pleads that her share of the provision vested in her at her father's death, and was carried by her transference to her husband in her marriage contract, and by his subsequent assignment; and consequently that he was entitled and bound to pay the assignee. On the other hand, Colonel Lautour, the son-in-law of Mrs Innes, contends, on the supposed authority of the late cases of Provan, of Johnston, and of Colonel Wright's trustees, in 1840, all reported in 2 D. and B., (pp. 298, 1039, and 1357,) that the provision did not vest till the term of payment, i. e. till the death of Mrs Barclay, senior, in 1833; and as Mrs Innes died in 1817, it is maintained that the provision never vested in her, but passed to her children as conditional institutes, in which view Colonel Lautour would be entitled to his wife's share.

“ With reference to these opposite claims, it is plain that the question of vesting must depend on the special terms and clauses of the particular bond of provision which is the subject of construction; and without in the least degree questioning any of the authorities referred to, the Lord Ordinary, in considering the bond in the present instance, has come to the conclusion that the provision contained in it did vest in Mrs Innes, and was validly transferred by her to her husband in their marriage contract, on the following among other grounds:—

“ (1.) Although legacies and provisions have been sometimes placed in the same category in legal argument, it is thought that a certain distinction must in general be drawn between legacies bequeathed to third parties, and provisions given by parents to children. In the former case, there is wider scope for the inference that the vesting was intended to be postponed till the period of payment or division mentioned by the testator; but in the case of provisions to children, the presumption must be as general as it is reasonable and natural, that parents intend their provisions to their children to vest at least from the period of their own death, when they become irrevocable, and when the power of assigning and raising money on the provisions is in most instances required for the outfit of the children in the world.

LORD JUSTICE-CLERK.—The objection to the competency of this multipending has been withdrawn at the bar, and we are thus relieved from the neces-

Jan. 31, 1841

A Hardie v.

Laird.

"It is manifest that, so long as a parent continues in life himself, he can provide for any emergency that may render it necessary for a child to anticipate his provision; but when the parent is dead, the most essential interest of the child may require that he should have the control and disposal of his own patrimony, at whatever future period it may be actually payable by the debtor, to enable him to apply it for his establishment or advancement in life, the purpose for which provisions to children are notoriously intended.

"In another view, the consequence of suspending the vesting of children's provisions, after the death of the father, would in many cases be injurious to the best interests of families. If the vesting were held to be postponed to the latest period, children so provided could not, on their own marriage, make their provisions the subject of settlement, unless they survived the liferenter, but would be compelled to allow their portion to be equally divided among their children, whether requiring or deserving a share or not. It would be very improbable to suppose that parents, in the great majority of instances, intended that the provisions to their children should be so construed as to be subject to these disadvantages.

"(2.) The terms of the obligation, in the present instance, are peculiar, and favourable to the construction of an early vesting. The fund was not, as in some analogous cases, conveyed to third parties and vested in trust; but a direct obligation was granted by the father to the younger children, not as in a class, but nominatim 'equally among them, and the heirs of their respective bodies, and the survivors or survivor of them,' to pay the sum of £4000, and that at the first term of Whitsunday or Martinmas that should happen after the decease of him and his wife; at the same time the father reserved a power of division, and, failing his exercising the same, he expressly declared that 'the capital should belong to my said children, share and share alike.' That provision naturally became operative when the division made by the father, on his failure to divide, became finally ascertained. Then the terms of the bond were entitled to effect, according to the plain meaning of the words, that the provision should belong to the younger children.

"(3.) Although the period of payment was postponed till the death of the longest liver of the granter and his wife, this was entirely for the ease and convenience of himself and his heir, in consequence of a heavy annuity payable by them to the wife, and affords a just inference that the protracted term of payment was intended and fixed on, not in order to postpone the vesting of the provision, but to serve the convenience of the debtor. Accordingly, in case of the annuitant predeceasing her husband, he became bound himself to pay interest to his younger children on the provision contained in the bond, from and after the death of his wife, thus showing that the right to the provision vested, to a certain effect, in the grantees, even prior to the death of the father.

"(4.) The bond not only contains repeated declarations that the sum therein obliged for should be a provision for the granter's younger children, but it contained a clause of immediate delivery, specially bearing, that 'I have instantly delivered these presents to James Chalmers of Abingdon Street, Westminster, Esq., for the use and benefit of my said younger children, and to be put upon record in the books of session, as soon as can be done conveniently.'

"(5.) This brings the question here to the enquiry, at what period were the parties here referred to as younger children to be ascertained? and this the granter does not leave in doubt. It is specially provided, in a previous clause, that 'in case any of my said children, herein before named, shall succeed to my lands and estate, either as my heir, or by conveyance from me, then the share and proportion in the said sum of £4000, and interest thereof, of the child so succeeding, shall devolve and accrue to the survivors or survivor, the sums hereby made payable being intended and hereby declared to be as a provision for the younger children

No. 65.

Jan. 31, 1848.
Allardice v.
Lautour.

sity of deciding a point, it might be, of some nicety, in which, as it turns out, the parties had now no real interest. But the interlocutor of the Lord Ordinary could not have been adhered to in any view. For he truly sustains the objection to the process, by reasons founded on the merits of the competition. This course could not be taken—we must either have found the process competent or incompetent, in respect of the nature of the point to be tried. The objection to the process is, however, not now before us.

The case depends on the question, whether the share or interest of Mrs Innes, under her father's deed of 27th August 1795, vested so as to be transmissible by assignation, or did not vest. I have arrived at a very decided opinion that her interest did so vest. I must begin, however, by stating that I cannot concur in many of the reasons set forth in the note of the Lord Ordinary. The supposed distinction between provisions to children and legacies to others, cannot be relied on as affording any general rule that will in any degree control or affect the construction of the terms in the particular deed, if these, on the whole, lead to a different result. At the utmost, this supposed distinction could only raise a sort of presumption as to intention; and really, in some cases, the presumption may operate as strongly the one way as the other. It seems to me to be an unsafe ground to adopt in the construction of any particular instrument, to the extent stated by the Lord Ordinary. And accordingly, in many prior cases, the results have been against vesting in instances of provisions to children, and in favour of vesting as to legacies, in respect of the terms of the particular deed, which always determine the matter.

Further, it seems very hazardous to allow the interpretation of the terms employed in any particular deed, to be in any degree affected by views as to the expediency of giving children vested interests under family settlements, so that they may raise money on the credit of assignation; and as to the beneficial results to follow from their having such vested interests. Such views ought not to operate with the Court in deciding what was the arrangement actually laid down by a parent in any particular case, and what is the legal effect of the provisions contained in his deed. The interests of the child, in the opinion of others, may not

of the marriage between me and the said Mrs Sarah Ann Allardice, other than the heir succeeding to or taking my lands and estates.'

"From the phraseology of the preceding clause, it follows clearly and unmistakably, that the granter of this bond meant and understood that all of his children who were younger children at the date of his heir's succession to him in the estate, should have an interest in and share of the provision. Hence the provision necessarily vested at the death of the granter when his heir succeeded. Had any other younger child succeeded to the family estate as heir to his or her brother, after the death of the father, but before the death of the mother, they would not, from the terms of the bond, have lost their share of the provision vested in them when the first heir took the estate, because they would have acquired the estate, not as heir of the father, but as the successor of the brother or sister.

"On these grounds, the Lord Ordinary is of opinion that Mrs Innes, by surviving her father, had a vested interest in her share of the provision, which she was entitled to convey; and if so, there is no fund in medio, and Captain Barclay is entitled to have his process dismissed, in respect he paid his sister's share to the right party legally entitled to receive and discharge it."

have been provided for in the best or most liberal manner by the father; it might be made more beneficial in the actual state of things which has occurred, to give the child a better provision than the parent really has done. But the only legitimate enquiry is, what has the parent actually done? What is the legal effect of the provisions in the father's deed—construed without reference to such views of general expediency, according to the natural obvious meaning of the terms employed, or according to the legal and technical meaning, if the terms employed have received a fixed and technical meaning? No. 65.
Jan. 31, 1846.
Allardice v.
Lantour.

The deed before the Court affords, in my opinion, sufficient and satisfactory grounds of decision, without having recourse to any such extraneous, arbitrary, and conjectural views.

1. The deed bears to contain a provision for the *younger children*, actually existing and specially named, of a marriage dissolved by divorce, granted in fulfilment of "a bargain" entered into between the grantor and the mother, formerly his wife, by which she conveyed an heritable estate to him and the children in *their order*. The deed then is one expressly intended to make, as the result of this coerced agreement, a certain and fixed provision for the grantor's children *individually*, by that mother. Then *particular* children are the parties meant to be benefited, and this in return for the settlement of the mother's landed estate on the eldest.

2. The children are all specially named in the deed.

3. The deed was delivered. This is a very remarkable fact as to a bond of provision; and either delivery set forth in the deed, or a clause dispensing with delivery, has often most decided influence in determining the legal effect of an instrument. It may be sufficient of itself to decide whether an interest vested under a particular deed. Further, the deed is declared to be delivered "for the use and benefit of my said younger children." The deed was thus onerous in its origin, specially granted for the benefit of the particular individuals therein named, and delivered, as it bears in gremio, for their *use and benefit*.

4. The obligation is direct to make payment to the children nominatim.

5. Though the term of payment is postponed till the death of the longest liver of the grantor and the mother, owing to an annuity payable to the latter, yet there is no life rent constituted by this deed over this particular sum of money, and no trace of any investment of a sum.

6. The sum provided is to bear interest, if the mother predeceases the grantor during the father's lifetime; and although he is to apply the interest for behoof of his children, yet still he is bound so to apply the interest. This is a very important, and in many cases decisive fact, as to the question of vesting. On bankruptcy, the particular children named in the deed would have ranked as onerous, although antecedent creditors on the father's estate; and it is not easy to see grounds on which it can, at the same time, be held that they had no vested interest in the sums provided for them.

7. Then, although the father reserves power to divide and apportion the sum, which, in the ordinary case of a gratuitous bond, would give him complete power over the share of any one, yet this power is in this deed expressly restrained by the declaration, that it must be so exercised as that the "capital shall be shared among the said children, according to the true intent of the agreement between me and Mrs Allardice." This clause leads me to believe that this agreement was in

No. 65.

Jan. 31, 1845.
 Allardice v.
 Lantour.

writing, and probably its terms might have been of use in the enquiry as to the rights of the children under the deed in question.

None of the previous decisions which have been quoted have any bearing on this case. They all stand very well together—appear to me to be perfectly consistent in their general strain, with the exception perhaps of *Marjoribanks*, and to afford valuable principles in the construction of similar cases. But here there is no trust created by this deed at all—no fund placed in trustees to be held by them. There is no investment in any form of a sum of money, nor any provision for any such investment to be made. The deed is a direct obligation, binding the grantor, his heirs and executors, to make payment of a sum of money to the parties therein named; and this is the whole structure and character of the deed. The obligation is not charged on any particular fund, even in the first instance. Certainly this is, generally speaking, the most direct case for vesting which can occur, whatever may be the term of payment—viz. a direct obligation to pay money to A B and C D. But then it is said that the obligation is to pay to the children *nominatim*, and the heirs of their bodies, and the survivors or survivor of them. The first addition, the “heirs of their bodies,” only the more marks the benefit intended for the parties named; and even in the case of a regular trust, and a sum invested in the mean time for the behoof of a *liferenter*, that addition in the case of a legacy to a third party, not a child, was not, in the case of *Marjoribanks* and in some others, taken as excluding the vesting of the interest in the party named as having benefit in the fee.

The other addition, “survivors or survivor of them,” is of more importance, and in some cases may go very far to decide the question of vesting. I do not, on consideration, attach importance to it in *this* particular case.

(1.) Experience shows, that however clearly the construction of a deed, on the whole, may be in favour of an interest vesting, some words or expressions often occur, which create at first sight a puzzle, just because the propriety of qualifying or explaining such words does not occur at the time; and therefore the question must be decided on the sound construction of the deed as a whole, taking its objects, character, general structure, and express declarations as to the parties to be benefited.

(2.) Although this expression occurs in the obligation in favour of the payees, yet it is to be kept in view that this is a reference to the relative interest of the payees themselves, not a substitution in favour of third parties. And any such expression as to contingent or relative interests among the payees themselves, ought to be construed in subservience to the primary and direct obligation to the *nominatim* payees, and not so construed as to deprive them *all* of direct and vested interest, merely in respect of a contingency which may or may not happen in favour of some. And this the more when the obligation is, in the first instance, to the heirs of the body. No competing interest, when there is issue, can arise, as in the second branch of the case of *Clelland*, with the survivor. Hence it would be adverse to every sound principle of construction to limit and restrict the benefit to the parties named, in respect of this latter addition, when there is previously introduced to the exclusion of the survivors the material benefit to heirs of the body. And I repeat that, in the ordinary case, an obligation to pay to the parties named, and the heirs of their body, only seems to me the more to mark the direct personal interest given to the parties named, and so to render the exclusion of vesting by reason of this after declaration as to survivors the more inadmissible.

(2) I do not think that in a direct obligation, such as in this bond, instantly delivered, for a sum of money payable equally to parties named, any addition of this sort can exclude by inference the *direct legal consequence* of such an obligation in favour of particular individuals.

No. 65.
Jan. 31, 1845,
Allardice v.
Lautour.

(4) That the declaration as to survivors might take effect in case of one of the parties dying intestate and without issue, although after the death of the mother a longest liver, is true enough; indeed the survivors would then be the next of kin. But as a provision or condition of the deed, I am satisfied that in this bond a delivered instrument, and containing a direct obligation in favour of the parties named, the reference to survivors applies to, and is satisfied by, survivance of the grantor. And this construction is most satisfactorily justified by the clause, that in case any of my said children shall succeed to the grantor's landed estates, then the share and proportion of that child shall devolve to the *survivors or survivor*. In this very material case, which might so probably have happened in the course of nature, the death of the grantor is beyond doubt the period to which survivance has reference. And then the clause goes on with this important declaration, which has a great bearing on the whole question of vesting, that the sums payable under the bond are *intended*, and are hereby *declared*, to be as a *provision for the younger children* of the marriage, which had subsisted between the grantor and Mrs Allardice, *other than the heir* succeeding to his lands and estate. No claim could be stated on the part of the heir of the body against the parent, if the deed had not contained the provision as to survivors. I think that to be a settled point. But if so, it seems the more against principle to allow this addition to give to the heirs of the body against the party named an interest and a right against their parent, which but for this addition they could not have.

I am therefore of opinion, that the share and interest of Mrs Innes in this sum did rest.

Lord MONCRIEFF.—This is a very special case, and, whatever difficulty may attend it, I think that it must be decided, on a careful consideration of the terms of the bond on which the question entirely depends, according to the best judgment which we can form of the intension thereby expressed. I think that we get very little aid from any other cases referred to, none of which, in my opinion, materially resembles it.

This is an onerous bond, executed under very peculiar circumstances—which circumstances appear distinctly on the face of the deed itself. It constitutes part of an onerous transaction between the late Mr Barclay and the lady who had been his wife, she being designed “formerly my spouse.” Then it appears that Mr Barclay had granted to her a bond or obligation for an annuity, which is specially referred to in relation to the term when that annuity would expire; and this bond is executed expressly “in part fulfilment of the bargain between me and Mrs Ann Allardice of Allardice,” of which the obligation of annuity had formed another part.

But it is very material, as distinguishing this case from all others, that the subject-matter of this bond—the money provided—is not in any manner constituted in favour of Mrs Allardice. There is no liferent of it to her; and so it is not a case of liferent and fee by constitution at all.

The obligation by the bond is further granted “as a part of the consideration” of a conveyance executed by Mrs Allardice, of her own estate of Allardice, in

No. 65.

Jan. 31, 1845.
Allardice v.
Lautour.

favour of Mr Barclay and the children of the marriage, in their order—that is, to the heir of the marriage, “as well as for other good causes and considerations.”

This being the character of the deed, the express obligation is, “to make payment to James Allardice Barclay, second lawful son of the marriage—David Stewart Barclay, Une Cameron Barclay, Margaret Barclay, Mary Barclay, and Rodney Barclay, equally among them and the heirs of their respective bodies, and the survivors and survivor of them, of the sum of £4000.” Thus it is not a provision to the younger children of the marriage indefinitely, but an express onerous obligation to each of six existing individuals, and the heirs of their bodies respectively, described as the children of that marriage; the effect of which, I apprehend, as a provision to each of them nominatim, is not altered by the declaration that it is to be paid to them equally among them, which is no more than what would have been the effect of it without any such declaration.

The words which follow, “and the survivors or survivor of them,” have a more emphatic force. But the first effect of them is plainly this, to make it certain that the right constituted by the previous words was not a conjunct right to a class of persons, but a separate right to each of the persons named, whereby, if such words had not been added, the death of any one of them without issue, before the time when such right should be held to have vested in him or her, (whatever time that might be,) would have extinguished the obligation pro tanto.

Such words, as constituting a destination or substitution beyond the first appointment, have in many cases, especially in cases of life rent and fee, been held to be of great importance in determining at what time any right vested in the class of persons first designated; and I certainly think that they are so in many cases, though no one ever said or thought that they are necessarily conclusive against all other indications of intention within the deed.

But in the very peculiar bond now before the Court, these words must be subject to construction with reference to the nature and the character of the obligation, and the other clauses of the deed, for they evidently admit of different constructions. 1. With reference to the precise time, the survivance of which is referred to; and, 2. With reference to the question, whether they denote a conditional institution or only a substitution. And the effect of them in these respects can only be determined by a due consideration of the other parts of the deed.

The bond goes on to provide, that the obligant shall so make payment of the £4000 “at and against the first term of Whitsunday or Martinmas that shall happen after the decease of the longest liver of me and the said Mrs S. A. Allardice.” So it is provided as to the principal sum. But it further bears—“together with the interest of the said principal sum, &c., from and after the term of Candlemas, Whitsunday, Lammas, or Martinmas, which shall happen immediately preceding the death of the said Mrs S. A. Allardice, yearly, termly, and proportionally, until the said principal sum is paid.” These last words are very remarkable; for, according to the construction that there could be no vesting till the death of the longest liver—whichever that were—the natural words would have been, till the principal sum “shall be payable.” Possibly, the words were employed with reference to the single case of the lady surviving the grantor; but still every word is important; and, in the other event of the grantor surviving, the expression implies that he might pay up the provision, without leaving it to rest on contingencies, till his own death.

But it is much more important to observe, that the appointment in regard to the interest clearly imports, that the provision might take effect in the lifetime of the father, the single obligant, and might be in operation for many years before his death; for, if Mrs Allardice had predeceased Mr Barclay, the provision in regard to the interest would have taken effect from the first term preceding her death. The purpose to which the interest was then to be applied, is one thing; but, in the first place, it is an express obligation to pay the interest. And must we not ask, in whose favour would that obligation have emerged in the event supposed? The answer must clearly be, that it would have been an obligation in favour of each of the children previously named, so that it would have been impossible to deny that there was in each some right under the bond vested even in the father's lifetime; and when the deed further provides, that the interest in that case shall be applied for the maintenance and education of the children, it is expressly "of my children above named, or any of them, in such way and by such proportions as I may think proper." In a case of bankruptcy, the bond would have ranked as a debt.

Now I am very sensible that it might have been a very delicate question, and one much more doubtful than that with which we have now to deal, whether, if Mr Barclay had survived Mrs Allardice, there would have been a vested right to the principal in each of the children named, even before Mr Barclay's own death, at which term only it would have been payable. It would be difficult to separate the right to the principal from the right to the interest, at least in the way this bond is constructed; but I do not think it necessary to resolve that question. The case which has occurred is, that Mrs Allardice survived Mr Barclay, whereby the bond was not in operation in Mr Barclay's lifetime; and the single question here is, whether the rights to principal and interest did or did not become vested in the children who survived him, although nothing was payable till the death of the wife, as the longest liver?

But there is another clause in the deed which has in it as near as possible to a plain declaration, that this was the true meaning of the term "survivors or survivor," as employed in this deed. For it is provided, that in case any of the children named shall succeed to the granter's estate, "either as my heir or by conveyance from me, then the said share or proportion of the said sum of £4000, and interest thereof, of the child so succeeding, shall devolve and accrue to the survivors or survivor." What do these words "survivors or survivor" mean here? I cannot construe them otherwise than as referring to the other children named, who should be survivors or survivor of him, Mr Barclay. If the child succeeding, succeeded as heir, that must be after Mr Barclay's death; but it might be in the lifetime of Mrs Allardice, or it might be upon his death surviving her. But the provision being absolute, it must have taken effect at whatever time he died; and supposing him to die before Mrs Allardice, it must be taken as a declaration, that the share in the fund and in the interest of it, falling to the child so succeeding, should at that moment devolve on the survivors or survivor, that is, on the children who had then survived himself. If, again, it be supposed to refer to the case of his surviving Mrs Allardice, the effect is still the same. For the term must still refer to the children surviving himself.

But a case may be imagined, that a younger child succeeded to the estate by conveyance of Mr Barclay. The effect would be the same as in the other case,

No. 65.

Jan. 31, 1845.

Allardice v. Lauteour.

No. 65.

Jan. 21, 1845.
Allardice v.
Lautour.

if Mrs Allardice were alive. But, if she were dead, the right to the interest would devolve on the other children as then surviving, though the principal would not be payable till Mr Barclay's own death.

There is then a clause, reserving to Mr Barclay a power of division among the children. It does not appear to me, that this very common clause can affect the question of vesting or not. It qualifies the extent of the interest of each child potentially, if the power be exercised, which it must be if at all, in the father's lifetime: but in other respects, it cannot affect the state of the right after his death; and then the deed expressly provides, that it must be so done that "the capital shall be shared among the said children, according to the true intent and meaning thereof," &c.; and that, failing thereof, the said capital "shall belong equally to my said younger children, share and share alike." In short, this reserved power of division, which appears to have formed a part of the agreement with Mrs Allardice, does not alter the nature of the right itself, but, on the contrary, rather implies that there was to be a vested right in each of the children at Mr Barclay's death, qualified only by a power in him alone to make a division in his own lifetime.

The last clause of the deed bears, that the granter had instantly delivered the bond to Mr James Chalmers for behoof of the children—a circumstance which I must think to be of material importance. It leads to this inference, that there was a vested and irrevocable interest of some kind from the moment of that delivery, a thing not naturally more out of the nature of the onerous transaction. And the question as to the title of each child might then be reduced to depend altogether, not on the postponed term of payment, but on the words "survivors and survivor." This takes it out of all the cases referred to, and leaves it as a very peculiar case, depending on its own circumstances.

From all the clauses taken together, I think it very clear that the intention expressed is for the establishment of a vested interest in each of the children named, at least from the death of Mr Barclay himself. I say nothing of any other case if Mrs Allardice had predeceased him.

And, reverting to the distinction to which I alluded in the beginning, it seems to me to be conclusive now, when all the clauses are attended to, that there is no case of *liferent* and *fee* at all. The bond is part of an onerous contract, stipulated for by the lady in behalf of her existing children, in consideration of the conveyance by her to the granter and the same children of a valuable estate. The single cause for the postponement of the term of payment, was not any thing affecting the lady as a *liferenter*, which would have made it a matter as of necessity, involved in the nature of the right given to her, but merely the condition of the granter of the bond, as separately bound to pay an annuity to her, and for his relief in that point. The bond was to be payable at all events to these children, or some of them, or the heirs of their bodies. The question, to which of them any sum should be paid, was a matter of indifference—except with reference to the power of division—and absolutely so if that power were not exercised. There is, therefore, not the slightest presumption in such a case, that there was not an intention, that the right given to each of the children nominatim should vest in that child individually, just as well as unquestionably there was a right vested in them all together.

In short, I am of opinion, upon the special terms of this deed, that there was a

right fully vested to the proper share of the provision of £4000 in each of the children of Mr Barclay; that that right, being vested in Mrs Innes as one of them, passed to her husband by her assignation to him in her marriage contract, and was validly assigned to Mr William Innes by the deed founded on, and effectually discharged to Mr Barclay after the death of Mrs Allardice. No. 65.
Jan. 31, 1845.
Allardice v. Lauteaux.

As the respondent has passed from the objection to the competency of the multiplexing, I think that we may, without discussion, sustain that process; and, in respect of the minutes of the parties, hold the record made up on the objections sufficient as a record in the competition.

Lord Cockburn.—I am of opinion that the sum in question did not vest till after the death of the widow of the granter of the deed.

On a subject so delicate as that of vesting, and on which general criteria for construction seem to be so difficult to be discovered, or to be applied, it is satisfactory to have the analogy of any nearly similar cases to rest upon.

In *Bochman* (Feb. 12, 1830,) a sum was directed to be held by trustees, in order that the interest might satisfy a liferent; and, after the expiration of the liferent, part of the capital was to be paid to a granddaughter, with a substitution over in favour of a different party. The granddaughter survived the granter, but, having predeceased the liferenter, it was decided that she had no power to give the money to her husband. She was prevented from doing so, solely by the two circumstances of the trust and of the liferent.

In *Powan* (Jan. 14, 1840,) a sum was appointed to be held by trustees, who were to pay the interest to an annuitant, and, after her death, to divide the capital among her children equally, whom failing, among their heirs, or the heirs of such as should have predeceased. It was held that there could be no vesting till the annuitant should die, not that the legacy lapsed, but that, failing children during the annuitant's life, it went at her death to the heirs. Here also, the child, though surviving the granter, was excluded solely by the trust, and by the subsistence of the annuitant. There were no other circumstances to which the decision can be ascribed.

The case of *Clelland* (20th June 1839,) has a still more exact application to the present one. 1. It was a provision to children, not a legacy, such a provision being supposed (erroneously as I think) to be more favourable for vesting. 2. The children were all named. 3. The shares of those deceasing without heirs were to go to the survivors. These are precisely the material facts of the present case. In these circumstances, the substance of the arrangement was, that on the death of a liferentrix trustees were to divide a sum among eight named children, or the survivors; and the question that was presented for decision, perfectly clear of all other circumstances, was, whether the mere creation of the liferent, joined to the trust, and to the virtual substitution in favour of the survivors and the heirs of the decessors, did not afford adequate evidence that the granter intended that there should be no vesting till the period of distribution should arrive? It was found that such intention must be inferred from these circumstances.

Now, what have we here? We have three circumstances, which, though founded on for the nominal raiser, seem to me to be perfectly immaterial. These are, 1st, That this is a case of provision. 2d, That it is an onerous provision, because it was made in consequence of some previous obligation (but of which we know nothing) between the granter and his wife. 3d, That the deed was delivered. I am not aware that these circumstances alter the principles of construc-

No. 65.

Jan. 31, 1845.
Allardice v.
Lautens.

tion. A person may certainly deliver a deed—even though it be a deed of provision, and made under a prior obligation—without affecting, or having the remotest intention to affect, a question such as the one now before us. He grants and delivers the bond, subject to all its qualities, legal construction included.

We have a trust, or what, *quoad hoc*, is equivalent to a trust, in the person of the father, or of his representative. The sum of £4000 is provided to the children, under certain conditions. One of these is, that the money is not to be parted with till after the death of the last surviving spouse. It is then to be distributed, equally, or according to a power of division, by the father, among the children as a class—by which I mean that, though each child be named, the division is to be amongst them all—but with a substitution, in the event of any of their deaths, in favour of the survivors, and of heirs.

But, though I think there was what was equivalent to a trust, I do not conceive this to be material; because, let it be taken merely as a case of payer and payee. It is at least the case of a postponed payment. It is postponed till a particular person dies; but with this essential circumstance, that, as the party engaging to pay could not know how many of several payees were to be then alive, he only obliges himself to pay them all, or the survivors. There is truly no need to complicate the question with much of the matter it has been connected with. Stated simply, but correctly, this was just a provision, payable at a future period, to six persons, or the survivors, or heirs.

Now, it appears to me that, according to the plain and natural import of such words, and of such an arrangement, the survivors must mean those who outlive the period of division. It might have been made otherwise by appropriate expressions. But there is no express statement what the term to be survived must be. In this situation, we must give the words that we have their plain meaning. And if a trustee, or other party, be simply directed to distribute a sum at the end (say) of ten years among a plurality of persons, or the survivors, it seems to me to be plain that the distribution could only be made among those then alive—those who survived. This, accordingly, was the positive decision in the case of *Clelland*. Their surviving till the period for division is a condition, which, by its uncertainty, necessarily suspends the vesting.

Various cases have been put, in which it is supposed that holding the father's death to be the term, is the most expedient. Cases might very easily be put of an exactly opposite nature. But whatever effect such considerations may have upon the planners of family arrangements, they are irrelevant in judicial construction. I can discover nothing in this deed to make me think it probable that the granter, who clearly had certain favour for survivors and heirs, thought it expedient that both of these classes could be disappointed, by finding, when the day of division arrived, that each child, as soon as its father had died, and possibly while each was still in minority, had spent its portion by anticipation, and died before the life interest, leaving nothing to be divided.

It has been said that interest is payable before distribution, and that this implies a vesting of the capital. So it does in general, but most clearly not here; because the interest is to be paid from and after the death of the wife, even though the father be then alive, and while confessedly there could be no vesting. It is a mere engagement by the father, that, as soon as the death of his wife should re-

lieve him of a sum he had to pay her, he, in his discretion, should lay out the interest of £4000 on the education and maintenance of the children. No. 65.

It has also been urged, that the clause about a younger child succeeding to the estate fixes the father's death as the term, because it is only his death that can produce the event which is to exclude that child from all share of the £4000. Jan. 31, 1845. *Allardice v. Lantour.* But there are two misapprehensions here. 1. There could clearly be no vesting during the father's life. But a younger child might succeed during his life. The event provided for is, that a younger child shall "succeed to my lands and estate, either as my heir, or by conveyance from me." The import of the provision is merely, that whoever shall "take" the estate, no matter how, shall cease to be considered as a younger child. 2. Even though he should take as heir, still the only result is, not that his share is to be then payable to, or vest in the rest, but that it is to "devolve and accrue to the survivor or survivors." But it may devolve and accrue under the radical provision, by vesting at the death of the widow. In short, except by striking the child who takes the estate out of the distribution, this clause has no effect on the situation of the rest.

On the whole, I can see no substantial distinction between this and the cases I have referred to, particularly that of *Clelland*. That there may be opposite cases, is extremely probable. But it is so desirable to get hold of any rules or precedents on this subject, that I am for adhering firmly to the latest authorities.

LORD MEDWYN was absent.

THE COURT accordingly pronounced this interlocutor:—"Recal the interlocutor of the Lord Ordinary complained of: In respect that the objection to the competency of this process of multiplepinding has been withdrawn at the bar, and that the parties, by their joint minute, have consented that the record made up shall be held as a record on the merits, as well as on the competency, as if regular claims had been lodged in a competition for the fund in medio, sustain the second plea in law stated for the nominal raiser, Robert Barclay Allardice,* and in respect thereof, find him entitled to decree of exoneration and discharge in terms of the summons, and exoner and discharge him accordingly of all claim for the fund in medio, and decern; of new, find him entitled to expenses of process, allow an account," &c.

WALTER DUTHIE, W.S.—JAMES BENNET, W.S.—Agents.

Authorities.—*Buchanan v. Downie*, Feb. 12, 1830, (8 S. & D. p. 516;) *Margribanks*, Feb. 18, 1836, (14 S. & D. p. 521;) *Clelland*, June 20, 1839, (ante, l. 1031.)

* This plea in law was in these terms:—"Supposing a process of multiplepinding a competent mode of trying the question, of whether the nominal raiser is still debtor for the sum alleged to be in his hands, and that the discharge held by him is ineffectual as an acquittance of the obligation libelled on, the respondent pleads that he is not debtor in the alleged sum set forth as the fund in medio, but has been legally discharged thereof by the proper creditors, who had become vested in the rights to the sums due under the bond of provision libelled on."

No. 66.

Feb. 1, 1845.
Denovan v.
Cairns.ALEXANDER DENOVAN, Suspender.—*Mailand*.
ROBERT CAIRNS, Respondent.—*Rutherford—Patton*.

Bill—Prescription Sexennial—Process—Lis alibi pendens—Prisoner—Aliment.—1. The holder of a bill, within the years of prescription, raised an ordinary action in the Sheriff-court against the acceptor for payment, and this action having fallen asleep before judgment, he, beyond the years of prescription, extracted the registered protest, and charged and imprisoned the acceptor thereon;—Note of suspension and liberation passed on the ground of *lis alibi pendens*. 2. Circumstances in which the Lord Ordinary refused a note of suspension and liberation, presented by an imprisoned debtor, upon the ground that, after having been liberated for want of aliment, he had been immediately reincarcerated on the same diligence.

Feb. 1, 1845.

1st Division.
Ld. Fullerton.
Bill-Chamber.
N.

ALEXANDER DENOVAN being incarcerated upon diligence proceeding on a bill for £20, at the instance of Robert Cairns the holder, presented a note of suspension and liberation, upon the ground that aliment had been awarded to him under the Act of Grace, and that the aliment money deposited with the jailer having been exhausted on the evening of the 24th September, and he having, in consequence, been liberated by warrant of the Sheriff on the 26th, had been immediately reincarcerated upon the same diligence, and at the same instance.

He pleaded, that a creditor having allowed the aliment of his imprisoned debtor to be exhausted, and he having in consequence been liberated, immediate reincarceration upon the same diligence was illegal.¹

Cairns, the respondent, answered, that no intimation had been made to him of the exhaustion of the aliment; that the suspender, having applied for the benefit of cessio, was examined before the Sheriff on the 26th of September, when his application was refused *in hoc statu*, in respect of his failure to give a satisfactory account of certain funds, and at the close of the examination the respondent had sent him from the court-room to the jail, with a new deposit of aliment.

He pleaded, that diligence did not fall in consequence of the debtor's liberation for want of aliment, but might again be competently put in force, if not done capriciously and vexatiously.²

The Lord Ordinary (Fullerton) refused the note, with expenses.*

¹ Crawford v. Dawson, March 11, 1836, (14 S. 688.)

² Abercromby v. Brodie, June 19, 1759, (M. 11811 ;) Boyd v. Ponton, Dec. 21, 1811, (F. C. ;) Morison v. Forbes, June 3, 1826, (4 S. 668;) Mackenzie v. Maclean, Jan. 14, 1830, (8 S. 306.)

* "NOTE.—The Lord Ordinary does not understand that the case referred to laid down any fixed or invariable rule; and it appears to him that the present case is attended with circumstances which fully warrant him in refusing the application of the complainer."

The suspender reclaimed; and, on the reclaiming note been moved in the summary roll, No. 66.

Maitland, on his behalf, stated that, in the discussion before the Lord Ordinary, it had been assumed that prescription of the bill, (which was dated 6th January 1829,) on which the diligence had proceeded, was interrupted by a charge, alleged by the respondent in his answers to have been given upon it in June 1830. He was now instructed to state that no such charge had in reality been given, and he moved that he should be allowed to give in a minute containing this denial, and a relative plea in law.

Feb. 1, 1845
Denovan v.
Cairns.

Rutherford, for the respondent.—The case must be decided upon the reasons of suspension stated. The suspender was not entitled at that stage to add a new reason; his right to suspend of new upon it might be reserved.

The suspender, in his statement of facts, averred that payment of the bill had never been asked till a few months before the charge and imprisonment complained of. It was in answer to this statement the respondent averred that a charge had been given in June 1830. There was nothing further about this matter in the papers, which were exclusively directed to the reincarceration after liberation for want of aliment.

The Court appeared to think that there was an implied denial by the suspender of the alleged charge in June 1830, and that a plea in law only was wanting; but in order that an explicit denial might be made, and a relative plea added, they allowed the suspender to lodge the minute proposed within six days. Answers were afterwards ordered, and both minute and answers were ultimately revised. From these it appeared that the bill, of which the suspender was the acceptor, and the respondent the drawer and holder, was dated 6th January 1829, and, being payable twelve months after date, fell due on 9th January 1830. That it was protested, and the protest registered on 21st June 1830. That on 29th May 1833, the respondent raised an ordinary action for payment of the contents in the Sheriff-court, and that after some procedure this action was allowed to fall asleep without the record having ever been closed, the last interlocutor being dated 29th January 1834. That on 31st July 1844, the respondent obtained an extract of the registered protest, with the usual warrant by the Sheriff-clerk appended, upon which the charge (dated 1st August 1844) and imprisonment, which was the subject of the suspension, proceeded.

In these circumstances the suspender pleaded, 1st, That the charge which preceded the imprisonment was illegal, the bill being at the date of it (1st August 1844) prescribed. 2d, That the ordinary action for payment of the bill being still in dependence, rendered the use of summary diligence incompetent upon the ground of *lis alibi pendens*.

The respondent answered, 1st, That prescription was interrupted by

No. 66.
Feb. 1, 1945.
Denevan v.
Cairns.

the action which was raised within the six years. 2d, That he was willing to minute an abandonment of that action, founding upon it merely as an interruption of prescription.

Maitland, for the suspender, argued;—The holder of a bill might, under the Act 1672, c. 38, interrupt prescription, either by using summary diligence, or raising an ordinary action within the six years; but he was not entitled to both remedies. There was no authority in the statute for interrupting prescription by action, and recovering payment by diligence. Prescription could only be interrupted by action or diligence by which payment was to be recovered. The statute declared that diligence should be incompetent after the lapse of six years, and it was not made competent after that period by action having been raised within it. A party having raised action within the years of prescription, was not entitled to resort to summary diligence after they had elapsed. *Lis alibi pendens* was another ground of suspension. The respondent had not abandoned his action, and he could only do so on payment of expenses, and this under the Judicature Act must be a total abandonment to every effect whatsoever, and then the bill would be clearly prescribed.

LORD MAKENZIE.—Registration is a decree, whether extracted or not; and if the party having it brings an action, is that not a dereliction and abandonment of the decree he had?

Patton, for the respondent, argued;—The import of the Act 1672, c. 38, was, that if there had been either action or diligence within the six years, there was no prescription. Where, therefore, action had been raised within the six years, diligence was competent at any time, the action having the effect of preserving the bill with all the remedies upon it. As to the plea of *lis alibi pendens*, the respondent must hold the action to interrupt prescription; but he would give security not to proceed with it to any effect, and would pay the defender's (the suspender's) expenses.

LORD FULLERTON.—So far as the case was argued before me as Ordinary, my opinion is the same. In the circumstances of this case, I do not think reincarceration was incompetent. But the case is entirely changed. In the first place, I cannot hold that the bill is prescribed. The effect of prescription, and the only interest to maintain it, is, that it puts an end to the bill as a document, and that the debt must be proved otherwise. Here action has been raised within the six years, which the statute says is sufficient to interrupt prescription. But, in the second place, here is a party who is the holder of a bill, and who, two or three years after it was due, instead of doing diligence, raised an ordinary action in which a record was made up, and then at the distance of a great many years, disregarding the action, he gives a charge on the bill. It will not do to talk of abandoning the action; it was not abandoned when the charge was given; if it had, it would have raised a nice question—whether an abandoned action would interrupt prescription. But it was not abandoned; and I do not think the holder was entitled to proceed

to do diligence, the action being in dependence. I therefore think the note should be passed. The party is not entitled to get quit of the action by resorting to diligence. It concludes for payment of this bill. If this suspension were refused, would it not settle the whole question in the ordinary action?

No. 66.
Feb. 1, 1845.
Denevan v.
Cairns.

LORD PRESIDENT.—I am of the same opinion. Points are raised which deserve consideration, and therefore the note ought to be passed.

LORD MACKENZIE.—I concur. A party who founds on an ordinary action for the purpose of interrupting prescription, cannot, I think, safely abandon it; at all events the point deserves consideration.

LORD JEFFREY.—I am of the same opinion on the whole. But at the same time I think this is one of the cases in which, though the only question is about passing or refusing a note, it is yet desirable that parties should know whether the opinion of the Court is maturely made up on the matter, so as to prevent further procedure. I agree with Lord Fullerton on the whole. I should rather not express any opinion on the point, whether abandoning the action would prevent it from having the effect of interrupting prescription. There has been here no abandonment or payment of expenses. The action may be awakened to-morrow, and brought here by advocacy. There is, therefore, a clear violation of the salutary rule, that a party shall not multiply remedies for the same debt. Therefore, on the ground of *lis alibi pendens*, I am for passing the note; and I have expressed my opinion so strongly on it, that I hope passing the note will not be the commencement but the end of the litigation, if your Lordships are as clear as I am.

THE COURT accordingly recalled the interlocutor of the Lord Ordinary, and passed the note without either caution or consignation.

WOTHERSPOON and MACK, W.S.—J. L. HILL, W.S.—Agents.

No. 67. **WILLIAM MITCHELL**, Suspendor and Pursuer.—*Sol.- Gen. Anderson—Cowan.*

Feb. 4, 1845.
Mitchell v.
Berwick.

WILLIAM BERWICK and **OTHERS**, Respondents and Defenders.—*Butherford—Cook.*

Proof—Agent and Principal—Landlord and Tenant.—In a suspension of a decree of removing;—1st, Held that a state of rents due by the tenant, rendered by the factor to the landlord, and retained by him, was competent evidence in favour of the tenant; and that the landlord having failed to produce it, being required, parole evidence of its contents was competent. 2d, Opinion that parole evidence of the payment of rent by sales under a transaction, whereby the landlord was allowed to sell and draw the price of certain sequestrated stock and crop, was competent.

Feb. 4, 1845.

1st Division.
Jury Cause.
Ld. President.

WILLIAM MITCHELL was tenant of the farm of Dewarismill, under a lease for thirteen years, granted in 1834 by Alexander Coupar, the proprietor. Alexander Coupar died in March 1838, leaving a conveyance of Dewarismill in favour of David Coupar, his nephew, under reservation of an assignation to trustees of all arrears of rents, and of the future rents, for five years subsequent to his death. David died in January 1839, and was succeeded by heirs-portioners, who the same year conveyed Dewarismill to trustees for their behoof. William Berwick was the only accepting trustee under Alexander Coupar's trust, and consequently the assignee to the rents of Dewarismill as above mentioned. In September 1838, Berwick, with consent of David Coupar for all interest competent to him as proprietor, obtained from the Sheriff sequestration of the tenant's whole stock and crop for the rent of crop and year 1837, due at Whitsunday and Lammas 1838; and also for the rent of crop and year 1838, to become due at the above terms in 1839. In August 1839, Berwick, along with the trustees for the heirs-portioners of David Coupar, presented an application for sequestration of the tenant's stock and crop, in security for the rent of crop and year 1839, due at Whitsunday and Lammas 1840; and in October following, they raised action of removing against him under the Act of Sederunt 1756.

These last two processes were conjoined, and considerable litigation ensued as to the amount of rent really due, which resulted in a finding by the Sheriff, that the tenant was a full year's rent in arrear at the date of the action of removing, and caution not being found in terms of the Act of Sederunt, decree of removing was pronounced on 13th July 1841.

Mitchell, the tenant, presented a note of suspension. He alleged that, in order to prevent a sale under a sequestration awarded against him in 1836, at the instance of Alexander Coupar, an arrangement had been entered into with David, who acted as factor or manager for his uncle, then an old man, under which he, David, besides other sums, drew, during his uncle's life, and on his behalf, the price of large quantities of stock and crop sold to third parties. That these sums, which were not given

credit for in the states produced by the respondents in the inferior court, reduced the amount of rent due at the date of the action of removing to less than a year's rent. The respondents denied this, and an issue was accordingly prepared, in which the suspender was pursuer, and the respondents defenders. The issue was in these terms:—

No. 67.
Feb. 4, 1845.
Mitchell v.
Berwick.

"It being admitted that the late Alexander Coupar, residing in St Andrews, was proprietor of the lands of Dewarismill and others, in the county of Fife, of which the defenders, Alexander Kirk and others, as representing the heirs-portioners of the deceased David Coupar, are now proprietors in trust, and the defender, William Berwick, is assignee to the rents, and that the pursuer, William Mitchell, is tenant, in virtue of a lease granted by the deceased Alexander Coupar, of the said lands of Dewarismill,—Whether, on or about the 13th day of July 1841, the defenders wrongfully obtained decret of removing against the pursuer?"

The cause came on for trial before the Lord President and a jury, at the sittings in July 1844.

From the evidence of the first witness, who was clerk to the law-agent (deceased) of both Alexander and David Coupar, it appeared that, during the latter years of Alexander's life, David had acted as his factor or manager, letting subjects to tenants, and granting receipts for the rents, and of Dewarismill among the rest: That the arrangement, alleged by the pursuer, had been made to prevent a sale under the sequestration in 1836, and several quantities of stock and crop sold, of which David was to receive the price: That after Alexander Coupar's death, an application was made by Berwick to David Coupar for a state of the rents due by the pursuer, and that this state was prepared and sent to Berwick, and received and retained by him.

The defenders having been called on to produce this state, and failed to do so, the pursuer was proceeding to prove by the witness the nature of it, and the balance which it showed, when the counsel for the defenders objected, "that because it would not be good evidence as to the payments of rent, even if the state was produced, this examination could not go on."

The LORD PRESIDENT overruled the objection, "in consequence of the evidence as to David Coupar's actings, and the fact of the state having been demanded by Mr Berwick himself."

The counsel for the defenders excepted.

The examination being resumed, the witness proceeded to speak to the contents of the state, when the counsel for the defenders again objected, "that the contents of the state cannot be held as evidence against the executor of the late Alexander Coupar, in reference to the payment of the rent of 1836."

The LORD PRESIDENT having overruled the objection, the counsel for the defenders excepted, and thereafter consented to a verdict being taken in favour of the pursuer, reserving their exceptions. A verdict was taken accordingly.

No. 67. The bill of exceptions was this day advised.

F.b. 4, 1845.

Mitchell v.

Berwick.

LORD MACKENZIE.—I think the exception is not well founded.

I. Regarding the proof objected to as surrogate for the writing that is not produced, and admissible or not as the writing would have been, I think it would have been admissible. The rent is money rent by written lease, but a tenant, though by written lease, is in a very favourable situation in regard to proof of payment of rent. Probative writ is not necessary. The books of the landlord's factor, though not signed, are yet evidence in favour of the tenant; so also is a written statement by the factor to his employer. I do not say they are absolutely conclusive and equal to a formal probative discharge by the landlord, but they are receivable as evidence, if in the circumstances they appear fairly stated as between landlord and factor. Here the original landlord was dead, but a representative had taken his place. The factor had ceased to hold his factory, but he remained cognizant of and answerable for the transactions he had carried on. In this situation he was called on by the representative of the landlord for a state of the affairs of this farm in respect to rent while under his charge, and he made up a statement for the use of the landlord, and sent it to him, and it was by him received and retained. There is nothing to show that it was not fairly made and held as binding on the factor in favour of the landlord. Why, then, should it not be admissible as evidence for the tenant? True, it was made after the factory had ceased in other respects; but when the landlord's representative called on the factor to make such a statement, and received it when made, and kept it, I think he continued or renewed the factory for that purpose, and made the statement as if it had been written during the time of general management. Suppose he had called on the factor to write up the books of his factory, and got it done, and received and kept the books, would these not have availed the tenant as evidence, at least so far as not shaken, but confirmed by other evidence, which was enough to make it receivable in the first instance? I think they would; and I must apply the same rule to a statement of the kind in question.

II. Even if the proof objected to could be regarded as merely parole, I rather think it could not competently be stopped at the time of the objection; for it was evidence to prove payment of rent by a transaction of a peculiar kind. I am aware it has been decided that a prior independent written obligation for money cannot be discharged simply by parole evidence of payment, or rather satisfaction in moveables given by the debtor. But, on the other hand, a sale of moveables for a price, and stipulation for and payment of the price, as one transaction, may be proved by parole as not separable from the sale of moveables. Now here, I think, what was to be proved by the evidence objected to came under the latter class of cases rather than the former; for there had been a sequestration, by which the landlord, and his factor for him, held a commanding interest in and over the tenant's stock and cropping. The tenant himself was no longer sole proprietor or had power to sell and take the price; for the state which was to be proved was this, that the landlord's factor and tenant jointly made bargains with third parties by which parts of the stock and cropping were sold to these parties for prices agreed to be paid, and which were paid to the landlord, or his factor for him. It seems to me that here the payment to the landlord or factor is not separable from the sale of moveables. I would ask,—Could the landlord take back the

stock or cropping by parcels proved to have been sold by his authority? And if not, how can he resist proof of that payment of price to him, which was the counter-part of the want of moveables by him, and without which the bargain could be of no use to the buyer? For, as the buyer cannot aver payment to the tenant, he must either be allowed to prove payment to the landlord, or be deprived of his bargain.

LORD FULLERTON and LORD JEFFREY concurred.

LORD PRESIDENT.—I had no conception, when I made the deliverance excepted to, that I was deciding the abstract point, that parole evidence was competent. Being clear that the document had been prepared under the order of the party himself, and that he had been required to produce it, and did not, I thought the evidence proposed ought to be admitted.

THE COURT accordingly disallowed the exception, with expenses.

D. M. ADAMSON, S.S.C.—LOCKHART, HUNTER, & WHITTAKER, W.S.—Agents.

ANDREW WOODROW, Advocate and Defender.—*Rutherford—Penney.* No. 68.
PATTERSON, PEEL, and COMPANY, Respondents and Pursuers.—
H. Robertson—Macfarlane.

Prof—Usage of Trade—Sale.—In an action for the price of certain goods having been sold out and out to the defender, who alleged that he had merely agreed them on sale and return, and with leave to return such as were unsaleable;—Circumstances in which the Court allowed a proof, before answer, of an alleged verbal agreement entered into before the course of dealing began, that the goods were to be sent on the terms stated by the defender.

In June and July 1838, Robert Patterson, manufacturer at Bradford, Feb. 7, 1845. sent two parcels of cloths to Andrew Woodrow, shawl-merchant in Glasgow. In each instance the accompanying invoice bore—"Bought of Robert Patterson." The amount of the two parcels was £64 : 4 : 6. It was settled in September 1838, by Woodrow returning part of the goods, to the amount of £25, 10s., and paying the balance of £38 : 6 : 6 in cash. In October 1838, Patterson sent three other parcels of cloths to Woodrow, each accompanied with a "Bought of" invoice, and amounting in all to £235, 8s. On 8th December 1838, Patterson wrote to Woodrow, "I enquire whether you (Woodrow) would have any objection to my bringing upon you at three months. If you have any commands, I should be glad to be favoured with them at the same time," &c. Woodrow answered, on 8th December, "I have not sold a piece of merino since you were here. The demand for these goods having been over for nearly two months, there will be none sold now until the turn of the year, when I will endeavour to dispose of yours. If you should wish any part of them

No. 68. to be returned, I will attend to your order. I would rather not accept, but pay you for the goods as they are sold, or in a month after. I can form no idea at present what are likely to be wanted for the spring, further than judging from the past, from which I would say that black, white, and drab, would be safe, if not certain colours to sell, fifty inches wide.—I am," &c. On 13th December, Patterson again wrote—"It would be a convenience to me to be allowed to draw, @ say 20th December, four months, and this would, I presume, afford you ample time. However, if it should appear in the interval that any colour does not take, it can easily be replaced, as I shall be sending you spring goods at any rate. Should I not hear from you to the contrary, I will take leave to draw as above, and I remain," &c. Woodrow replied, 20th December—"Your favour of the 13th was duly received, and I suppose that you will draw as therein stated. Some of my customers are now wanting white and light-coloured merinoes. Send me as soon as you possibly can, a few pieces of fifty inch white." On 20th December, Patterson drew on Woodrow at four months, for £236, 5s., which Woodrow accepted. During the currency of the bill, three further parcels of cloths were sent to Woodrow, partly by Patterson, and partly by the firm of Patterson, Peel, and Company, of which he was a partner. They were accompanied, as before, with "Bought of" invoices. A bill was drawn on Woodrow for the amount, which he refused to accept, and intimated by letter of 14th March 1839, that "I did not accept it, just because I have already accepted for more than I shall be able to sell of the goods received from you. Up to this time there have been sold only six pieces. The reasons of this are, that many of the colours I cannot sell, being bad shades, and the whole are charged too dear." When Woodrow's acceptance for £236, 5s. fell due, he retired it.

Patterson, Peel, and Co., for themselves and Patterson, brought an action before the Sheriff of Lanarkshire for £198 : 3 : 5, the amount of the last three parcels of goods, from which they afterwards deducted £42, 8s., being the price of the second of the three parcels. This parcel was alleged by Woodrow to have been defective and unsaleable, and, after some attempts at selling it, had been returned by Woodrow to the pursuers. The pursuers alleged that they consented to this deduction, *ex gratia* merely.

In defence against their action, *quoad ultra*, Woodrow alleged, that before his transactions with Patterson began, "Patterson proposed to him (Woodrow) that he (Patterson) should send on sale and return to the defender, merino cloths suitable for shawl middles; that the defender should take as many of these cloths as he could dispose of, and allow the pursuer the invoice prices for them; and that the defender should, at the period of settlement, return to the pursuer such of the cloths as he could not sell, and should pay for the cloths taken by him."

Woodrow alleged, that such an agreement was common in the trade

which the parties respectively carried on ; that the large amount of goods returned at the first settlement, afforded real evidence of the agreement having been acted on ; and that, in consistency therewith, Patterson's letter of 3d December merely asked leave to draw, which he would not have done if the goods had been sold out and out ; and as little could Woodrow, in that case, have proposed in his letter of 8th December, to pay for the goods only in proportion as they were sold. Patterson's subsequent letter still asked leave to draw as a favour, and was on that footing assented to ; and the bill was truly an accommodation bill. When that bill was ultimately retired by Woodrow, he was entitled, after deducting the amount of goods sold by him, to claim the balance as remaining due by Patterson, Peel, and Co.—the parties properly bound to have retired it—and to retain any goods of theirs still in hand, in security of that balance.

No. 68.

Feb. 7, 1845.
Woodrow v.
Patterson.

Patterson, Peel, and Co. denied the existence of the alleged agreement prior to the commencement of the transactions. They averred that the transactions in question were out and out sales ; and pleaded, that as each parcel of goods was accompanied with a "bought of" invoice, there was written evidence of the nature of these transactions, which could not be redargued by parole. And further, as all the goods prior to those sued for had been settled, and, in the last instance, by a bill drawn on Woodrow, and accepted and retired by him, he could not offer proof of that bill being for the accommodation of Patterson, Peel, and Co., except by writ or oath. As to the portion of goods returned at the first settlement, that had been asked and granted merely as a favour, and was not an uncommon favour, where parties contemplated further transactions together.

A record was made up, and the Sheriff-substitute, "in respect there are, in this case, contradictory averments as to the practice of trade, allows parties a proof of their averments ;" * * * and "finds that the defender can only prove his averment, that the bill referred to in his statement was an accommodation bill granted without value, by writ or oath of the pursuer ; and allows him such proof accordingly."

On appeal, the Sheriff-depute adhered, "but under this limitation, that the proof allowed is before answer, and is granted only in relation to the averments of parties regarding the usage of trade, in interpreting *remitte-notes* or invoices, in the terms of those which occur in the present process."

In the course of the proof, Woodrow offered evidence of his averments generally, and, *inter alia*, of the agreement which he alleged to have been verbally made between Patterson and him, before their transactions began. This was objected to by Patterson, Peel, and Company, and the objection was sustained. From the proof as led, it appeared that between some persons engaged in transactions such as those of the parties, "bought of" invoices were employed solely in the case of out and out

No. 68.

Feb. 7, 1846.
Woodrow v.
Patterson.

sales; while between other persons similarly engaged, goods were frequently passed with "bought of" invoices, though truly passing upon sale and return, or "on approbation," in the manner alleged by Woodrow; and that such a course of dealing took place sometimes under an express previous arrangement, verbal or written, between the parties, and sometimes not, according to the confidence which the parties mutually felt in each other.

On advising the proof, the Sheriff found that nothing was established to prevent the transactions from being "regarded, as the invoices bear them to have been, out and out, sales;" that the bill retired by Woodrow, was a settlement up to the date of the transactions libelled on; and, therefore, he decerned for the balance due under these transactions.

Woodrow advocated, and pleaded, *inter alia*, that he should have been allowed to prove the previous agreement of parties, in reference to which their dealings took place, and under which the invoices had been sent, and the bill drawn and accepted.

The Lord Ordinary pronounced this interlocutor:—"In respect it appears to the Lord Ordinary that the proof offered by the defender, (advocator,) which was restricted by the interlocutors of the Sheriff, dated 18th May, 30th November, and 21st December 1842, was competent, and ought to have been admitted, without any limitation, before the case was advised on the merits—advocates the cause, and recalls, *in hoc statu*, the interlocutors of the Sheriff now complained of: Finds that, under the special circumstances of this case, as set forth on record, and as in part established by the terms of the letters that passed between the parties in December 1838, a proof *prout de jure* of the whole allegations of both parties should still be allowed, and completed, before the case is disposed of on the merits." *

* "NOTE.—The judgments of both the learned Sheriffs in the inferior court, proceed on the assumption that there was here a written contract of sale relative to the goods sent by the pursuer to the defender, as ample and precise as any contract of sale that could be framed relative to mercantile goods. That contract is said to have been embodied by the invoices sent by the pursuer to the defender, setting forth that the goods had been 'Bought of' the pursuer by the defender—these, it is argued, constitute a bargain of sale and purchase, in writing, which cannot be controlled or explained by parole evidence. But the Lord Ordinary has formed a clear opinion that that rule is not sufficient to exclude parole proof in the present case, (at least before answer,) on the following grounds:—

"I. The invoices here do not stand alone: they are not the only written evidence to which the Court is bound to look, in ascertaining the nature of the transaction or arrangement under which the goods were sent to the defender. The letters of December 1838 do, of themselves, materially qualify and explain the invoices; and render the case, in so far as it depends on the written evidence, so reasonably doubtful as to let in parole testimony to explain the whole *res gestæ* which passed when these goods were ordered, and when the parties originally transacted with each other.

"II. The parole evidence offered in the present case, seems to be more peculiarly competent from the circumstance, apparent on examination of the documents

Paterson, Peel, and Compay reclaimed.

The Court did not call on the respondent's counsel.

No. 68.

Feb. 7, 1845.
Woodrow v.
Patterson.

produced, that there is no written evidence prior to the invoices, so that much must have passed at interviews between the parties, or their agent or traveller, before the transmission of the invoices, which the Court or the jury is entitled to know before being called on to decide as to the legal import and effect of the invoices. For aught that appears, the goods were sent subsequent to and in consequence of verbal orders; and it seems quite out of the question to give any decision on such mercantile transactions, without hearing all that passed between the parties at and preceding the order.

"III. The parole evidence already produced upon the usage of trade, and upon the understanding of merchants as to invoices expressed in the terms of these here founded on, is such as to render it more especially desirable and necessary to know all that passed prior to the transmission of the invoices, in order to form a satisfactory opinion as to the weight and effect due to them in the present case. The witnesses on both sides are men of equal integrity and experience, and are manifestly very greatly at variance with each other as to the practice and understanding of merchants respecting invoices in the terms of those here founded on—some holding them as invariably applicable to sales only, while others are equally positive that such invoices are often applicable to goods sent on approbation or for trial in the market, and with a privilege of sale and return. Assuming the witnesses on both sides to be men of equal integrity, experience, and respectability, (which it is sincerely believed they are,) what conclusion can any Court draw, except that the practice of merchants, as to the transaction and terms of these invoices, varies in a remarkable degree, so as to render it necessary to ascertain what passed prior to each transaction—to judge what effect ought to be given to them in adjusting the accounts of the parties in each particular case.

"As far as the Lord Ordinary can at present judge, the testimony of Mr James J. Robertson (of the Company of Reid, Robertson, and Company,) carries on its face intrinsic evidence of its probability and accuracy, when he was interrogated, 'How he knows, when he receives goods accompanied with a regular "Bought of" invoice, that they are sent on approbation merely, or consignment? Depones, that this is known from the previous understood arrangement between the parties. Interrogated whether the invoices, just referred to, do not indicate a sale in the absence of a different arrangement or understanding between the parties, and while the goods, with relative invoices, are received without objection or explanation? Depones, that they certainly do in such circumstances. Interrogated for the defender, depones, that the deponent is not aware of any arrangement, with reference to goods sent on approbation to deponent's house, being in writing. That, so far as the deponent recollects, such arrangements have been all verbal.'

"He is afterwards asked, 'How often it has occurred that the deponent's house, after granting bills or paying the precise amount of an invoice of goods furnished, that goods sent on approbation, and thus settled for, had been returned? Depones, that the deponent cannot state how often such thing has occurred, but it has been of frequent occurrence.' Other witnesses, examined for the defenders, depose to the same effect.

"Finally, with reference to the whole case, the Lord Ordinary has only to add, that if he were compelled at present to give judgment on the merits of the case, without further light than is to be obtained from the evidence in process, he should be disposed to hold, on connecting the parole proof with the correspondence of December 1836, that the defender had established his case, and that the pursuers were not entitled to found on the bill then granted by the defender, as barring his right to return the goods, which seems implied in that correspondence. But it would certainly be more satisfactory to have proof of all that passed verbally be-

No. 68.

Feb. 7, 1845.
Grant v.
Johnston.

LORD PRESIDENT.—I have no difficulty in adhering. We are not called on to decide the abstract point argued. When parole evidence is taken, it ought to be full and complete.

LORD MACKENZIE.—I concur. We cannot go into the general question, but I think there is room for argument on it.

LORD JEFFREY.—What I go on is the nature of the proof we already have. This invoice is lithographed. The letters produced show that the party thought the demand for payment unjust.

LORD FULLERTON.—I am of the same opinion. We do not touch any principle of law. The fallacy of the reclaimer's argument is, that the signing of the invoice was a contract, which is not the case. We don't say what is to be the effect of the proof—it is before answer.

THE COURT accordingly adhered, reserving all questions of expenses.

SIMON CAMPBELL, S.S.C.—CHARLES FISHER, S.S.C.—Agents.

No. 69.

JAMES GRANT, Pursuer.—*Sol.-Gen. Anderson—Neaves.*
JAMES JOHNSTON, Defender.—*Rutherford—A. McNeill.*

Proof—Cautioner—Guarantee—Banker's Order.—In an action by a bank on a letter of guarantee,—Held, (1.) That it was competent to prove by parole that the bank had paid a sum of money on an order, subsequent to and on the faith of the guarantee. (2.) That the order on the bank might be used in evidence, although it was altered and vitiated in its date, and no explanation of the alteration was given.

Feb. 7,* 1845.

2d Division.
Lord Justice-
Clerk.
Jury Cause.

SEQUEL of case reported February 28, 1844, ante, Vol. VI. p. 875.

This was an action at the instance of James Grant, agent for the Caledonian Banking Company at Elgin, against James Johnston, for payment of £200, advanced by Grant to John Wink, upon a guarantee by Johnston.

For a statement of the nature of the action, and the terms of the guarantee, see report of the former discussion.

The following issue was sent to trial:—

“ It being admitted that the writing, No. 5 of process, (the letter of guarantee,) was subscribed by the defender,—

tween the parties, prior to the transaction of the goods; and therefore the Lord Ordinary, before farther answer, has allowed the proof, as offered by the defender, to be completed.”

*. Decided 18th January.

"Whether the sum of £200 was advanced by the pursuer, on Saturday the 23d day of October 1841, after receiving the said writing with the subscription of the defender thereto, and on the faith of the same; and whether the defender is indebted and resting-owing to the pursuer in the said sum of £200, with interest?"

No. 69.
Feb. 7, 1844.
Grant v.
Johnston.

At the trial, the pursuer put in evidence the above letter of guarantee, dated 23d October 1841, and a draft or order by Wink, of the same date, upon the Caledonian Banking Company, for £200. This last document was vitiated in its date, which had evidently been altered from 22d to 23d October. Across the face of the draft were written the words "Paid 25th October 1841."

The pursuer also adduced the accountant and a teller of the bank, to prove the circumstances in which the advance of the £200 had been made. They stated that Wink, who had a cash credit with the Caledonian Bank, upon Saturday the 23d October, after the bank had closed, had applied for an advance of money; that upon Grant informing him that his account was overdrawn, he had proposed Johnston as guarantee: this having been agreed to, the letter of guarantee in question had been written out by the accountant of the bank, and given to Wink, who, in about half an hour, returned with it, bearing Johnston's signature: that upon this the draft or order above mentioned was filled up by the teller, and was signed by Wink; and that Wink then received the £200.

The pursuer, with the view of showing that Wink's account had been overdrawn, tendered in evidence a certified copy of the account in the form specified in his cash credit bond. The defender having objected that, being no party to the bond, this account could not be proof against him of the state of Wink's account, it was not admitted as evidence. The pursuer, however, put in evidence an admission by the defender on record, that the account had been overdrawn. There was further given in evidence by the pursuer a decree in absence against Wink, and an admission that he had claimed, and drawn a dividend in Wink's sequestration for the sum in question.

The pursuer did not produce in evidence either the bank books, or extracts from them.

The Jury returned the following verdict:—"Find for the pursuer, subject to the opinion of the Court, on the following points:—1st, Whether, in the circumstances, the payment of £200 by the order, No. 23 of process, could competently be connected with the guarantee in question by parole evidence? 2d, Whether the order, being vitiated in its date, can be used or referred to at all, no explanation in evidence being given of the alteration apparent on the face of it? 3d, Whether the evidence of the debt being resting-owing is sufficient to answer this issue, the

No. 69. defender not having averred or proved that he paid any part of the sum to which the guarantee applied; with power to the Court to enter up the verdict for the defender, if the opinion of the Court shall be favourable for the defender on any of the above points?"

Feb. 7, 1845.
Grant v.
Johnston.

Rutherford, for the defender, pleaded, in reference to the two first reserved points;—

The date of the order on which the money had been paid was of essential importance in a question, whether the advances had been made subsequent to, and on the faith of the letter of guarantee. Being vitiated in this particular, and no explanation being given as to the alteration, it could not be used against the defender. In a question like the present, a writing might be good as against the original party, while it would not be good as against the guarantee. It was not competent, with the view of showing that the money had been paid on the faith of the guarantee, to prove by parole that this vitiated date was 28d October. Had the order borne the date of the 22d, it would not have been competent to prove in this manner that its true date was in reality the 23d. In order to connect the payment of the money with the guarantee, the pursuer ought to have produced the books of the bank, which were the proper evidence, especially in a question as to the date when a sum had been paid. The proper records of a bank were its books, not the recollection of its officers.¹

Solicitor-General, for the pursuer, answered;—

1. Parole evidence was not only competent, but was the only mode of proof which could have been adopted, as it was necessary, for the purpose of establishing that the money had been paid subsequent to the guarantee being received, to prove not only the day, but also the period of the day, on which the order had been paid. The bank books were not the proper evidence to be adduced—they were not evidence in favour of the bank. They might be used by the officers and clerks of the bank to refresh their memory, but it was not necessary that they should be referred to if their recollection was otherwise clear.

2. It was not necessary that a bank order should bear a date. The pursuer had proved that it had been drawn out, and the money paid upon it, on the day in question, and subsequent to the guarantee being received, and this was all that was requisite.

LORD MEDWYN.—I consider the issue in this case as involving two points. 1st, To obviate the want of the legal solemnities of the letter of guarantee, whe-

¹ *Authorities.*—Stewart, Dec. 12, 1815; Mitchell and Stewart, July 9, 1819, (Hume's Decs.)

ther the sum of £200 was advanced on Saturday the 23d October, after receiving the said writing, and on the faith of it? and, 2d, If the defender is indebted in this sum, as I understand it, as still resting-owing?

No. 69.

Feb. 7, 1845.

Grant v.

Johnston.

Now, the verdict finds the affirmative of the issue, that the sum was so advanced, and is still owing, subject however to the opinion of the Court on these two points, so far as regards the first matter in the issue,—whether the payment can be connected with the guarantee by parole evidence, and whether the order, being voided in its date, can be used or referred to at all, no explanation being given of the alteration? And as to the other matter in the issue, whether the evidence of resting-owing is sufficient, the defender not having averred or proved that he paid any part of it?

Now, as to the first matter in the issue, I am willing to consider the two first points reserved together. I begin with observing, that I do not understand we have any thing to do with the sufficiency of the proof adduced, whether the testimony of the clerks was sufficient; and whether it was insufficient, as it was so strongly pressed upon us, because the bank books were not produced. I certainly never before heard so much stress laid on bank books as evidence in favour of the banker whose books they are. I had always understood that a banker's or merchant's books could not be evidence in his favour, on the obvious principle that they are kept by himself, and entirely under his own control, but that, on this ground, they are evidence against him. Had they been produced without a sufficient voucher, they would not have proved payment, as it would have been merely the assertion of the party himself; and, even if the books had stated that the payment was made on the faith of the guarantee, this would not have been evidence of the truth of the statements. It could have gone no further than to prove that the books contained such a statement. But to be safe, to a certain extent, if regularly kept, bank's or merchant's books are admitted to supplement or support a proof in such matters as, from their minuteness and multiplicity, it cannot be that the testimony of witnesses, unaided by a reference to them, could be expected to supply the requisite evidence. If the clerks in a bank recollect generally a payments made to a particular person, about some particular period, and swear to this, and refer to the books of the bank, regularly kept, for the exact sum paid, and the day on which it was paid; this will be admitted; but I know not if the evidence of the books alone would be sufficient in a transaction so recent, that the actors in it and memory of it should not be extinct. On the other hand, if two clerks, from the particular nature of the transaction, can take upon them to swear to all its circumstances, and do not require to refer to the bank books, here is the proper testimony of witnesses of their own knowledge, requiring no supplement in support of it, if believed by the jury, as has been in the present case. Now, here the clerks have been able to give testimony of all the circumstances, from their own recollection of the facts at the time, having been a peculiar transaction—an advance of money when the account was much overdrawn—on a Saturday, after bank hours—the only transaction, I presume, going on at the time—refused at first, and granted afterwards, on the guarantee being produced; and the evidence of this has been satisfactory to the jury. So that I see no objection, as little as the jury did, from non-production of the bank books.

Now, then, as to the points reserved, an unfavourable opinion on any one of which against the pursuer may change the verdict. Take first the vitiation of the

No. 69.
Feb. 7, 1845.
Grant v.
Johnston.

date of the order, and no explanation of the alteration being given. I do not hold this of the slightest consequence—I think no date was required to this order at all. In this respect, it is quite different from a bill of exchange, where, in general, a date is necessary, and then a vitiation in the date will prevent action upon it. But, even as to a bill, the date is only indispensable when it is necessary to prove any particular fact, as to currency of interest, or date of payment. But if the bill be payable at a precise day stated in the bill, no date is necessary.¹ But an order for payment on a cash account is a simple mandate to pay the amount when it is presented; the day of payment is the date from which interest runs, which cannot be proved by its date; and the only occurrence on which a bank will require a date to be affixed to such an order is, if a date is given to it later than the day of presentment. For, if the bank pays it on a prior day, they are responsible, if the party who gives it does not survive; being a mandate, it expires with the grantor; and, therefore, if they deal accurately, and do not care to incur this risk, they would require the party to alter the date, and make it correct. I therefore hold the change of the date of the order of no consequence, although no explanation has been given of the alteration from 22d to 23d, when it is recollected that both the accountant and the teller of the bank concur in saying that the order was written out by the teller in the office that day, and subscribed by Wink, and was handed over, when the money was paid.

Now, then, can this payment be connected with the guarantee by parole evidence? I cannot comprehend on what grounds it can be said that it is incompetent to prove the facts to establish this in this manner. When the issue was framed by the Court, it was not then said that such a mode of proof of this part of it could not be admitted. Not, it will be observed, to prove payment of the money—that is proved by possession of the order, and ranking for the sum, and receipt of the dividend on it—but that it was paid subsequently to, and on the faith of the guarantee, and this in order to supply the want of the statutory solemnities. Now, the above two witnesses distinctly state the whole transaction, that the sum was asked and refused; that it was agreed to advance it if a guarantee was got that the guarantee of the defender was obtained, and brought to them, and then the order was made out and signed, and the money paid—the guarantee expressly bearing, “as you have this day advanced Mr Wink £200.” Thus, then, it is obvious that is a very different case from that of *Stewart*. There was nothing there to connect the defender’s father with the bill said to have been granted for his accommodation, and of which relief was sought. His name was not on it at all. There was, indeed, an acknowledgment of debt by him, but it was improbable, and, moreover, it did not refer to the bill at all; and the attempt was to prove by witnesses that the bill on which the money was raised, and of which relief was sought, was for his accommodation, and that he received the value. This was just an offer to prove by parole evidence the payment of money to the predecessor of the defender, which was clearly incompetent. The distinction between that case and the present then is manifest.

Having thus disposed of the two first reserved points applicable to the first portion of the issue, we have now to attend to the latter point, whether the evi-

¹ Thomson, p. 61.

deceit of resting-owing is sufficient, the defender not averring that he paid any part of the sum; whether, in short, it is shown that it was not paid by the principal party. Now here, too, we had a great deal said as to non-production of the bank books, and that in their absence there was no proof of resting-owing. The production of the bank books alone, and without any other evidence, would not have been sufficient; but no doubt an examination of the account, and comparing it with the vouchers by an accountant, who, on examination, should give the result of it, would have afforded satisfactory evidence that the debt was still unpaid. But the pursuer says this was unnecessary, as there was sufficient evidence in the process to establish this. Perhaps this is the narrowest point in the case, since evidence of the fact could have been so easily produced; but still I think the evidence, that it was not paid by the principal party, is sufficient, from the statements by the defender, and the productions made in process; the jury reserve to the Court to decide this, instead of doing so themselves, and we must enquire into the amount of this evidence. Now we have a decree, in absence no doubt, against Wink, in a process where Johnston was also a defender. It is admitted that Wink became bankrupt, and was sequestrated; that the pursuer lodged a claim for the amount of the advance, supported by an affidavit. He does not distinctly admit, in so many words, that the trustee had admitted the claim, (which must have been sufficient, as he himself did not allege that he had made payment,) but he admits that £30 was drawn from the sequestrated estate in virtue of the affidavit, which, I think, clearly admits the subsistence of the debt of £200 as not having been paid by Wink.

I am, therefore, for holding this verdict for the pursuer.

Lord MONCREIFF.—I have had considerable doubt on all the points; but on the whole matter, and attending to the terms of the issue, the nature of the fact to be proved, and the opinions delivered when the issue was allowed, I am now satisfied, 1. That the evidence adduced, though partly parole, was competent to show that the payment, of which the bank order is the voucher, was made in consequence, and in consideration of the letter of guarantee referred to; and, 2. That the vitiation in the date of the bank order—the alteration of it from one date to another—is not sufficient to prevent it from being used or referred to in evidence. I have no doubt that, notwithstanding the judgment of the Court allowing the issue, it was quite competent to the defender to take these objections. But still the nature of the question of fact undertaken to be proved, which the Court had distinctly in view, is very material in this question as to the competency of the evidence. The general fact is *rei interventus*—something done in consequence, and on the faith of the improbative letter of obligation; and as it is a great deal too late to doubt the competency of proving some such fact, to the effect of enforcing such an obligation, although as standing on a writ not probative under the Act 1691 it would not otherwise be legally effectual, it was impossible to refuse the proof of such an averment in its general aspect. The difficulty here arises from the nature of the special fact of intervention as consisting in the payment of money, which brings into operation another rule of the law of Scotland which we cannot put aside, that in general, and subject to some exceptions, payment of money cannot be proved by parole; and if nothing but parole evidence had been offered, I should have very much doubted the competency of such proof. But it is not so. The order is in itself a legal document, and, in the hands of the bank, is at least *prima facie* evidence of the payment. It does not absolutely prove the

Feb. 7, 1845.
Grant v.
Johnston.

No. 69.

Feb. 7, 1845.
Grant v.
Johnston.

date of payment. It would not do so though there were no viciation, but it is competent to prove the date of the transaction. It is necessary, at any rate, to prove the time of the day; and how can this be done but by parole? It is competent in other cases, as in holograph wills, to prove the date, though, without the writing, it would not be competent to prove all by parole. Now the case here is, that the order is the proper evidence of the payment; and they only prove by parole the material fact that that was after, and on the faith of the guarantee. In fact, on the instrument itself it appears that the payment was on the 25th.

The case of *Stewart* has a strong resemblance to the point, when first heard; but I have considered it carefully, and it is quite different. There, the attempt was, to contradict the natural effect of a bill by another writing, which had no relation to it—first, by proving by parole that the transaction was different. I do not think that the apparent alteration of the date on the bank order renders it not capable of being used. The date, in such a writing, is not essential; and the time of payment is the material thing.

I have much more doubt on the third point. The proper evidence was not produced; and the question is, whether such evidence as they did produce was sufficient? I only state my doubts, and do not mean to differ, if the rest of the Court think it sufficient; but I certainly do not think it as satisfactory as it ought to have been.

LORD COCKBURN.—1. On the first reserved point, I am of opinion that the payment could be competently connected with the guarantee by parole evidence. In order to discover the meaning of this word connect, we must look to the issue, where the question put is, whether the money was advanced after receiving the guarantee, and on the faith of it. I see no objection to the competency of proving these facts by witnesses. It would clearly be competent to show, by facts and circumstances, that though a letter of guarantees had been made out, it had not been acted upon; and the reverse is equally provable in the same way.

2. On the second point, I am of opinion that what is termed the viciation in the date of the order, creates no legal obstacle to the order being used, even although there was no explanation given of that viciation. Cases of vitiated bills, or receipts, or other writings, where a date is essential, have no application to the question now before us. A date is not necessary for such an order. A bank may pay on an order without a date, and consequently on an order with a vitiated date. The defender did not guarantee such payments only as should be made on correct written orders. I see nothing to have hindered the bank from advancing on a verbal request. And if such an advance would have made a good debt as between the original parties, no third party can object to it. It is established that this order was made out in the bank on the 23d, and that the money was instantly paid. The fact of the advance on the 23d, and upon an order made out that day, puts an end to all objection founded on the figure 3 as written, even though any such figure were necessary.

3. I am of opinion that the fact of resting-owing is sufficiently established. If the defender meant to have met, or to have impaired the evidence of this fact, by showing that he or Wink had paid any of the sum covered by the guarantee, or by ascribing the advance to any thing else than the guarantee, it was his business to have led evidence on these points. Not having done so, I think that the pursuer, though he might have proved more, proved enough.

LORD JUSTICE-CLERK.—I agree with Lord Medwyn. I am of opinion that

the verdict must stand for the pursuer. On the first point reserved by the verdict, No. 69. I think it very material that the Court were formerly all of opinion that it was competent to look to the terms of the document itself, when considering whether ^{Feb. 7, 1845.} *Grant v. Johnston.* ~~rei interventus~~ was relevantly alleged. In the trial of the matter of fact, whether the money was advanced on the faith of that letter, I think its terms must be considered. Then the enquiry is, whether, in point of fact, the money was advanced after that letter of guarantee was received by the bank, and on the faith of it. I do not know how that fact can be cleared up except by parole evidence. The evidence may be unsatisfactory to a jury, if the bank books are not produced, or it may be complete. But I am clearly of opinion, that parole evidence is competent in the enquiry into the matter of fact, whether the advance of money was after the letter was received, and made on the faith of it.

The case of *Stewart* is very different. There the attempt made was by parole evidence to show what was the meaning of parties in one document, so as to make it interpret and alter the obligation as expressed in another document; while by its own terms it did not relate to that latter document at all. No such point occurs here. The question here is a pure matter of fact. (Reads issue.) Neither do I think that the alteration in the date of the order of itself prevents that order being used. It is a fact which may be most material in many instances in destroying the force of the parole evidence, or even of the order itself, according to the circumstances. But when, as is proved here, it is distinctly sworn that this order was written out at the time, and that on it the money was paid, the alteration in the date is not a matter which will warrant the Court to throw aside the order.

I had more difficulty on the third point, especially as it is wholly the fault of the bank for leaving this matter in such an unsatisfactory and meagre state. But, on the whole, I think there was an admission in the passages of the record put in evidence, that the bank had been ranked for the sum in question on the sequestrated estate of Wink, and had drawn a dividend thereon; and that such admission is sufficient proof that the same was due by Wink. I am much influenced by the undoubted consideration, that the latter point in the issue was no part of the question which the Court sent to trial, or on which any doubt existed or was raised at that advising. How or why the additional point as to resting-owing was added to the issue I do not know, and I regret much that the issue went beyond the articulate judgment of the Court. We never intended the trial to embrace any matter but the question stated in the interlocutor. We must see, however, that there was enough of evidence. On the whole, I think the proof is sufficient.

THE COURT accordingly pronounced an interlocutor finding for the pursuer on the reserved points, and decerning against the defender for the sum of £200, under deduction of a certain sum recovered from Wink's estate.

INGLIS and BURNS, W.S.—L. MACKINTOSH, S.S.C.—Agents.

No. 70.

Feb. 7, 1845.
Harvey v.
Miller.

JOHN HARVEY, Advocate.—*Rutherford—Macfarlane.*
ROBERT MILLER and MANDATORY, Respondents.—*Maitland—
Buchanan.*

Process—Stamp—Contract—Gaming.—Where a written agreement between parties to fight cocks, founded on in a process, was not stamped,—The Court refused to dismiss a reclaiming note, on the objection that the agreement not being stamped could not be looked at, but allowed time to have it stamped.

Feb. 7, 1845. ROBERT MILLER presented a petition to the Sheriff of Lanarkshire
2^d DIVISION. against John Harvey, for recovery of £100, which he had deposited in
Ld. Robertson. Harvey's hands as stakeholder, upon the issue of a cock-fight between
T. him and Mr John Merry, Glasgow, on the allegation that the rules of cock-fighting had not been observed on the part of Merry, who had been the winner at the fight. In the course of the process, a written agreement between the parties to fight the cocks was produced and founded on.

The case having been advocated, and having come before the Inner-House upon a reclaiming note for Miller, the objection was taken by the Court, that the agreement, not being stamped, could not be looked at.

Rutherford, for Harvey, then moved that the reclaiming note should be refused.

Maitland, for Miller, answered, that he was entitled to have a reasonable time allowed to him to have the document stamped.

LORD JUSTICE-CLERK.—I am not aware of this having been ever refused. Where a jury trial has failed from a document wanting a stamp, a new trial has been granted.

THE COURT allowed a fortnight to have the agreement stamped.

JOHN LEISHMAN, W.S.—JOHN CULLEN, W.R.—Agents.

JOHN STRACHAN, Pursuer.—*Maitland*.
 GEORGE MONRO, Defender.—*Monro*.

No. 71.

Feb. 8, 1845.
 Strachan v.
 Monro.

Reparation—Process—Issues.—In an action of damages for “illegal, unwarrantable, oppressive, and injurious” conduct, in causing the pursuer to be apprehended and tried in a police court on a false charge of creating a disturbance,—Held that the pursuer did not require to take an issue of malice or want of probable cause, the case not being privileged.

See the previous report of this case, when the relevancy of the summons was disposed of, *ante*, p. 178. Feb. 8, 1845.

The following issue was returned by the issue-clerks :—

1st Division.
 Lord Murray.
 W.

“Whether on or about the 20th day of December 1843, within, at, or near the office or premises in Princes Street, Edinburgh, now or lately occupied by the London, Leith, Edinburgh, and Glasgow Shipping Company, the defender wrongfully apprehended the pursuer, or caused him to be apprehended, and to be detained in the police-office, to his loss, injury, and damage.”

The defender objected to this issue, upon the ground that malice and want of probable cause ought to have been inserted in it.

The pursuer answered, that malice and want of probable cause were technical phrases, which were necessary only in privileged cases.

The Lord Ordinary reported the case to the Court.

LORD PRESIDENT.—You cannot insert the words proposed except in privileged cases, and this case is not privileged.

The other Judges concurred.

THE COURT accordingly approved of the issue.

MAURICE LOTHIAN, S.S.C.—GEORGE MONRO, S.S.C.—Agents.

No. 72.

Feb. 8, 1845.
Ker v.
M'Ewan,

JOHN KER, Appellant.—*T. Mackenzie*.
HUGH M'EWAN, Respondent.—*Whigham—Horn*.

Bankruptcy—Sequestration—Claim—Stat. 2 and 3 Vict. c. 41, §§ 11 and 102—Bill of Exchange.—A claim in a sequestration having been rejected by the trustee, upon the ground that the bill on which it was founded was vitiated by erasure;—the claimant was held not entitled to support his debt by other documents which were afterwards produced as additional vouchers of the debt, but not till within two months of the period fixed for payment of the first dividend, to the effect of entitling him to a share of that dividend, but he was allowed a proof of the circumstances under which the erasures were made, in support of the bill originally produced with his affidavit.

Feb. 8, 1845. JOHN KER, the trustee of the Renfrewshire Banking Company, lodged a claim on the sequestrated estate of Alexander and John Milloy for £589 : 18 : 10, being the sum contained in a bill of the bankrupts, of which the Renfrewshire Banking Company were the holders, with interest thereon, and £5 : 5 : 7 of expenses of diligence. This claim was refused by M'Ewan, the trustee upon the Milloys' sequestrated estate, on the ground that, in so far as regarded the bill, the sum, both as denoted by the figures, and as appearing in the body of the bill, being written upon erasures, the bill was incapable of forming the ground of a claim to any amount; and that, in so far as regarded the expenses, no vouchers at all had been produced.

2d Division.
Ld. Fullerton.
Bill-Chamber.
T.

Against this deliverance of the trustee, Ker presented a note of appeal to the Lord Ordinary on the bills, craving that his claim should be placed on the scheme of ranking, to the effect of drawing the proportion of divisible funds to which the Renfrewshire Banking Company might be entitled.

At the discussion before the Lord Ordinary on the bills, Ker produced in further evidence of the debt on which he claimed, inter alia, a letter, of date 3d May 1842, from the Milloys to him, containing a reference to a bill of the same amount as due by them, with an engagement to make a certain payment to account, and the promise of a guarantee for the balance, and a voucher for the expenses of diligence.

The Lord Ordinary, of date 27th September 1844, pronounced the following interlocutor :—"In respect of the documents now produced, sustains the appeal, authorizes the trustee to place the appellant's claim on the scheme of ranking, to the effect that he may draw the proportion of the divisible funds to which the Renfrewshire Banking Company is entitled : Finds the appellant entitled to expenses."

M'Ewan reclaimed. He pleaded that Ker was not entitled to rank for the first dividend, as he had not, in terms of the 11th and 102d sections of the Bankrupt Act, produced any sufficient grounds of debt, two months

before the time fixed for the payment of that dividend, nor had he stated any cause why they were not produced. The time for payment of the first dividend was in September 1844, and the vouchers of debt, in respect of which the Lord Ordinary had sustained the claim, had only been produced before his Lordship in that month. The bill he had produced with his oath, being vitiated, was not a valid ground of debt, and had been properly rejected by the trustee.

No. 72.
Feb. 8, 1845.
Ker v.
M'Ewan.

Ker answered, that it was the duty of the trustee to have called upon him for further evidence in support of his claim; and, in point of fact, the additional evidence had been communicated to him extrajudicially, and it was after this had been done that the deliverance rejecting the claim had been pronounced. The additional documents produced were not founded on as separate vouchers or acknowledgments of the debt—they were founded on for the purpose of showing that the bill itself was a good document of debt. The appellant was willing to instruct that the erasure appearing on the face of the bill, which was the only objection urged against it, had not been made fraudulently, but had been made with the consent of all the parties to it. The decision of the trustee could not have the effect of excluding this enquiry and offer of proof.

Replied for M'Ewan, that the letter of 3d May 1842 had not been produced to him as trustee, but merely a copy of it, although he expressly called upon Ker to produce the original; that this letter was, besides, neither in itself sufficient evidence of the debt claimed, nor was it sufficient as an adminicle of the bill, as obviating the objection under the Stamp Act, that the erasure must have been made bona fide before the issuing of the bill; that in support of that part of the claim which was for expenses, no voucher at all had originally been produced; and that, in these circumstances, the trustee had no course left but to reject the claim.

LORD JUSTICE-CLERK.—This interlocutor not only sustains the appeal, but also directs that the claimant should be ranked. It seems to be admitted that at present it cannot stand. I am not disposed to give much effect to the letter of May 1842. There is, I think, a defect in the evidence; and it ought first to be shown to us, that there were no other bills between the parties besides that mentioned in the letter. I understood Mr Mackenzie to maintain, first, that the bill was sufficiently supported by the documents produced; and, in the second place, to offer further proof that the alteration in the bill had been made with the consent of the accep-

¹ *Authorities for Appellant.*—M'Lean, May 20, 1834, (12 S. & D. 613;) Whitehead, Feb. 19, 1836, (14 S. & D. 544;) Armstrong, June 2, 1842, (ante, Vol. IV. p. 1347.)

For Respondent.—Wright v. Kirkpatrick, Nov. 19, 1842, (ante, Vol. V. p. 164.)

No. 72.

Feb. 8, 1845.
Ker v.
M'Ewan.

tors. I think, then, that the proper course will be to recal the interlocutor, and to allow the appellant to substantiate his claim in this manner.

I do not think that the appellant, if he shall succeed, is cut out from the benefit of the first dividend, but I could not, in the present state of the case, sustain a ranking upon the vitiated bill. He was bound to have produced his grounds of debt within the statutory time. The trustee required him to produce them. He did not produce the documents, and the trustee was not bound to enter into any correspondence as to copies. But he says that the bill which he did produce, is a good ground of debt; that he has never abandoned it as such; and that the acknowledgment is merely a piece of evidence to support the bill, and not a separate voucher of debt. Mr Mackenzie must understand, that if he does not hereafter succeed in making out the bill to be good, he cannot revert to the acknowledgment, which was not produced or marked in due time, as of itself a ground of debt.

The other Judges concurred, and

THE COURT accordingly pronounced as follows:—"Recal the interlocutor complained of, and; before further answer, appoint the respondent to give in a minute, stating what he avers and offers to prove, in order to obviate the objection of erasure in the bill issued founded on."

Of a subsequent date, Ker gave in a minute, stating, inter alia, that in writing out the bill the bank clerk inadvertently had made an error in the sum, which was immediately corrected; that this alteration was made before the bill was discounted, or issued, or put to any use, to correct an innocent mistake, and to make it correspond with the sum for which it was truly intended by all parties to be granted; and reference was made to a variety of documentary evidence, consisting of the entries in the Renfrewshire Banking Company's books, and correspondence with the manager of the Royal Bank, &c., tending to instruct these facts.

After seeing and considering this minute, and, it was understood, after satisfying himself that Ker would be able to substantiate his averments, M'Ewan consented to the bill being ranked for the first dividend.

Of this date, the Court, of consent, pronounced an interlocutor to that effect; but found M'Ewan entitled to his expenses, on the ground that the judgment of the trustee was right when it was pronounced, and that the documents he called for ought to have been sent to him.

ROLLAND and THOMSON, W.S.—JOHN ROSS, S.S.C.—Agents.

WILLIAM GALLOWAY, Reclaimer.—*Maitland*,
EDWARD SCRIVENS, Respondent.—*Pattison*.

No. 73.

Feb. 8, 1845.
Galloway v.
Scrivens.

Cessio.—Where the pursuer of a cessio, after instituting the process, had sold a part of his property, and paid away the proceeds to some of his creditors, the Court refused him the benefit of cessio hoc statu.

EDWARD SCRIVENS, spirit-dealer in Dundee, brought a process of cessio before the Sheriff of Forfarshire, which was opposed by William Galloway, one of his creditors. In his examination, Scrivens had admitted, that about a month after the application for cessio had been presented, he had sold his shop furniture, by which he had realized a sum of about £80, which he had paid away to four of his creditors.

Feb. 8, 1845.

2d DIVISION.
T.

The Sheriff having found Scrivens entitled to the benefit of cessio, Galloway presented a reclaiming note against his judgment.

Lord MONCREIFF.—The one fact, that pending the cessio, this party had taken up a sum of money, and paid it away to some of his creditors, is a sufficient ground with me for altering the Sheriff's judgment.

LORDS JUSTICE-CLERK and COCKBURN concurred.

LORD MEDWYN was absent.

THE COURT accordingly remitted to the Sheriff, with instructions to refuse the application for cessio hoc statu.

WILLIAM WOTHERSPOON, S.S.C.—CAIRNS and MORFAT, S.S.C.—Agents.

DAVID SCOTT THRESHIE, Pursuer.—*Rutherford—Fyfer*.
THRESHIE'S TRUSTEES and OTHERS, Defenders.—*G. G. Bell*—*Baillie*.

No. 74.

Provision—Marriage-Contract—Settlement—Clause—Succession.—A father bound himself in his second son's marriage-contract to pay him £1000, and further to "put him on an equal footing" with any of his younger children, by paying or bequeathing to the son the difference between that sum and any larger sum he might give or bequeath to any of them; by the subsequent marriage-contract of a daughter, the father bound himself to pay her an annuity of £200 for life, commencing with her marriage; in his settlement, he directed his trustees to divide the reversion of his estate among his children on the death of his wife, to whom he gave a liferent of the whole;—Held that the son, under his marriage-contract, was a creditor of his father to the effect of being immediately put on a

No. 74. footing of equality with his married sister; that the bequest to him of a share of the reversion, upon the death of his mother, the liferentrix, was not implement of the father's obligation; and that, in order to put him on an equality with his sister, he was entitled to draw from the trust estate immediately the amount of the sister's annuities already paid, and prospectively to the amount of such further annuities, or share of reversion, as she might receive.

Feb. 11, 1845.
Threshie v.
Threshie's
Trustees.

Feb. 11, 1845. **MR ROBERT THRESHIE** of Barnbarroch, writer in Dumfries, died, survived by a widow and four children, viz. Robert, David Scott, Cairns, and Mary Threshie, the wife of Captain William Denholm Dalzell, and who, after his death, by subsequent marriage became Lady Reid.

2d Division.
Lord Wood.
R.

A postnuptial contract of marriage had been, in 1818, entered into between David Scott Threshie, the second son, and Miss Jean Crawford, daughter of Mr John Crawford, merchant in Leith, to which their respective parents had been parties. By this deed, Mr Crawford, on the one hand, bound himself to pay to David Scott Threshie £1000 in name of tocher with his daughter, at the first term after his death, with interest from the time that the said David Scott Threshie and Jean Crawford "shall set up house;" and also to pay to him an annuity of £50 for seven years. Mr Crawford further bound himself "to put the said Jean Crawford on an equal footing with any of his other daughters, that is to say, if he shall give or bequeath to any of them a sum above the tocher hereby contracted for with Jean, he shall pay or bequeath to the said David Scott Threshie the difference betwixt the said principal sum of £1000 sterling hereby contracted for, and any larger sum which he the said John Crawford may give or bequeath to any of his other daughters."

On the other hand, "and in order to carry the views and real meaning and intention of the contracting parties more effectually into execution," Mr Threshie, senior, bound himself "to pay to the said David Scott Threshie, his son, the money that will become necessary to discharge the fees of entry on his passing notary-public, and entering with the society of writers to the signet;" and also, to pay to him and his children the principal sum of £1000, at the first term after his (Mr Threshie, senior's) death, and to pay interest upon this sum "pending the marriage," from the time he should deem it expedient that the said parties should take up house. Mr Threshie, senior, further bound himself, to "put the said David Scott Threshie on an equal footing with any of the younger branches of his family; that is to say, if he shall give or bequeath to any of his children other than his eldest son, a sum above £1000 sterling, he shall pay or bequeath to the said David Scott Threshie and his foressaids, the difference betwixt the said principal sum of £1000 sterling, hereby contracted for, and any larger sum which he, the said Robert Threshie, may bequeath to any of his children."

About a year after the date of this contract, it was arranged that David Scott Threshie and his wife should take up house, on which occasion he

father, in implement, pro tanto, of the obligation under the contract of marriage, advanced to him £400 ; Mr Crawford advancing the like sum. In 1825, Mrs D. S. Threshie died, leaving two daughters.

No. 74.
Feb. 11, 1845.
Threshie v.
Threshie's
Trustees.

Mr D. S. Threshie had passed as a writer to the signet, his father having paid the expense of his doing so—but he did not pass as notary-public. There were various pecuniary transactions between Mr D. S. Threshie and his father, upon which it was alleged a balance would arise in favour of the latter on an adjustment of accounts.

In 1834 Mr Threshie was a party to a contract of marriage between his daughter, Mary, and Captain Dalzell, whereby he bound himself to pay to her, during all the days of her life, a free yearly annuity of £200, beginning the first term's payment at the Martinmas then next. There had been also a sum of about £100 given to Mrs Dalzell by Mr Threshie, on the occasion of her marriage.

Mr Threshie, senior, died in July 1836, leaving a trust-disposition and settlement, executed in 1835, by which he provided, inter alia, that his trustees should make payment to Mrs Dalzell of the above annuity settled on her in her marriage contract—that they should pay to Mrs Threshie, his widow, during all the days of her life, the clear annual income arising from the reversion of his whole estates—and that after the death of Mrs Threshie, they should pay over the reversion to his younger children, in manner following, viz. :—One equal third part or share to his second son, David Scott Threshie, after deduction of the sums paid to him, under his marriage contract, and of the debt owing by him to his father ; another equal part or share to his third son, Cairns Threshie : and declaring, with regard to the remaining third part or share of the reversion, that it had been his intention that the same should have been paid over in the same manner to Mrs Dalzell ; but as he had recently come under the above obligation in her marriage contract, to pay her an annuity of £200 per annum during her life, his trustees were thereby directed to deduct from the said remaining third share the whole bygone payments already made, and which should be made by him under the said marriage contract, or by his trustees after his death, and interest thereon at the rate of four per cent, and a sum of money equal in amount, at the period of the death of his said spouse and him, to the value of the annuity, and pay over to his daughter the balance only of the said third part or share, if any balance there should be.

An action of declarator, count, and reckoning, was brought by David Scott Threshie against his father's trustees—calling also his mother and brothers, and his sister for their interests, concluding, 1. For payment of £600, being the balance of the £1000 provided to him in his marriage contract, with interest thereon from Martinmas 1825, when his father had ceased to pay interest, till Martinmas 1836, the first term after his father's death. 2. For payment of £40 as the expense of entering as notary-public. And 3. For having it found and declared

No. 74.
Feb. 11, 1845.
Threshie v.
Threshie's
Trustees.

that, under his contract of marriage, he was a creditor of his father and his trustees, "to the effect of being put on an equal footing with Mrs Mary Dalzell, his sister, by drawing from the trust estate the sum of £150, or such other sum, more or less, as should be found to be a just equivalent to him for the sum given to his sister by her father, at her marriage, with interest thereof from Martinmas 1834, till payment, and also by drawing from the said trust estate an annuity of £200, by equal half-yearly payments of £100 each, in the same way as his sister had hitherto drawn her annuity, commencing the first of said half-yearly payments as at the term of Whitsunday 1818, being the term following the date of the pursuer's contract of marriage, and continuing the same at Martinmas and Whitsunday yearly thereafter until his death; or commencing the first of said half-yearly payments as at Martinmas 1834, being the term following the date of his sister's contract of marriage, and continuing the same at the terms of Whitsunday and Martinmas in every year thereafter, until his sister's death; or, commencing the first of said half-yearly payments at such term, and continuing the same at and until such other terms as should be found just, with a view to a perfect equality betwixt him and his sister, and the difference of their ages."

The pursuer pleaded, in reference to his claim to be put on an equal footing with his sister Mrs Dalzell,—

1. That he was a creditor of his father for the whole provisions in which the latter became liable in the contract of marriage with Mrs Crawford, and the defenders were now his debtors therein, according to the purpose of his trust, whereby they were taken bound to pay all his just and lawful debts and obligations.

2. The defenders were bound, in terms of the said contract, to put the pursuer on an equality with his sister, Mrs Dalzell, by paying him an annuity of £200, calculated from, and payable during such period as the sound construction of the contract required, in estimating the difference between the principal sum of £1000 thereby specially provided to the pursuer, and of the annuity provided to her by her contract of marriage and her father's settlement.—*M^{rs} Queen v. Nasmyth*, 29th January 1831.

The defenders pleaded *inter alia*:—

1. Under the sound construction of the pursuer's marriage contract, he has no title to call on the defenders to pay the £200 termly annuity sued for, in respect such payment is not requisite to produce, and, if made, would not produce the equality among the younger children of the late Mr Threshie, contemplated and contracted for by that deed.

2. More particularly, the equality therein contemplated had reference solely to the final provision to be made by Mr Threshie for his children after his own decease, and to payments to account of such provision, but did not include onerous obligations undertaken by him for behoof of his children; nor did it bar him from disposing of his funds at pleasure, during his own lifetime, to any of his children.

3. In any view, every obligation undertaken by the testator on that head, was duly implemented by his settlement, in respect that the equality contemplated by the pursuer's marriage contract, is thereby substantially and effectually accomplished.

No. 74.
Feb. 11, 1845.
Threshie v.
Threshie's
Trustees.

The Lord Ordinary pronounced this interlocutor upon the following amongst other points: " Finds that in this process the pursuer, David Scott Threshie, claims inter alia as a creditor of his late father, Robert Threshie, and of his estate, in virtue of the pursuer's contract of marriage with Miss Crawford, dated the 13th and 16th days of April 1818, to which his said father was a party, for implement of the obligations in his favour, which his father thereby came under: Finds, that in addition to an obligation to pay to the pursuer the sum of £1000 sterling, with interest, in the manner there specified, and other obligations, the said Robert Threshie bound and obliged himself to put the pursuer, the said David Scott Threshie, on an equal footing with any of the younger branches of his family, 'that is to say,' as the said contract bears, 'if he shall give or bequeath to any of his children, other than his eldest son, a sum above £1000 sterling, he shall pay or bequeath to the said David Scott Threshie, and his foresaids, the difference betwixt the said principal sum of £1000 sterling hereby contracted for, and any larger sum which he, the said Robert Threshie, might bequeath to any of his children other than his eldest son:' Finds that the said Robert Threshie in the contract of marriage of his daughter Mary Threshie, with the deceased Captain William Denholm Dalzell, dated the 3d November 1834, bound and obliged himself to pay to his said daughter, during all the days of her life, a free yearly annuity of £200 sterling, at two terms in the year, Martinmas and Whitsunday, in equal portions, beginning the first term's payment at the term of Martinmas then next for the first half-year, and so on half-yearly thereafter: And finds, that by his trust-disposition and settlement, dated 24th February 1835, conveying his whole estate, heritable and moveable, excepting as there excepted, to trustees, of whom the defenders are the surviving acceptors, the said Robert Threshie, after providing for payment of his debts, and of the foresaid annuity to his daughter, and making certain provisions in favour of his wife, if she should survive him, directed his trustees, after the death of the survivor of him and his said spouse, to pay one-third of the reversion of his said estate to his second son, the pursuer, and another to his third son, Cairns Threshie, in the manner and subject to the provisions thereanent, as there set forth: And further, with regard to the remaining third, he provided and declared as follows: 'It was my intention that the same should have been paid over in the same manner to my only surviving daughter, the said Mary Threshie or Dalzell, but as I have recently come under the foresaid obligation in her marriage contract before mentioned, to pay her an annuity of £200 per annum during her life, to be continued eventually to her said husband,

No. 74.
Feb. 11, 1845.
Threshie v.
Threshie's
Trustees.

my said trustees are hereby instructed and directed to deduct from the said remaining third part or share the whole bygone payments already made, and which shall be made by me under the said marriage-contract, or by my trustees after my death, and interest thereon at the rate of 4 per cent, and a sum of money equal in amount at the period of the death of my said spouse and me to the value of the said annuity, and pay over to my said daughter the balance only of the said third part or share, if any balance there should be ;' and there is then added certain provisions as to the payment or disposal of the balance of the said third, if any, in the event of the decease of his said daughter, before payment thereof should be received by her : Finds that the said Robert Threshie died in July 1836, survived by his spouse, who is still in life : Finds that the said annuity so provided to Mrs Mary Threshie or Dalzell, was paid as stipulated by the said Robert Threshie during his life, and since his death has continued to be so paid by the defenders, his trustees : Finds that the pursuer is, under his foresaid contract of marriage, a creditor of his father, the said Robert Threshie, and of the defenders, his trustees, to the effect of being put on an equal footing with the said Mrs Mary Threshie or Dalzell, his sister ; and that assuming that the provisions settled upon him by his father in the foresaid trust-disposition and settlement, with the provisions in his contract of marriage, as modified by the said disposition and settlement, were made with a view to produce such equality, he is not bound to accept thereof as implement of the foresaid obligation in his favour, these provisions not being, in the circumstances, calculated to produce substantial equality between him and the said Mrs Mary Threshie or Dalzell : But that while the pursuer is thus entitled to refuse to receive the said provisions in implement of the foresaid obligation, and to stand upon his rights as a creditor under his marriage-contract, he, in respect of the terms of the foresaid trust-disposition and settlement, can only do so, subject to the condition of being excluded from all claim directly as a legatee under the latter, inasmuch as by so claiming as a creditor, instead of accepting the said provisions as in full of all he can demand, he necessarily reprobates the said trust-disposition and settlement : Finds, with reference to the terms of the conclusions of the present summons, that the pursuer, as a creditor of his father, the said Robert Threshie, by his contract of marriage, to be put on an equality with the said Mrs Mary Threshie or Dalzell, is entitled to draw from the trust-estate the sum of £200 per annum, as at the dates at which the same was payable to her, or may become payable to her, with interest from these dates, and till paid, in so far as having regard to the other obligations in his favour in the said contract, the sums received, or which are exigible by him in implement thereof, the so drawing may be necessary to put him on such equality, reserving to the pursuer any further or additional claim, which, at the death of the said Robert Threshie's widow, he may have, either to a sum equivalent to the value of the said annuity, or equivalent to the

No. 74.

Feb. 11, 1845.
Threshie v.
Threshie's
Trustees.

amount of any balance of the third of the said Robert Threshie's estate, bequeathed to the said Mrs Mary Threshie or Dalzell, which may become payable to her in terms of the foresaid trust-disposition and settlement, or equivalent to the balance of the third of the said estate bequeathed by the said Robert Threshie to any of his younger children, which may become payable in terms of said deed: Finds, that to the same effect he is entitled to draw the sum of £150, or such other sum as shall be found to have been advanced to the said Mrs Mary Threshie or Dalzell, as outfit on her marriage, with interest from the date of the advance: Finds, that in ascertaining what may now be due to the pursuer, there falls to be deducted from the amount of said annuities paid to the said Mrs Mary Threshie or Dalzell, with interest as aforesaid, and the said allowance for outfit, with interest, the sums received by the pursuer in discharge of the provision made for him in his marriage-contract, but not including the sums exclusive of which the sum of £1000 is mentioned in said contract as being thereby provided, or which are still exigible in implement thereof, in so far as the latter may not be compensated by the debt due by the pursuer to his late father, and with which it is hereby found that the defenders are entitled to compensate the same, and that there further falls to be deducted any sum in which, upon an adjustment of accounts, as between the pursuer and his father, it shall be ascertained that the pursuer was debtor to his said father: And finds, that if upon a state of accounts made up upon the above footing, a balance shall, at the date to which the account is carried down, remain at the credit of the pursuer, he will be entitled to immediate payment thereof, and to payment prospectively of a sum equal to the future annuities that may become payable to the said Mrs Mary Threshie or Dalzell, as they shall fall due; and that if there shall be a balance at his debit, the same must be paid by him, or placed against the annuities to fall due, as the matter may be ultimately decided: Finds, that in implement of the obligation of the late Robert Threshie, in the pursuer's contract of marriage, to pay the pursuer 'the money that will become necessary to discharge the fees of entry on his passing notary-public,' the offer by the defenders to pay said money when the pursuer shall pass notary-public, is sufficient; and finds that they are then bound to pay the same accordingly: Finds, that in implement of the said Robert Threshie's obligation in the said contract, relative to the sum of £1000 thereby provided to the pursuer, there remains unpaid a balance of £600, and that said balance is due to the pursuer, with interest from and after the term of Martinmas 1836, being the first term after the death of Robert Threshie in July of that year; but finds that, by the terms in which the said sum of £1000 is settled in the said contract, no interest is due on said balance of £600, from the date of the dissolution of the pursuer's marriage in 1825, by the death of his wife; and that it is not disputed that all prior interests due thereon, or on the balance of £400, the capital of which was admittedly received

No. 74. by the pursuer during the subsistence of his marriage, have been paid or
 Feb. 11, 1845. accounted for : And, before further answer, remits to Mr Donald Lindsay,
 Threshie & accountant, to make up a state of accounts between the parties,
 Threshie's Trustees. with instructions, that in doing so he shall give effect to the preceding
 findings."

Both parties presented reclaiming notes ; but several points which had been discussed between the parties, and were decided by the Lord Ordinary, were subsequently abandoned. Amongst others, the claims for interest on the £600, previous to Mr Threshie's death—for the immediate payment of £40, as the expense of passing notary-public—and for £150, on an equivalent to the sum paid to Mrs Dalzell on her marriage, were not pressed in the Inner-House. It was not denied that the balance of £600 was due to the pursuer. It was further conceded by D. S. Threshie, that if he were to be found entitled to an immediate settlement on the footing of equality with his sister, as a creditor under his marriage-contract, he would not be entitled to insist that the payment of any balance due by him to his father should stand over till the distribution of the trust-estate under the settlement. The question, therefore, upon which the Court ultimately decided, thus came to be substantially that noticed in the above pleadings.

LORD JUSTICE-CLERK.—The obligation in Mr D. S. Threshie's postnuptial contract, undertaken by his father, is in these terms :—(His Lordship read the clause above quoted.)

It is unnecessary to go over the other provisions, either undertaken by the father, or by the father of the wife. The deed is a mutual contract between the parents of the spouses, as well as between the spouses and their respective parents to them severally ; and it is a contract eminently onerous as to the obligations undertaken by the parents, for they come under certain obligations—each distinctly, in consequence of the obligations undertaken by the other.

It is equally clear that, under this deed, D. S. Threshie became an onerous creditor, directly of his father, for fulfilment of this obligation. I am not disposed, especially as it is quite unnecessary for this case, to go the length of holding, that under the above clause the son had any right (as contended) to demand payment from his father of sums equivalent to what he might advance to any of his other children, during his own lifetime, towards their ultimate provisions—such, as an outfit to Cairns Threshie if he had gone to India, or this annuity to Lady Reid, under her marriage-contract with her first husband. We are not called upon to give an opinion, I think, on that question, and, therefore, I only say that I am not prepared at present to carry the construction of the obligation to that extent. But the question arises on the father's death, as to the fulfilment of this onerous obligation. I apprehend that the ruling principle in judging whether the father has fulfilled the obligation, must be *equality*. Accordingly, the trustees admit that this is the principle of judgment.

Then the obligation further bears expressly, that the father is to put D. S. Threshie on "an equal footing" (a very expressive phrase with reference to practical results) "with any of the younger branches of his family." I agree, that

No. 74.

Feb. 11, 1845.

Threshie v.
Threshie's
Trustees.

under this obligation the father retained considerable discretion, and that if the object of the obligation had been secured substantially, without any solid practical difference, the Court would not entertain demands founded on nice and critical calculations of an accountant, as to the effects of the mode in which the different provisions were to be paid. But, on the other hand, the father has tied himself up by this deed much more than was necessary for the fulfilment of the main object of the clause, for the undertaking is not to divide equally his fortune among his younger children, or not to leave a larger share to the others than to D. S. Threshie; for the obligation (subsequently amplified, but not thereby altered) is express, to put D. S. Threshie on an equal footing with any of the younger children. This general part of the obligation goes very far. He must be on an equal footing. I hold that term relates necessarily to the *practical effects and advantages* enjoyed by any one else. It is a plain expression, not capable of being mistaken. It refers, I think, at once to the main thing to be looked to, the actual benefit derived by others, so as not to put the son on an unequal footing; and then it is an equal footing with any of the younger children. I think this entitles the son in this case to make the various provisions made for the other younger children the subject of comparison with his own, as to actual personal direct benefit and advantage, and to say—I am not on an equal footing with Lady Reid—I can get nothing, it may be, for twenty years—I have got nothing for nine years—I am without business, an exile in America, it may be, starving—and the postponement of the provision for me does not put me on an equal footing with my sister, who is drawing annually an annuity out of my father's estate.

It is impossible, I think, to deny, that D. S. Threshie is not on equal footing with Lady Reid. He may be with Cairns Threshie, but that is not the obligation. He must be on an equal footing with any of the younger children; and I think the inequality between him and Lady Reid is real, practical, and injurious in immediate results.

The father, in this case, appears to have seen perfectly the advantage to Lady Reid—that is, the inequality of the footing she would be placed on; for he directs that, in the final division, she must be charged with interest at four per cent on all the bygone payments made to her, whether made by himself or the trustees, so that ultimately she is only to draw the balance.

This would, at the period of distribution—the widow's death—no doubt prevent her drawing more than D. S. Threshie, if alive, would then get. But this is no answer to his objections—1. That he is not on equal footing with her, when she is drawing annually, for a long period, a good annuity, and he is getting nothing. 2. That even if his right was declared to be personal, and although the Court were to hold that the declaration against vesting could not operate against him, (which might easily be done if the provision had otherwise put him on an equal footing with Lady Reid,) still he would not be on the same footing with her; for so great is the benefit she has, that she is to pay ultimately four per cent for that immediate benefit. 3. That he may starve in the mean time, and die before the period of distribution, while his vested interest might sell for little. Now, I cannot think that these parties are on an equal footing, when one gets nothing, and may be starved, and the other draws a large comfortable annuity for years. I think that the risk of starvation solves the case.

The main finding, therefore, in the interlocutor, I think, is correct.

No. 74. The finding as to the £100, (by mistake stated £150,) I think, must be altered; and Mr D. S. Threshie did not press that point.

Feb. 11, 1845.
Threshie v.
Threshie's
Trustees.

On the note of D. S. Threshie, it was admitted that the second prayer* could not be consistently pressed, and that the claim under the third prayer† was against the words of the marriage-contract, *pending the marriage*. The second prayer being given up, I think it is quite clear that no question of approbate and reprobate arises in the present case; and that the general finding complained of under the first prayer of D. S. Threshie's note‡ ought to be recalled. In other respects the interlocutor appears to be quite correct, and very accurately framed.

LORD MEDWYN.—I concur in holding the pursuer a creditor of his father's trust-estate under the marriage-contract, to which his father was a party, for implement of the obligation contained in it, that he should be put on a footing of equality as to provisions with any of his other younger children. That in this the father contemplated a money provision, not one by way of annuity, seems clear; and I cannot hold that the terms in which the obligation is conceived,—if he shall give or bequeath to any of the other children a sum above £1000, he shall pay or bequeath to the pursuer the difference, &c., that these terms are correlative; so that if he gives to another in his lifetime, he must also come under an obligation to pay the pursuer, also in his lifetime, an equivalent sum; so that the pursuer might have claimed it from his father by a direct action against him in his lifetime. The pursuer pushed his claim thus far, and I think he was bound to do so; it is only carrying out his view of the obligation. But I cannot think such a claim could be sustained against the father in his lifetime; for I think he would fulfil the obligation, if, in the case of giving during his lifetime to a younger child, say £2000, he either paid or bequeathed the difference to the pursuer,—paid it during his lifetime, or bequeathed it to him at his death. In 1834, his daughter Mrs Dalzell was married, and circumstances made it convenient to pay her a portion of her provision by way of annuity. It is plain that Mr Threshie contemplated at this time bequeathing all but Barnbarroch to his three younger children, putting them on a footing of equality. He knew the state of his funds at the time, and saw he could do so by making a deduction from her share of the sum she would previously draw by way of annuity. Accordingly he does so in his settlement which he makes in February 1835, just four months after Mrs Dalzell's marriage. Now it is admitted, that when Mr Threshie came to make this settlement, he had not overlooked the pursuer's marriage-contract, and his obligation under it, but had it in his eye at the time; and I think it clear he was providing for implement of it, by wishing to put the pursuer on an equality with Mrs Dalzell and his other younger son. His object was to make them all equal, by providing to each a third of the residue of his property, having found it necessary to provide her by way of annuity: but as his fortune which he was dividing among his three younger children was so ample as

* In reference to the postponement of a settlement of the debt due to his father, till the period of distribution of the estate.

† In reference to the interest upon the £600, previous to the death of Mr Threshie.

‡ In reference to the finding, that the pursuer, by claiming as a creditor under his marriage-contract, could only do so subject to the condition of being excluded from all claim as a legatee under his father's settlement, which he must thereby be held to reprobate.

No. 74.

Feb. 11, 1845.

Threshie v.
Threshie's
Trustees.

to exceed the value of such annuity, there was little difficulty from this circumstance in producing the equality he wished to create among them, and thus fulfil his obligation to the pursuer. He had only to provide for the value of the annuity paid and to be paid, to be valued at the period of distribution; throw this into the amount of residue; then deduct this from the third provided to her; and deducting, in like manner, the sums paid to the pursuer from his third, the equality would be thus obtained, and the obligation fulfilled, by bequeathing the difference between the £1000 and the higher sum given to Mrs Dalzell. No doubt the period of distribution does not take place till after the liferent of his widow, and this may be thought to interfere with the pursuer's right as a creditor competing with a gratuitous donee. But the widow is not viewed as a gratuitous donee, except as against onerous creditors, third parties; a son competing with her is only quodammodo a creditor, and must submit to have payment of his claim postponed to the expiration of the liferent; and the third which Mrs Dalzell is to get is to be at the same period, so that there is no inequality in this respect. If the pursuer's view were to prevail, that he was entitled to payment of an annuity of £200 on the same terms with Mrs Dalzell, this would so far diminish the widow's liferent by stating a debt against the estate in one way, when Mr Threshie had provided for it in another way, not affecting the widow's rights, but giving him equality with Mrs Dalzell—all he was entitled to. It is true that payment of an annuity during his life may be more convenient, may be made more useful, than the payment of the value of such annuity at a future period; but as the money payment reaches the same amount, when the annuities with the interest on each respectively come to be added together, and paid in one sum, I cannot bring myself to hold that Mr Threshie did not provide for putting the pursuer on an equality with Mrs Dalzell by the settlement which he made of one-third of the residue to each of his younger children. And in truth I do not consider that Mr Threshie did not contemplate that he had bound himself to pay an annuity to his second son, because his daughter got one; for I cannot conceive any mode of provision so reasonable and less likely to occur to the parties, than to make an annuity terminable, not on the life of the annuitant, but on the life of another person. I never contemplated this; and accordingly when he makes provision for deducting from Mrs Dalzell's third the annuities she shall have received, with the interest on each—and further, the value of the future annuity, if she shall survive the period of distribution—he makes no such provision as to the similar payment of an annuity to David Scott Threshie.

I do not think the case of Nasmyth aids the pursuer's plea; there the father had nothing to bring about the equality he had engaged for, and no claim was made at the period of distribution; and then all that came into discussion was, what amount of payment would produce fulfilment of the obligation, and whether the intent of the provision was contemplated as well as the provision itself; but there is no room for the enquiry, whether, because one child got this interest, it was payable from the father during his lifetime, or from his estate after his death, at the distribution, when the equality was to be effected; and therefore I do not hold that that case affords any ground for decision in the present—the point is not whether equality is to be given, but whether the father has not by his settlement provided for this equality when he gives to each one-third, deducting from each the sums previously paid, to the one by way of annuity, and to the other in the way of a simple debt. If this view be sustained, there is no reference.

No. 74.

Feb. 11, 1845.
Threshie v.
Threshie's
Trustees.

to an annuity in estimating David Threshie's share. It is deducted from Mr Dalzell's share, according to an estimated value; but neither requires nor admits of any deduction from the other, which he just draws under no other deduction than that provided by the settlement—the advances previously made to him.

The only objection I see to this view is, that it must be held that the father has no immediate vested right in this third, and that it might be defeated if he died without issue. In the view of this being implement otherwise of Mr Threshie's obligation, the effect of this would not be to hold that it was not implement of it, but that it was a condition which, in this view, the father could not attach to it, and that it was in error that he had done so, being not, exactly, aware of the import which the law would attach to the terms of the provision he had made; and therefore that it must be held that it did vest, and was indefeasible. I therefore incline to alter the interlocutor to this extent. I would also alter the finding as to the £150, and would read the finding as to being held to reprobate the settlement by the claim he makes. According to my view, he gets what is provided by the settlement; according to the view of the interlocutor, he founds alone on the marriage contract, and takes nothing under the settlement.

LORD MONCRIEFF.—As the claim on account of the £150 or £300 given to Mrs Dalzell upon her marriage has been given up, and we are all clear that the claim for interest on the £600, after the dissolution of Mr David Scott Threshie's marriage with Miss Crawford, cannot be maintained on the words of the marriage contract, this case is now reduced to a single point; and that point appears to be in a very narrow compass.

The question depends on the legal import and effect of a very onerous contract bearing reference to the marriage of Mr David Scott Threshie and Miss Crawford. It is not an antenuptial contract of marriage. But I apprehend that it is even stronger than that, as creating strictly onerous obligations contracted between Mr Crawford, the father of the lady, and Mr Robert Threshie, the father of the pursuer, Mr David Scott Threshie.

The obligations undertaken by each of these parties, in so far at least as the present question is concerned, appears to me to be strictly correlative.

Laying aside for the present the stipulations for the payment of interest and other advantages, on the son and daughter taking up house, Mr Crawford undertakes to pay on account of his daughter, at the first term of Martinmas or Whitsunday after his own death, £1000; and, on the other hand, Mr Robert Threshie undertakes to pay, at the first term after his death, the like sum of £1000.

But these parties, looking to future contingencies in their respective families thought fit to bind themselves to one another, and to the married parties, in a very stringent and special obligation of a more undefined nature. Mr Crawford further undertakes, and binds himself “to put the said Jean Crawford on an equal footing with any of his other daughters;” and, in return, Mr Threshie “binds and obliges himself, and his forefathers, to put the said David Scott Threshie on an equal footing with any of the younger branches of his family.” These are the terms of the mutual obligations as generally expressed in the first instance; and they are plainly reciprocal in the strictest sense, to be applied according to emerging events in either of the families. If there were no further explanation given, it is evident that counter covenants, made in such terms, must establish a legal obligation of the most onerous nature on each of the contracting parties, and effectual rights in the parties for whose benefit it is undertaken. And such obligation

and rights must receive fair and full effect as in a contract of bona fide con- No. 74.
traction.

And, without going further, these words have a meaning so emphatic, that it is Feb. 11, 1845.
possible to escape from the force of them, when the pursuer, Mr David Threshie, Threshie v.
demands that he shall be put on an equal footing with his sister, Mrs Dal- Threshie's
Trustees.
self. So that the single question ought to be, whether he is put on an equal
footing with Mrs Dalsell, either by receiving the sum of £1000 at his father's
death, partly paid although it has already been, or by the provisions made for
him by the mortis causa settlement of his father, to be paid only at the death
of the surviving wife, and under all the qualities and conditions of that settle-
ment.

When the marriage contract of Mrs Dalsell is examined, and the terms of the
settlement are considered, I think that it would be impossible to say that the par-
ties are placed on an equal footing; even in the simplest view which could be taken,
although the very stringent pleas made against Mr David Threshie were laid
out. For, supposing that he could claim and receive at once the full sum of
£1000 at his father's death; and also a full third share of the property on the death
of the widow, and supposing that his right to this last should be held to be vested
in him from his father's death, and to be subject to no contingency; it is very
clear to me that he would not be put on an equal footing with Mrs Dalsell. To
put it so, it would be necessary to hold that the sum of £1000, to be paid
at his father's death, was equivalent to an annuity of £200 upon the life of
Mr Threshie, exigible half-yearly, from November 1834, during all the days
of his life. I believe that no reckoning would make this even approach to
equality.

The case does not entirely depend on this view; for, in each branch of the
case, the parties profess further to explain those terms. In that part which
relates to Mr Crawford, the deed bears, "that is to say, if he shall give or be-
queath to any of them a sum above the tocher hereby contracted for with Jean,
he shall pay or bequeath to the said David Scott Threshie the difference betwixt
the principal sum of £1000 sterling, hereby contracted for, and any larger
sum which he, the said John Crawford, may give or bequeath to any of his other
children."

On the other hand, Mr Threshie explains his obligation in terms clearly equiva-
lent. "That is to say, if he shall give or bequeath to any of his children, other
than his eldest son, a sum above £1000 sterling; he shall pay or bequeath to the
said David Scott Threshie, and his assigns, the difference betwixt the said prin-
cipal sum of £1000 sterling, hereby contracted for, and any larger sum which he,
Robert Threshie, may bequeath to any of his children, other than his
eldest son."

It is evident that, in both branches, the parties distinctly contemplated, not
the case of bequests by mortis causa settlement, but that of gifts or obli-
gations effectual in the father's lifetime. And the provision is quite ex-
plicit, if either of them should either give by direct deed or act more than
provided in this contract, to any other younger child, or should be-
queath exceeding that tocher, he should, in the one case, pay the difference
to Threshie, and, in the other, bequeath that difference to him.

The question, therefore, which I can see in the case, as it stands at the

No. 74. present moment, is, whether it appears that Mr Threshie did give a portion, exceeding that stipulated to David, to Mrs Dalzell?
Feb. 11, 1845. Now, the provision to Mrs Dalzell is, by a direct onerous grant in an antenuptial marriage-contract, of an annuity of £200 a-year during her life, beginning from the first term after the marriage. This is a direct gift by the contract, independent of the actual payments. And it is admitted that that annuity was paid during Mr Threshie's life, and must be paid twice a-year as long as Mrs Dalzell survives. On the other hand, David Threshie can get no more than the balance of £600, to make up £1000, and that without interest since the dissolution of his marriage.

**Threshie v.
Trustees.**

Thus, Mrs Dalzell has actually received at least nine or ten years' annuities of £200—making about £1900 or £2000—and that by half-yearly payments, giving the benefits or interests, from 1834 downwards.

Whatever, therefore, were the result of the distribution by a mortis causa settlement at a future contingent date, it cannot properly be said that, at the father's death, David is put on an equal footing with Mrs Dalzell, unless an actual payment shall be made to him now of a sum equivalent to the difference between his provision of £1000 paid, or to be paid, in the manner stated, and the annuities received and still to become payable to Mrs Dalzell. No arrangement by the mortis causa settlement, even if it were to take effect now, could set this matter right, except by a distinct arithmetical comparative reckoning, to make the two things equal.

But, in point of fact, there is no attempt at such an adjustment. Nothing is payable by the settlement till a distant contingent date—contingent by a liferest created by a gratuitous deed.

I think it clear that, according to the settlement, no right would vest in David unless he survived Mr Threshie. And thus, the supposed equalization gives nothing at all absolutely to him. Though it did vest, there would still be no equality in the postponed payment.

I doubt the possibility of the Court allowing him to take by the settlement, and reject the conditions—I mean, reject the condition of not vesting. I do not differ, generally, as to the question of approbate and reprobate arising; and think it unnecessary to decide as to whether there was vesting or not.

I think the case of *Nasmyth* applies in the first point decided. This case is a fortiori.

I doubt as to the second point of that case. But this case is different.

LORD COCKBURN.—Upon the only material point now to be determined, I agree with your Lordship and Lord Moncreiff.

There is no doubt about the import of the father's obligation. He bound himself to put the son on an equal footing with the daughter—perhaps an odd engagement, or at least one contracted in an odd form; but, having been entered into, and onerously, it must be given fair effect to.

Now, I agree with all your Lordships in the necessity of giving very large discretionary power to the father in the mode of fulfilling such a contract. So a substantial equality be produced, he is entitled to a pretty wide latitude in the form of effecting it.

But the simple ground on which I am for adhering to the interlocutor is, that I do not think that the principle of equalising the provisions has been substantiated.

observed in any form whatever. So long as the pursuer made, or was supposed to make, his claim partly under the settlement, there might have been some doubt; because, if the matter was to be considered in reference to any final and general winding up of the whole of the father's arrangements, the precise result would require a good deal of nice and complicated calculation. But as it is now fixed that the pursuer's success under the contract is to be taken into account, like his sister's, in ultimately adjusting his rights under the settlement, and that all that he demands is a fair present equality, this seems to me to remove all difficulty.

Because I cannot hold that any party—but especially a son, who has to maintain and advance himself in the world—who only gets a share of his father's succession on the demise not merely of a father, but of a surviving widow, is put upon an equality with a sister, who, besides getting the same share on the occurrence of the same event, gets an annuity of £200 for many years before. No doubt all the payments of annuity, and interest, are at last to be deducted from the sister's share, so that the sums to be then paid may be the same. But is it no advantage to the sister to have been receiving payment prospectively for several years before? It is an advantage of the most important character. £200 a-year to a person at one period of life, may be of more value than £2000 a-year at a different period. The pursuer may be dead before the distribution under the settlement can take place; and he must at least live under the fear of being dead. Yet the essence of the case against him is, that he is in a state of substantial equality with another person who has all along been enjoying the actual and present comforts of £200 a-year.

It does not appear to me that the case of Nasmyth is of any material use in the present discussion. It is merely an example of a mode in which the Court, in particular circumstances, adjusted the principle of equality, and has no application in favour of, or against, either of the present parties; the circumstances of whose case are different.

Of course, all this is said only as between David Scott Threshie and the trustees. The effect of it, in so far as the widow is concerned, cannot be determined until she, if she wishes it, shall be heard.

THE COURT accordingly pronounced this interlocutor:—"In respect that no question as to approbating or reprobating the settlement of his father, Robert Threshie, arises under the present action, Recal the finding on that subject complained of in the reclaiming note for the pursuer, and to that extent alter the interlocutor reclaimed against: Refuse the prayer of the reclaiming note for Robert Threshie's trustees, except as to the finding relative to the sum of £150 paid to Mrs Mary Threshie or Dalzell: Recal the said finding, and repel the claim of the said David Scott Threshie for a corresponding sum; and alter the interlocutor reclaimed against to that extent; and remit the cause to the Lord Ordinary to proceed therein as he shall see fit; and find no expenses due to either party."

D. M. and H. BLACK, W.S.—HOPE and OLIPHANT, W.S.—Agents.

Authorities.—*McQueen v. Nasmyth*, 29th January 1831, (F. C.) and 9th March 1832, (10 S. & D. 470;) *Wedderburn*, 18th July 1666, (M. 6587;) *Anderson*, 16th July 1729, (M. 6590;) *Douglas*, 21st December 1843.

No. 75.

JAMES STEVENSON, (the Purchaser.)—*Rutherford—Marshall.*WILLIAM MONCREIFF, (the Judicial Factor.)—*G. Bell—Moncreiff.*

Competing Claimants.

Feb. 12, 1845.
Stevenson v.
Moncreiff.

Competition—Sale—Rent—Proof.—By the articles of roup of a judicial sale, it was declared that Martinmas 1843 should be the purchaser's term of entry, and that he should have right to the rents "falling due from and after the said term;" —Held, 1st, That the purchaser was not entitled to the rents payable at Whitsunday and Candlemas 1844, for crop and year 1843. 2d, That it was incompetent to control or modify the construction of the articles of roup by production of correspondence between the common agent and judicial factor, or by any declarations as to the meaning thereof.

Feb. 12, 1845. IN December 1843, James Stevenson became purchaser at a judicial sale of the liferent interest of the heir in possession of the entailed estate of Thirdpart. The articles of roup declared the purchaser's term of entry to be Martinmas 1843, and that he should have right to the rents "falling due from and after the said term."

1st DIVISION.
Ld. Robertson.

The rents for crop and year 1843 were payable at Whitsunday and Candlemas 1844; and these being claimed by both the purchaser and the judicial factor on the estate, the tenants brought a multiplepoinding.

The questions raised between the claimants (the purchaser and judicial factor) were, 1st, Whether the rents in question, being *due* for crop and year 1843, though not *payable* till Whitsunday and Candlemas 1844, were, in the meaning of the articles of roup, rents "falling due from and after" Martinmas 1843. 2d, Whether it was competent to aid the construction of the articles by production of correspondence between the common agent in the ranking and sale, and the judicial factor, prior to the sale,—the purchaser having moved for a diligence to recover certain letters passing between them.¹

The Lord Ordinary pronounced the following interlocutor:—"Finds that, on the 20th December 1843, the liferent interest of the heir of entail of the estate of Thirdpart was exposed to sale under authority of this Court, and that the claimant James Stevenson became purchaser thereof: Finds that the said sale took place under regular articles of roup prepared under the authority and sanctioned by the Court, and the said

¹ *Authorities for the Purchaser in support of motion for diligence.*—Tait on Evidence, 3d edit. p. 226, and cases there referred to; Fairny, Feb. 1662, (M. 12308;) Lawson v. Murray, Feb. 10, 1829, (7 S. 380;) Stewart v. Ferguson, Feb. 27, 1841, (ante, Vol. III. p. 668;) A. S. July 11, 1794, (2 Bell's Com. 226;) Tait on Evidence, p. 262.

Authorities for Judicial Factor on both questions.—1. 2 Ersk. 9, § 64; Penman and Campbell v. Kerr, June 10, 1828, (6 S. 940;) IL Lang v. Bruce, July 7, 1832, (10 S. 777.)

articles were binding alike on seller and purchaser: Finds that the purchaser's term of entry was thereby declared to be Martinmas 1843, and that the articles expressly bore he should have right to the rents of the said lands and estate falling due from and after the said term of Martinmas 1843: Finds that the rents now in question, although conventionally payable, partly at Whitsunday 1844, and partly at Candlemas 1844, are for a half-year's rent of the crop of the lands for the year 1843, and for the rent of lime-works from Martinmas 1842 to Martinmas 1843, and that neither of these sums were rents legally falling due after the term of Martinmas 1843, the said term of entry, but were applicable to possession prior thereto, and consequently that the same do not, under a sound legal construction of the articles of roup, which form the purchaser's title, belong to him: Finds that it is incompetent to control or modify the construction of the said articles of roup by any alleged communings with, or written communications from, the common agent in the ranking and sale, or any other party, either prior to the approval of the said articles of roup by the Court, or by any declarations as to the meaning and intention thereof subsequent thereto, and therefore refuses the motion of the said James Stevenson for a diligence, and dismisses his claim: Ranks and prefers the said William Moncreiff in terms of his claim in the original process of multiplepoinding, and decerns: Finds the said James Stevenson liable in the expenses of this competition."

Stevenson reclaimed.

LORD PRESIDENT.—The purchaser's motion just resolves into this, that we should have the common agent here to tell us what he meant by the words used in the articles of roup. I think this is incompetent. The words are clear, and we must take them as they stand. I am for adhering to the interlocutor.

LORD JEFFREY.—The clause in dispute is in one sentence, that the entry shall be at Martinmas 1843, and that the purchaser shall have right to all the rents falling due from and after entry. There can be no doubt about the meaning of the words in our law and practice. As to examination of the common agent, or production of correspondence between him and the judicial factor, I cannot agree to. The question is, what is the meaning of that on which the purchaser, who had nothing to do with the *animus*, proceeded?

The other Judges concurred.

THE COURT adhered, with additional expenses.

ROBERT DOUGLAS, S.S.C.—W. MACKENZIE, W.S.—Agents.

No. 75.

Feb. 12, 1845.
Stevenson v.
Moncreiff.

No. 76.

MRS LILIAS TAYLOR and WILLIAM GILLESPIE, Advocators.—

Inglis.

Feb. 13, 1845.

Taylor v.

Hutchison.

WILLIAM HUTCHISON and COMPANY, Respondents.—*Rutherford—**T. Mackenzie.*

Competing Claimants.

Stamp—Bill.—Terms of a letter held to fall, within the meaning of the Stamp Act, to be considered as an order for the payment of money out of a particular fund which might or might not be available, and, being delivered to the payees named therein, liable as such to stamp duty.

Feb. 13, 1845.

THE following letter was addressed by Thomas Buchan to Allan Cuthbertson:—

1st Division.

Lord Ivory.

N.

“ Allan Cuthbertson, Esq.,
Accountant, Glasgow.

“ Glasgow, 20th May 1842.

“ SIR,—In addition to the order by me which you already hold to the extent of one hundred pounds in favour of Messrs William Hutchison and Company, you will please pay further to these parties the sum of one hundred and sixty-five pounds, or the balance which may be found due me on the wright-work of that building situated in Sauchiehall Street, presently finishing, should the same not amount to these sums, and their discharge will be binding on me.—I am, Sir, your most obedient servant,

(Signed) “ THOMAS BUCHAN.”

Cuthbertson acknowledged intimation by subscribing a note written at the bottom of the letter in these terms:—“ A copy of the above, also signed by Thomas Buchan, left with me on the 23d May 1842.” The original letter, which was unstamped, was delivered to and held by Hutchison and Company, the payees.

Cuthbertson admitted that he was indebted to Buchan, but Taylor and Gillespie, other creditors of Buchan, having used arrestments in his hands subsequent to the date of the above letter in favour of Hutchison and Company, he brought a multiplepoinding in the Sheriff-court of Glasgow.

The claimants were Hutchison and Company, Taylor, and Gillespie, and the question raised was, whether the letter in favour of Hutchison and Company was substantially a bill of exchange, and so required a stamp.

The Sheriff found that it was not, and therefore preferred Hutchison and Company.

Taylor and Gillespie advocated.

No. 76.

The Lord Ordinary pronounced the following interlocutor :—"Advocate the cause, and recalls the interlocutors submitted to review, so far as they decern in the competition, or in any way affect the questions of preference in discussion between the parties: Finds that the letter of 30th May 1842 falls, within the meaning of the Stamp Act, to be considered as an order for the payment of money out of a particular fund which might or might not be available, and that, having been delivered to the payees named therein, the same was accordingly liable, as such, to stamp duty: Finds that the said letter, not having been so stamped, cannot be judicially looked at, or received in evidence of the alleged transfer or assignment in favour of the respondents, of the fund in the raisers' hands, more especially in competition with the diligence used for attaching the said fund by the advocates: Therefore, as in the competition between the advocates and respondents, prefers the advocates respectively, *Imo et 2do loco*, in terms of their claims, and decerns: Finds the advocates respectively entitled to expenses, both in this Court and the court below, and remits the accounts thereof, when lodged, to the auditor to tax and report: *Quoad ultra*, and before answer, appoints the cause to be enrolled, that it may be considered how any balance remaining over of the fund *in medio* is to be disposed of."*

Feb. 13, 1845.
Taylor v.
Hutchison.

Hutchison and Company reclaimed, pleading, 1st, That the case of Brierly¹ was precisely in point; and, 2d, That, at all events, the letter, being an order for such balance as might be found due to the drawer by the drawee, was not an order for a specific sum, which was necessary in order to bring it under the Stamp Act.²

The advocates answered, 1st, That the case of Brierly was distinguished from the present, as stated at the end of the Lord Ordinary's note;

* "NOTE.—The order having here been delivered to the payee, the Lord Ordinary cannot, in other respects, distinguish between the present case and that of *Hutchison v. Heyworth*, (9 Adol. and Ellis, 375,) where the same provision of the statute was given effect to, with reference to an order 'to pay to Messrs Boyds and Co., (having revoked the former order in their favour,) after you have paid yourselves the balance we owe you, from the nett proceeds of our shipments to your foreign establishments to the present date, one-half of the remainder of the proceeds of said shipments, provided the same shall not exceed £5000.' The cases of *Emily*, (6 M. and S. 144;) *Firbank*, (1 B. and Ald. 36;) *Butts*, (2 Brod. and B. 781,) are all substantially to the same effect; and are clearly distinguishable from *Jones*, (2 B. and C. 318.) The authority of these cases is not touched by *Brierly*, 1st June 1843, when regard is had to the very special ground on which the Court rested their decision, viz. (as explained by the Lord Justice-Clerk, and in substance embodied in the judgment,) 'that by the transaction as set forth in the summons, and held as proved, Macintosh was all along trustee for Brierly, and the money lodged with him was not the property of the bankrupt.'

¹ June 1, 1843, (ante, Vol. V. p. 1100.)

² *Jones*, (2 Barn. & Cress. 380.)

No. 76. 2d, That the letter was an order for a specific sum out of a particular fund, though, in the event of its not being available for the full amount, the balance due was ordered to be paid.

Feb. 11, 1845.
Taylor v.
Hutchison.

LORD JEFFREY.—There are here two separate questions. One of these, viz. whether this letter corresponds with the requisite of the statute, in being an order for a specific sum, did not occur in the case of Brierly. If we are supposed to trench on that case on the other question—whether the letter is, from its nature, a document requiring a stamp—it is right that we should consult our brethren; but that is no reason for not now deciding the first question, which will disembarass the case so far. On it I am prepared to say that the objection is not well founded. The availableness of the fund contemplated by the statute may either be in whole or in part. The fact of its not being available for the amount specified, makes no difference in the stamp-duty, which must be for the amount nominated in the bill. The letter here, by providing that, though the fund is not available for the whole amount, it shall be paid whatever it is, just gives needless expression to what the statute contemplates—that the order shall only be available to the extent of the fund in hand. I don't think the objection is maintainable.

As to the other question, I am at a loss to know on what ground the judgment in the case of Brierly was obtained. I think what was meant by the Lord Justice-Clerk was, that it was not an order to dispose of a fund belonging to the party granting the order, but an intimation that it belonged to another party. If that is not the ground of the judgment, I am at a loss to know what it is.

LORD PRESIDENT.—I think the question, whether the Stamp Act applies to a document of this nature, is the preliminary one here, and should be determined first. I must consider that the Second Division determined in the case of Brierly that the letter was one which did not fall under the Stamp Act. What I desiderate here is this—Where is the material difference between it and the present case—why Cuthbertson must not be considered as trustee for Hutchison and Company, in whose favour the order was made? Macintosh was held to be trustee for Brierly in consequence of the order, and it was held free from the Stamp Act. This case is in exactly the same situation. I see no ground on which we can find a distinction between this case and the case of Brierly. There the principle was positively laid down, that such an order does not fall under the Stamp Act. It is there my difficulty is.

LORD MACKENZIE.—I have no objection to consult our brethren, though I think the document clearly does fall under the Stamp Act. In the case of Brierly, it seemed to be held that there were circumstances in the case more than the order to make Macintosh trustee. There are no such circumstances here. If it is thought that it was there held the order made a trust, we must consult, for I cannot stir a doubt in my mind that any trust was constituted here. I do not see where the principle would stop. Every bill or order in that view creates a trust, and so would be free from stamp-duty. But I think we are pretty safe in assuming that they did not hold that. On the other point, I agree with Lord Jeffrey. I am for adhering.

LORD FULLERTON.—I do not think we can hold the decision in the case of Brierly to rule the present. There it appears, both from the report of the opinions,

and from the interlocutor, that the Court went not on the import of the writing, No. 76.
but on the supposed relation of trust between the holder of the fund and the
payee—a specialty which certainly does not occur here.

Feb. 14, 1845

Brown v.

M'Callum.

The point then is, Whether this writing truly falls within the description in the schedule of the Stamp Act? And I agree with Lord Jeffrey in thinking that it does.

It is not an order to pay an uncertain or indeterminate sum. The sum to be paid is definite, though the amount ultimately receivable on it might fall short in consequence of the balance, out of which it was to be paid, not affording the full payment. The uncertainty of the payment arises not from any indefiniteness of the sum ordered to be paid, but from the uncertain amount of the fund out of which it was to be paid; and I think it clear, both from the words of the schedule, and from the construction put upon them by the English decisions, that these are just the circumstances which it was intended to provide for in the article of the schedule alluded to.

THE COURT adhered, with additional expenses.

JAMES BURNES, S.S.C.—JOHN MORRISON, S.S.C.—Agents.

ANDREW BROWN, Petitioner.—*Craufurd.*

No. 77.

JOHN M'CALLUM, Respondent.—*Deas.*

Citation—Bankruptcy.—Held that a debtor was well cited under the Bankrupt Act by leaving a copy of the petition and deliverance thereon with his father, as the messenger's execution bore—"within his said father's dwelling-house in Newburgh, with whom he lives and resides when not at sea."

ANDREW BROWN, as a creditor of John M'Callum, "shipowner in Feb. 14, 1845. Newburgh, and also an underwriter there," presented a petition for sequestration of his estates under the Bankrupt Act. The usual warrant for 1ST DIVISION.
of citation was granted by the Lord Ordinary, and executed by a mes- Ld. Robertson.
senger, as the execution returned bore—"by leaving said copy of certi- Bill-Chamber.
fied copy of petition, and deliverance, and certificate, with short copy of service and citation subjoined, for the said John M'Callum, with his father, within his said father's dwelling-house in Newburgh, with whom he lives and resides when not at sea, to be given to him, because I could not find himself personally."

The respondent objected that this was not citation at his dwelling-place in terms of the Act. No evidence was led on either side, both parties agreeing to have the point decided upon the terms of the execution.

The Lord Ordinary, "In respect of the informality of the execution

No. 77. of citation, dismisses this petition : Finds the respondent entitled to expenses."

Feb. 14, 1845.

Brown v.

M'Callum.

The petitioner reclaimed.

LORD PRESIDENT.—I am decidedly of opinion, that on a fair and rational construction of the Act, this objection is not well-founded. The Act requires that the citation shall be left at the debtor's dwelling-house or place of business. Where a man lives and resides, is his dwelling-house. An execution, bearing that citation was left at Blackhouse or Whitehouse, where the debtor lives and resides, would be clearly sufficient. Saying that it is his father's house is only descriptive, just as Whitehouse or Blackhouse is. The statement that the debtor lives and resides there, is fulfilment of the Act. Any thing else would be a judicial construction.

LORD MACKENZIE.—Giving this execution a fair construction, I think it is sufficient. The opposite interpretation is too subtle, and not according to the Act. The expression is, that it was left at his father's dwelling-house, "with whom he lives and resides when not at sea." The construction I put on that is, that he has his residence at his father's house. Every sailor has a residence on land. We have no persons who are born and live and die on the water. The execution just certifies that he is a sailor, and has a residence on land with his father.

LORD FULLERTON.—I am of the same opinion.

LORD JEFFREY.—I am entirely of the same opinion. Would a clerk, who did business elsewhere, but lived with his father, not be well cited at his father's house? The addition here, "when not at sea," just means that his father's house is where he lives and resides when not absent on business. There are many men whose business is peripatetic. They are less in the bosom of their families than more fortunate men, but they have a residence. The object of the Act is, to exhaust all the reasonable modes by which, in almost every case, the party may be reached. Dwelling-place does not mean the place belonging to him, but the place where he dwells.

THE COURT altered the interlocutor, and repelled the objection to citation, with £4, 4s. of expenses.

ROBERT LANDALE, S.S.C.—WOTHERSPOON and MACK, S.S.C.—Agents.

EARL OF EGLINTON, Pursuer and Charger.—*Mackenzie*.
 LORD MONTGOMERIE and OTHERS, Defenders.—*Sol.-Gen. Anderson—*
Cook.

JAMES MORTON, Suspender.—*Cowan*.
 (Conjoined declarator and suspension.)

No. 78.

Feb. 14, 1845.
 E. of Eglinton
 v. Lord
 Montgomerie.

Entail—Clause.—An entail prohibited the heirs “to sell, alienate, impignorate, or dispose the said lands and estate, or any part thereof, either redeemably or under reversion;” the prohibition was duly fenced with irritant and resolute provisions;—Held that the heir was not prohibited from making absolute and irredeemable sales, and was entitled to apply the price received for the lands sold, at his pleasure.

In 1763, Robert Hamilton of Bourtreehill and Rozelle executed an entail of these estates, in which the prohibition against sales, alienations, &c., was conceived in these terms:—That it shall not be in the power of any of the heirs of tailzie “to sell, alienate, impignorate, or dispose the said lands and estate, or any part thereof, either redeemably or under reversion, or to burden the same,” &c. The entail contained the usual prohibitions against contracting debt or altering the order of succession; and the whole prohibitions were duly fenced with irritant and resolute clauses.

After the death of Robert Hamilton, his testamentary trustees, acting under directions in his settlement, executed two entails of other lands, in the years 1791 and 1808 respectively, in which the same fettering clauses occurred as in the entail of 1763.

In 1843, the Earl of Eglinton, heir of entail in possession, being advised that the prohibition above quoted merely struck at sales or alienations made “redeemably or under reversion,” and not at absolute and irredeemable sales, executed various sales of the lands in question. These were followed by a declarator at his Lordship’s instance against the heirs of entail, and by a suspension at the instance of one of the purchasers. The actions of declarator and suspension were conjoined. The first conclusion of the declarator was, that the pursuer had full power to sell the lands, in whole or in part, absolutely and irredeemably, and to apply the price at pleasure. The suspension was of a threatened charge for the price, and was rested on alleged defect of power in the heir of entail to sell.¹

¹ *Pursuer’s References.*—2 Ersk. 8, 2; Brown on Sale, p. 4291, and authorities there cited; 1 Jurid. Styles, pp. 274, 276, 310, (3d ed.) Dallas’ Styles, p. 587, (ed. 1697;) Russell on Conv. p. 287; 5 Bell’s Forms of Deeds, p. 24; 1 Jurid. Styles, p. 229; Lang, Aug. 16, 1839, (M’L. and R. 894;) Lumsden, Aug. 18, 1848, (2 Bell’s App. 104;) Douglas, June 10, 1825, (1 W. & S. 323;) Edmonston, April 15, 1771, (4411;) Ker, Dec. 1813, (2 Dow, 210;) Steel, June 17,

No. 78. A record was made up, in the course of which the pursuer produced *fac-similes* of the several portions of the principal deeds of entail, in which the clause in question occurred. *Fac-similes* of the same portions of the record of the register of tailzies were also produced. The object of this was to show that the word had been all along written "redeemably" from the first, and that there was no ground for suspecting any erasure or vitiation of the deeds.

Feb. 14, 1845.
E. of Eglinton
v. Lord
Montgomery.

Cases were ordered, on advising which the Lord Ordinary pronounced this interlocutor:—"Finds that the several deeds of entail executed by the deceased Robert Hamilton in 1763, and by his testamentary trustees in 1791 and 1808, referred to in the summons, contained no valid or effectual prohibition against selling or alienating the lands therein contained, absolutely and irredeemably: Finds that the contracts of sale entered into between the Earl of Eglinton and the several parties referred to in the summons, were and are valid and unchallengeable: Therefore in the process of suspension at the instance of James Morton repels the reasons of suspension, and decerns; and in the action of declarator, finds that the pursuer the Earl of Eglinton has full power to sell the whole lands in the said deeds of entail, absolutely and irredeemably, and to grant valid dispositions to the several purchasers; and further, finds and declares, that upon the sales taking effect, the prices or considerations which the pursuer may receive will become his absolute property, and free from all claims at the instance of the defenders or the substitute heirs of entail—all in terms of the first declaratory conclusion of the summons, and decerns and declares accordingly." *

1817, (5 Dow, 33;) Stewart, July 16, 1830, (4 W. & S. 212;) Sharp, April 18, 1835, (1 S. & M.L. 594;) Speid, Feb. 21, 1837, (15 S. 618;) Sinclair, Nov. 8, 1749, (15382;) Bruce, Jan. 15, 1799, (15539;) Brown, May 25, 1808, (Dict. voce Tailzie, App. 73;) Henderson, Nov. 21, 1815, (F. C. ;) Montgomery, Aug. 18, 1843, (2 Bell's App. 149.)

Defenders' References.—Lamsden, Aug. 18, 1843, (2 Bell's App. 104;) Steel, June 18, 1817, (5 Dow, 73;) Douglas, June 10, 1825, (1 W. & S. 247;) Hamilton, March 3, 1815, (F. C.)

* "NOTE.—The defenders decline arguing the case upon the footing of there being any clerical mistake in the words of the prohibitory clause in the entail 1763, and other entails referred to, and rest their defences solely upon what they maintain to be the sound legal construction of the clause, as it stands in the respective deeds.

"If it had been shown that the terms 'either redeemably or under reversion' could not in legal language be with propriety applied to the preceding words 'sell' and 'alienate'—that they were terms not appropriate as expletives or qualifications of these words, but that their natural and legitimate application was to the words 'impignorate' and 'dispose,' or to 'dispose' only, the Lord Ordinary might have arrived at the result contended for by the defenders. But it does not appear to him that this has been done. He thinks generally that the reverse is the case; and he finds nothing in the particular collocation of the words in the prohibitory clause in the entail to give the terms 'redeemably or under reversion' a special application to the words 'impignorate' and 'dispose,' to the exclusion of their being applied to the words 'sell' and 'alienate,' or to render their application to

The defenders and suspender reclaimed.

No. 78.

Feb. 14, 1845.
E. of Eglington
v. Lord
Montgomery.

LORD PRESIDENT.—The question raised in these processes of declarator and

'impignorate' and 'dispone,' the fair and natural construction as they stand in the clause, and an extension of it, to sell and alienate, a strained and unfair construction, so that the latter ought to be rejected, and the former adopted, although the entail is thereby supported.

"Had the terms 'either redeemably or under reversion' been placed immediately after the word 'dispone,' ground might have been afforded for the plea (the Lord Ordinary does not say that it would have been sufficient) that they were used as expletives of dispone, and had been so placed expressly for that purpose; but their actual collocation is quite different, and apparently exactly that which would occur, if the purpose were that they should be applied to all the preceding verbs, in so far as in ordinary or legal language they were appropriate expletives of them.

"Let the verb impignorate be thrown out of the clause, which so far would bring it to a form which frequently occurs, could it be held that the terms 'either redeemably or under reversion' did not apply to sell and alienate, but only to dispone? It is thought not. And it does not appear to the Lord Ordinary that the insertion of the word 'impignorate' can affect or alter the construction. If in the form just suggested the terms added had been the usual ones, 'either irredeemably or under reversion,' it is conceived that whether these terms were or were not necessary to make the prohibition perfect, still they must both have been held to apply to all the preceding verbs. Certainly this must have been the construction in regard to the first term, 'irredeemably,' and the Lord Ordinary can see no reason why the second term, 'under reversion,' should not be subject to the same construction. But if so, why should a different construction be adopted in regard to a term substituted for the first, unless it were a term which naturally and technically applied only to some one or other of the antecedent verbs, and not to them all. The term, however, which has been substituted, and where it is found in the clause, has neither naturally nor technically a meaning which points to an exclusion of its application to any one of the antecedent verbs. It so happens, indeed, that the substituted term is of very much the same, if not exactly the same meaning, as that by which it is followed; and granting that the latter, where it is found, has a general application to all the preceding verbs, it becomes difficult to hold that the former has an application more limited and restricted. Had the term 'irredeemably' not only not been inserted, but no other term substituted for it, so that 'under reversion' had been the sole expletive, what would have been the construction? Would it have been that 'under reversion' was to be applied to dispone only, or to all the antecedent verbs? If the last, which it is thought must have been the construction, it would seem that the construction, as regards the term 'under reversion,' cannot be altered, because it is preceded by the term 'redeemably.' But the construction of 'under reversion' being fixed, it is apprehended that the same must be given to 'redeemably.'

"The intention which the entailor has clearly shown of making a perfect entail, has been referred to, and it has been said that the construction advocated by the pursuer is directly opposed to and destructive of it. It may be so; but intention to make a perfect entail, as it may be evidenced by the deed generally, will not support intention, indistinctly or not clearly expressed, in regard to any of the special provisions of an entail. If the expression of intention is defective in reference to a particular provision, it is nothing to the purpose to say generally, that it was clearly the entailor's purpose to make a valid entail in all its provisions. In short the Lord Ordinary cannot, in any view he has been able to take of the clause, see ground for holding that the terms 'either redeemably or under reversion,' where they are found, can fairly be construed as only applying to impignorate or dispone, or solely to dispone, or that so to construe them is equally open as to construe them as applying also to sell and alienate. On the contrary,

No. 78.

Feb. 14, 1845.
E. of Eglington
v. Lord
Montgomerie.

suspension is, whether the various deeds of entail, relative to the estates of Bourtreehill and Rozelle, executed by the late Mr Hamilton and his trustees, and in all of which the same identical clause occurs, contain a valid and effectual prohibition against selling and alienating absolutely and irredeemably, so as to prevent or invalidate the sales which have been made of these estates by the Earl of Eglington and Winton, the heir now in possession.

Upon considering the arguments that have been urged in the cases for the pursuer and charger, and the defences and reasons of suspension for the next heirs of entail and purchasers, the Lord Ordinary has found that the entails contain no valid or effectual prohibition against selling the lands therein contained, absolutely and irredeemably; and, therefore, his Lordship determines and declares accordingly, while he repels the reasons of suspension. This judgment has been submitted to review, and we are now to decide whether or not it ought to be adhered to.

Keeping in view the words of the clause of prohibition, which forbid the heirs "to sell, alienate, impignorate, or dispose the said lands and estate, or any part thereof, either redeemably or under reversion," the question does not appear to be attended with any real difficulty, or to require us to resort to any very rigid application of the rules of construction peculiarly appropriated to entails. For nothing can be held to be more undeniably fixed in law, than that, however clear the intention of an entailor may appear to provide for the descent of his estate to a distant series of heirs under fetters or restrictions, still, if he does not express that intention in the clearest and most unambiguous terms, his deed will be held inoperative. Nor can aid be afforded by a court of law to supply any defects that may be found in it, or to correct what may even appear to be mere clerical blunders, in order to impose fetters or limitations.

In none of the many cases in which entails have been found to be invalid, from blunders or defects in the prohibitory, irritant, or resolute clauses, could any reasonable doubt exist that the granter intended to make an effectual entail of his estate. But as entails are the creatures of statute, and the law is unfavourable to the multiplication of restraints on property, it has ever been deemed indispen-

he is of opinion that the latter construction, by which they are connected with the words 'sell and alienate,' as well as with 'impignorate and dispose,' is not only admissible, but is more according to their natural and technical meaning in the place where they occur, than is the opposite construction contended for by the defenders. But this is more than enough for the pursuer; for, even were the two constructions equally open and admissible, that would be conclusive against the defenders, who are maintaining the validity of the entail, because in that case the construction must be adopted which destroys the entail, rather than that which supports it. A court of law, while it has no right to defeat the distinctly expressed intention of the entailor, in order to liberate from fetters, is not called upon to give effect to an intention not distinctly expressed, in order to impose them. Agreeably to the recognised rule of construction, a defect in that respect is fatal to the efficacy of an entail. But in the present instance, as just stated, the Lord Ordinary thinks that, assuming the two constructions respectively contended for to be open, they are not equally open, that which is supported by the pursuer being the construction which gives to the words used the meaning which, in the place where they occur, is their most natural, technical, and grammatical meaning, and which, therefore, is the construction that ought to be preferred."

able that the prohibitions and restrictions of entails should be framed so as to be free from all doubt or uncertainty. Nevertheless, if the will of the maker of an entail is expressed in clear and appropriate terms, it will undoubtedly have effect; but if he uses expressions that are plainly susceptible of two different meanings, the one leading to freedom and the other to fetters, that which leaves the heir free will be supported.

No. 78.
Jan. 14, 1845.
E. of Eglington
v. Lord
Montgomerie.

Now, although it may be fully conceded that Mr Hamilton meant and intended that the heirs called by his deeds should only succeed to an estate strictly entailed, the clause regarding sales and alienations, when examined, will be found to prohibit none whatever that are made absolutely and irredeemably, but only such as are made "redeemably, or under reversion."

Look at the collocation of the words in the clause, and see if the closing words "redeemably, or under reversion," do not plainly and grammatically, as well as technically, apply to, and stand connected with, the four preceding verbs, "sell, alienate, impignorate, or dispone," which are all connected together, and form one sentence. There can be no ground, therefore, for limiting their application either to the verbs "impignorate or dispone," or to any one of these verbs, more than to the two that precede them. And this is quite manifest from the position of the words, "the said lands, estate, or any part thereof," being placed immediately before the words "redeemably, or under reversion," which last are evidently synonymous in their meaning.

It must always be kept in view that it is a fixed rule in law, that when a redeemable right is meant to be created, as in the case of a wadset, or a disposition in security, a style very closely resembling the clause in this very entail is used, being that a proprietor "has sold, alienated, wadsetted, and disposed to and in favour of A B, and his heirs and assignees whatsoever, heritably but irredeemably always, and under reversion." So, in like manner, in regard to a bond and disposition in security, as is noticed in the case for the pursuer, the terms, "sell, alienate," &c., are qualified by the words "redeemably and under reversion." Such is the appropriate and authoritative style, in regard to the creation or grant of redeemable rights, which are well known in law.

But is the same style, according to authority and usage, that which is applicable to an effectual prohibition against absolute and irredeemable sales or alienations in an entail? Most certainly not; for, in regard to such prohibition, the words uniformly used are, "irredeemably, or under reversion;" irredeemably being exactly the opposite of under reversion. If such, then, is found to be the uniform way in which such a prohibition as the present is formed in strict entails, it affords a most conclusive answer to the supposed way in which the defenders contend the clause in question may be read, by limiting the words "redeemably or under reversion" merely to impignoration or disposition. It accordingly appears, not only from the most approved styles that are given for the construction of strict entails, from Dallas to the Juridical Styles, and including the Styles of both Russell and Bell in the intermediate period, that wherever the prohibition of sales and alienations is framed on a similar plan with that before us, while, in all other respects, the phraseology of the rest of the clause is almost identical, the concluding words are, (as of necessity they require to be,) "irredeemably or under reversion," and not "redeemably."

It is certainly fair to refer to the language of Sir George Mackenzie's entail, executed in 1689, whose name has so often been connected with the Act 1685.

No. 78. These are recited in the case for the pursuer, and are as follows :—"Declaring that it shall not be lawful to sell, alienate, and dispense the lands, baronies, and others above rehearsed, or any other parts thereof, either irredeemably or under reversion."

Feb. 14, 1845,
E. of Eglington
v. Lord
Montgomerie.

Again, in the more modern entail of Hoddam, (owing to a grammatical defect in the irritant clause, of which, in the want of a proper nominative to one member of it, the entail was cut down by the House of Lords, shewing how little effect can be given to the mere intension of the entailer, as to which not a particle of doubt could exist,) the prohibitory clause, to which no objection whatsoever was mooted, was conceived in these terms :—"That the whole heirs aforesaid are and shall be limited and restrained from selling, alienating, impignoring, or disposing the said lands, or any part thereof, either irredeemably or under reversion."

Now in that entail the exact same collocation occurs as in the present. The four verbs hold the very same position. The lands or any part thereof are in the same place, preceding the concluding words; but these bear to be "irredeemably, and not "redeemably," or under reversion.

Without noticing many other entails which are constructed in the exact same form in regard to a prohibition against absolute sales and alienations, I can entertain no reasonable doubt, that, in the deeds now under consideration, there has been a fatal departure from the use of an essential term or expression, and the substitution of another that is inadequate to accomplish an effectual prohibition against selling and alienating. It is quite in vain to state that sales and alienations of an estate may simply be prohibited; and if such prohibition is fortified with proper irritant and resolute clauses, it will be effectual; as that is not what this entailer has done, and assuredly it cannot now be done for him. He has chosen, whether by accident or not is of no consequence, to resort to a totally different mode of prohibition, and that, when examined, is found to be quite unfit for its supposed purpose. By the use of the words in the clause in question, he has left the matter of selling and alienating very much as if he had omitted the use of the word "not," before the words "be lawful." If he had meant to confer upon his heirs an express given power to that effect, he would just have given power "to sell, alienate, impignorate, or dispose the said lands and estate, or any part of them, redeemably or under reversion." Such a power might certainly be exercised, but it never could be construed into one prohibiting an irredeemable sale or alienation.

In one word it appears to me, that according to the plainest principles that are applicable to the construction of entails, and giving effect to the clear and technical language of the clause in question, no doubt can be entertained of the correctness of the judgment pronounced by the Lord Ordinary, in finding that, however undoubted the intention of the maker may be, and however confident he may have been that he had executed a valid and effectual entail, as is indicated by the many anxious provisions and restrictions it contains, the clause in regard to the prohibition against sales and alienations, labours under a fatal defect, and is totally inoperative.

LORD MACKENZIE.—I am entirely of the same opinion. The question is, whether there is a prohibition of sales irredeemable? The defenders and suspender have failed in making out that prohibition. There are two views of that clause. 1st, That it contains an error of the pen which has not been attempted to be maintained. It would be difficult to maintain that in any case; but in an

entail it would be wild to say that we could make such an alteration. Then, taking the deed as it stands, I do not think the suspender and defenders can obtain the interpretation they contend for. What they attempt is this—they divide the clause into two parts, making it a prohibition to sell, alienate, or impignorate, which is one part, and then, or to dispoise redeemably, which is the other part. There is no sort of warrant for adopting such an interpretation. If the words had stood as put, it would still have been as grammatical to apply the words redeemably or under reversion to selling and alienating, as to disposing. But there is an interposition of other words which excludes this interpretation entirely. I mean the words, “the said lands and estate, or any part thereof.” These refer to the whole four words—sell, alienate, impignorate, or dispoise; and we cannot pass them over, and apply the words following to only two of them. That is a difficulty which it is quite impossible to get the better of. If applicable to the whole four words, there is no prohibition of a sale not redeemable. But there is another view—viz. that if there is a natural interpretation unfavourable to fetters, it must be taken. I think applying redeemably to the whole four words is quite grammatical. Indeed, it is introduced and applied in the same way as qualifying words generally are in entails—not the same words certainly, but so far as grammatical construction goes, the same. There is nothing against this construction, except that it is too favourable to freedom. That argument is ingeniously disguised, but it is against the construction contended for. The intention of an entailor to make a strict entail, is never to be helped out. We will not give effect to it if we can well help it. It is said that the word “redeemably” cannot be carried back to impignorate, for an impignoration cannot be irredeemable. That is a great deal too nice, and it is not correct, for I can conceive a pledge that would not be redeemable. I do not know that it ever happened, but it is possible. At any rate, entailors are not so accurate in the use of language as that. I observe that there is a great deal of argument on opinions in the House of Lords about the meaning most favourable to liberty. That principle has been carried too far; but it certainly goes this length, that where two fair and reasonable meanings can be put on words, you are to take that most favourable to liberty, though not the most conform to intention, as in a will.

LORD FULLERTON.—The point is free from all difficulty. No question is raised on the ground of clerical error. Indeed I do not see how it could be raised, for there is nothing in the words as they stand forcing us to amend or alter them. The supposed error is to be proved, not *ex facie* of the deed, but by the extreme improbability of supposing that the entailor could have intended to use the expression as it stands, and the extreme probability that he must have intended to use one not merely different, but directly the reverse.

Any attempt to amend a supposed error on such a ground as that, is clearly quite inadmissible. We must, then, take the words as they stand; and so taking them, the case presents no difficulty whatever.

The words “redeemably, or under reversion,” are words which are in law applicable, and are by this deed applied to the words “sell, alienate,” as well as to the word “dispoise.” We have here then nothing but a prohibition of selling, or alienating, or disposing, either “redeemably or under reversion,”—a description of acts and deeds which does not apply to the sale under consideration.

The defender, the heir of entail, maintains that, when construed in this way,

No. 78.

Feb. 14, 1845.
E. of Eglington
v. Lord
Montgomerie.

No. 78. the clause is tautological and absurd. It may be tautological, but it would be hazardous to admit that as a good objection to a phrase in conveyances. Besides, the defenders, in urging this difficulty, forget the respective obligations of the parties in such a question. It does not lie on the pursuer to show that this is a clear and intelligible prohibition in the limited sense. The obligation lies on the heirs of entail to show that there is a special prohibition in the unlimited sense; and supposing that the pursuer had really failed in defending the phrase as accurate, it would be rather difficult for the heirs of entail to make out that, because it was an ill-expressed prohibition against selling redeemably, it was, therefore, to be held as a good prohibition against selling irredeemably. That is their case, and I need not say that such an attempt must be unavailing.

Feb. 14, 1844.
E. of Eglington
v. Lord
Montgomery.

LORD JEFFREY.—I concur in the views expressed by your Lordships. If it could have been said that the idea of adjecting the quality of redeemably and under reversion was incongruous with the nature of a sale, and that it was absurd to qualify such a word as "sell" with such an addition, there might have been more in the argument that the qualifying words must be disjoined from it, and applied to the others; but the fact is, that sales redeemably and under reversion are well-known expressions in conveyancing. They are so in ordinary wadsets and bonds, and dispositions in security. In the same way, if it could have been made out that it was the almost uniform style to leave the prohibition against selling and alienating on the plain words without any adjection, the argument would have been better; but, alas! the practice is the other way. It is universal, with the caution and love for large words in the profession of conveyancing, to add the words "irredeemably, or under reversion." When the word "redeemably" is substituted, we must hold that it was done for a purpose. I am not moved by the tautology involved in applying redeemably to impignorate. I, therefore, quite agree with the Lord Ordinary.

THE COURT accordingly adhered.

TOD and HILL, W.S.—W. and J. COOK, W.S.—W. MENZIES, S.S.C.—Agents.

MRS M. GOWAN OR NICHOLSON and HUSBAND.—*Sol.-Gen. Anderson—* No. 79.
Patton.

JOHN BRADLEY, and JOHN BRADLEY GOWAN, (Gowan's Executors.)—*Feb. 14, 1845.*
Rutherford—Dunlop. *Gowan v. Bradley.*

Foreign—Testament—Clause.—1. Held that a will executed by a Scotchman at St Kitts, written by himself in ordinary popular language, must, even with regard to a bequest of funds in Scotland, be interpreted, and the testator's intention judged of, according to the law of England. 2. Opinion indicated, that, by the law of Scotland, a condition adjoined to a bequest must be given effect to, though it appears to have been adjoined from a mistaken notion on the part of the testator as to the extent of his power.

ROBERT GOWAN died in Scotland in 1833, leaving a trust-settlement, Feb. 14, 1845. whereby he directed his trustees to invest a sum sufficient to produce £150 of yearly interest, and take the securities in favour of his mother, Mrs Gowan, then residing in Glasgow, in liferent, for her liferent use alienably, and of his brother, William Gowan, and his children in fee. The trustees did not invest as directed, but set apart stock in their own names as trustees, sufficient to meet the annuity to Mrs Gowan. 1st Division.
Lord Cuninghame.
W.

William Gowan died domiciled at St Kitts in 1841, predeceasing his mother, leaving a settlement executed by him there in 1840. This settlement was written by himself in ordinary popular language, and contained a clause in these terms :—" I also will and bequeath, in the event of the death before me of my mother, Mrs Margaret Gowan, now residing in Liverpool, by which I will become entitled to securities created in trust, for my behoof as survivor, by my late brother, Robert Gowan, to the extent of about £4000 sterling : I then leave and bequeath whatever they may produce, equally between my sons, John Bradley Gowan, and William Charles Gowan, and the other half to my sister, Mrs Margaret Nicholson, wife of Dr Benjamin Nicholson of Liverpool." And by a codicil to this settlement, of same date, William Gowan bequeathed as follows :—" A certain sum of money in securities in trust, created by my brother's will, to give my mother for her life £150 per annum, in the event of my death, said securities to be converted into money ; and whatever may be the surplus beyond such, I leave and bequeath equally between my sons, John Bradley Gowan, and William Charles Gowan."

On Mrs Gowan's death in 1842, Robert Gowan's trustees brought a multipolepinding with reference to the fund retained and set apart by them to meet her annuity. The claimants were Dr and Mrs Nicholson, and William Gowan's executors ; and the question between them was, Whether the bequest of this fund in William Gowan's settlement, being expressed conditionally, " in the event of the death before him of his mother," took effect, he having survived his mother ?

No. 79.

Feb. 14, 1845.
Gowan v.
Bradley.

On the one hand, it was contended that the condition was manifestly introduced upon the erroneous supposition that the fund did not vest in the testator, and that he had no power to test upon it unless he survived his mother; and that his obvious intention of dividing it equally between his sons and his sister, Mrs Nicholson, ought to be given effect to.

On the other hand it was maintained, that the condition being clearly expressed, and not inconsistent with the rest of the will, could not be rejected; and that therefore the fund fell into William Gowan's general personal estate.

The Lord Ordinary directed a case to be prepared for the opinion of English counsel. It was laid before Mr W. H. Tinney, who returned an opinion in favour of the latter view.

The Lord Ordinary pronounced the following interlocutor:—"In respect of the opinion of Mr Tinney, finds that the capital sum or provision liferented by Mrs Gowan, senior, and conveyed to the deceased William Gowan in fee, by the prior settlement of his brother Robert, was not carried by the will latterly executed by the said William Gowan: Therefore, repels the claim of Dr and Mrs Nicholson to any share of the said fund, and sustains the claim of William Gowan's executors, in so far as any part thereof is still in the hands of the pursuers: And, in respect that this judgment exhausts the present process, finds it unnecessary to give any decision on the other pleas raised for the parties on record: Finds no expenses due to, or by, either party in this competition, and decerns." *

* "NOTE.—The preceding judgment proceeds entirely on Mr Tinney's opinion, which, in a question turning on the construction of a will executed in an English colony, is entitled to great weight. If the case, however, were found not to depend on any technicality peculiar to English law, and if it were open to this Court to enter on an enquiry as to the import of William Gowan's will, and the codicil annexed thereto, as a question of general construction, the Lord Ordinary must state, with all due deference, that he should have entertained considerable doubt whether William Gowan truly meant his bequest to be conditional, and dependent on his surviving his mother, as laid down by Mr Tinney.

"It is very evident that William Gowan, or the framer of the colonial will, laboured under a mistake as to the nature of his right to the liferented fund bequeathed to him by his brother Robert under a Scots trust-settlement executed at Glasgow; and he supposed that the bequest of that fund to him could not take effect till the death of his mother. Now, although the terms both of the will and codicil of William Gowan respecting this bequest, are somewhat involved and ambiguous, yet, if the response of the learned counsel is not be held to exclude further discussion, it is thought that a question might be fairly raised here, whether the words founded on as conditional in the legacy by William, amount to more than a mis-description or mis-recital by the testator of his own powers over the fund bequeathed, which could not annul the legacy. In particular, the codicil, which applies to the case of William predeceasing his mother, and leaves any surplus of his funds to his sons in that event, is not very intelligible, if it does not refer to

Both competitors reclaimed—the Nicholsons on the merits, and William Gowan's executors in so far as they were not found entitled to expenses.

No. 79.

Feb. 14, 1815.

Gowan v.

Bradley.

On the part of the Nicholsons it was contended ;—

1. That the question, being one of intention with regard to Scotch property, upon a settlement written by the testator himself, a Scotchman, in ordinary popular language, fell to be determined by the law of Scotland.¹

2. That, at all events, the opinion of other English counsel, or a second opinion from the same counsel, ought to be taken.

LORD JEFFREY.—The only grounds on which you can get a second opinion of English counsel are, that questions were omitted that ought to have been put, or that the answers are equivocal.

LORD MACKENZIE.—When in the Outer House, I have ordered a second opinion where the counsel had reasoned in his opinion, and the reasoning appeared to me to be bad.

The Court did not call on the respondents' counsel.

LORD JEFFREY.—This is plainly a conditional bequest, and by the law of Scotland, though it were satisfactorily made out that a condition was adjoined to a bequest on account of an erroneous notion by the testator of his own power, that would never do away with the condition. But I think the law of England must rule. I should have agreed with Mr Tinney, had the question been one of Scotch law.

LORD MACKENZIE.—I think this is an English will, and must be interpreted

by surplus which might remain after the liferented fund was divided in the manner directed by the will.

Still, the Lord Ordinary cannot place his own impression as to the construction of a foreign will against that of a counsel learned in the law of the country where the will was framed ; and, looking to the case of Lord Cranstoun in 1839, (1 D. 521,) there seems to be some doubt if a single judge, acting in the Outer House, ought to make a second reference to foreign counsel. But it is indisputable that the power of the Court to consider if any further light can be derived from English law, or if the case is open to discussion in our tribunals as a question of general construction. If there had been any information as to the nature of the liferented fund not fully communicated to Mr Tinney in the case ; and, in particular, if he did not understand that the right to the fee left to William under Robert's trust, executed in Scotland, had not only vested in William Gowan all from the death of Robert, but that it was disposable by him, and attachable by creditors, (under burden of the liferent,) the Lord Ordinary would probably have directed that fact to be more fully explained to counsel ; but when it was fully stated in the case laid before the counsel, that William Gowan had, at the date of the will, a vested right in the fee of that part of Robert's funds, it was sufficient to enable a counsel, of the experience of Mr Tinney, to understand the nature of the right vested in William Gowan under the Scots will."

Cranstoun v. Cuninghame, Feb. 16, 1839, (ante, Vol. I. p. 521.)

No. 79. by English counsel. The case of Trotter¹ is a very strong authority. A Scotchman making a will in St Kitts must be held to have looked to the law of England. I therefore think the judgment of the Lord Ordinary right, and I am not inclined to adopt his scruples.

F.b. 14, 1845.
Struthers v.
Dykes.

LORD FULLERTON.—I agree. I think we should have decided in the same way by the rules of interpretation here. I have no scruples on the subject.

LORD PRESIDENT.—I am of the same opinion.

LORD JEFFREY.—I must state that, in the case of Cranstoun,² my note received no countenance from the Court, and I have stood corrected ever since, looking on the case as settling the point—that even where no technical words are used; yet, in an English will, intention must be judged of by the English law.

THE COURT adhered on the merits, but awarded expenses to the executor under their reclaiming note.

ANDREW MURRAY, W.S.—GIBSON-CRAIGS, DALZIEL, and BRODIE, W.S.—Agents.

No. 80. ROBERT STRUTHERS, Pursuer.—*Sol.-Gen. Anderson—Buchanan—Maitland.*

THOMAS DYKES, Defender.—*Rutherford—Cook.*

Sheriff's Officer—Messenger—Cautioner—Relief—Intimation.—A Sheriff's-officer, who had been employed to do diligence upon a bill, committed an error in his charge, which led to an action of damages and other legal proceedings being instituted against his employer and him; the employer, at an early stage of the case, had served a notarial protest upon the officer, holding him and his cautioners liable for the damage and expense he might sustain in consequence of the irregularity in the charge; but he did not intimate the institution of the legal proceedings, or his claim of relief, to the cautioners, till after the litigation had gone on for some years: In an action by the employer against a cautioner of the officer, for relief from the expenses incurred by him in the matter,—Held that the want of intimation was not of itself sufficient to liberate the defender from liability as cautioner.

Process—Record—Plea in Law—Stat. 6 Gen. IV., c. 120, § 11.—Special circumstances in which the Court allowed a plea to be added to a closed record, in terms of section 11 of the Judicature Act, “as fit to be discussed in relation to the facts already set forth.”

Feb. 14, 1845.

2D DIVISION.
Ld. Robertson.
T.

ROBERT STRUTHERS, in the year 1836, employed the late Lockhart Baird, a Sheriff's-officer in Hamilton, to charge James M'Closkie upon the extract registered protest of a bill for £20, of which he was acceptor. Baird gave an erroneous charge to M'Closkie, to make payment of the contents of the bill to “James —” instead of Robert Struthers. The

¹ Trotter v. Trotter, Dec. 5, 1826, (5 S. 78.)

² Ante, Vol. I. p. 521.

charge having been followed by the execution of a poinding, M'Closkie presented a bill of suspension upon the ground, inter alia, of the irregularity of the charge. He further, in the same year, brought an action against Struthers and Baird, concluding for reduction of the execution and of the diligence, and the warrants thereof; and also for damages, upon the ground, amongst others, of the irregularity of the charge. A previous action of reduction and damages had been instituted by M'Closkie against Struthers and Baird, also calling Thomas Dykes, writer in Hamilton, and Dugald M'Callum, who were Baird's cautioners for the faithful discharge of his duties as a Sheriff's-officer. This action, however, was never executed against the cautioners, and was abandoned shortly after it was brought into Court. The action of reduction and damages, first above-mentioned, and the process of suspension, were conjoined, and considerable litigation took place. In 1839 an issue was adjusted between M'Closkie and Struthers, (Baird having died in the meantime, and his representatives having renounced his succession,) and, in January 1840, a trial took place, at which the jury returned a verdict for the defender, Struthers. M'Closkie then applied to the Court to set aside the verdict, as contrary to law, and succeeded in obtaining a new trial. The case was tried a second time in March 1841, when the jury found for M'Closkie, with one shilling damages. The verdict was afterwards applied by the Court, and expenses were awarded in favour of M'Closkie.

On 11th July 1840, after the first Jury-trial had taken place, a notable instrument of intimation and protest was served by Struthers upon Dykes, as one of the cautioners of Lockhart Baird, intimating to him that a protest had been served by Struthers upon Baird upon the 7th September 1836, holding him and his cautioners liable in relief for all damages and expenses that might be sustained from the irregularity in the charge; and further intimating the subsequent legal proceedings that had taken place, and protesting that Mr Dykes should be liable in relief for all the damage and expense Struthers had or might sustain by these proceedings. To this protest Dykes made answer, "that he does not present recollect of his having become cautioner for Lockhart Baird as messenger, and that at any rate his interest cannot be affected by the result of the action referred to, to which he is no party, and the expense of which he was not till now aware of."

Thereafter Struthers brought an action against Dykes, and against William Baird, son of the deceased Lockhart Baird, concluding for payment of the sum in the bill, and relief from the whole expenses which he incurred to his own agents, and in which he had been subjected to M'Closkie, amounting to nearly £1000.

William Baird having renounced his father's succession, an interlocutor was pronounced, assailing him from the passive title libelled against him, but decerning against him cognitionis causa tantum.

Dykes pleaded various defences to the action, which it is unnecessary

No. 80.
Feb. 14, 1845
Struthers v.
Dykes.

No. 80. to notice. The fourth and seventh pleas stated by him in the closed record were in the following terms :—
 Feb. 14, 1845.
Struthers v.
Dykes.

4. The pursuer is not entitled, *post tantum temporis*, and especially after the defender's right of relief against Baird, the officer, had been defeated and lost, to maintain the action.

7. In all the circumstances, and as the grounds of action are not well-founded either in fact or law, the defender is entitled to absolvitor.

In his statement of facts, Dykes had stated that the first notice he had received of the judicial proceedings upon which the action was founded, and of any claim being meditated against him as a cautioner of Baird, was the notarial intimation of July 1840.

The following interlocutor was pronounced by the Lord Ordinary :—
 “ Finds that, by bond of caution dated the 28th of July 1830, the defender became cautioner for Lockhart Baird in the faithful discharge of his duties as a Sheriff-officer in the county of Lanark : Finds that the said Lockhart Baird having been employed, on the part of the pursuer, to give a charge on a registered protest proceeding on a bill for the sum of £20 sterling, dated 3d March 1836, accepted by James M'Closkie, messenger in Hamilton, he, the said Lockhart Baird, on the 23d July 1836, charged the said James M'Closkie to make payment of the said sum to ‘*James Struthers, residenter in Hamilton,*’ in place of *Robert Struthers* : Finds that the said charge was irregular and inept, and that no further diligence could legally proceed thereon ; but finds that a poiding took place under the said charge : Finds that the said James M'Closkie, on the 23d August 1836, presented a bill of suspension of the said charge, and interdict against the sale of certain goods alleged to have been illegally poided by virtue thereof : Finds that, on the 29th of August 1836, a summons of reduction of the said bill, registered protest, execution of charge, and execution of poidings, was raised against the said Robert Struthers, in which the said Lockhart Baird, the present defender, Thomas Dykes, and Dugald M'Callum, writer in Hamilton, as cautioners for the said Lockhart Baird for the faithful performance of the duties of his office as a messenger-at-arms, conform to bond of caution dated 12th April 1822, were called as defenders : Finds that, on the 7th September 1836, notarial intimation was made by the pursuer to the said Lockhart Baird of the institution of the said process of suspension and interdict, and that he would hold him and his cautioners liable in relief and damages ; but finds it not alleged that notice was given to the defender as cautioner foresaid : Finds that thereafter, on the 16th December 1836, another action of reduction was raised against the said Robert Struthers and Lockhart Baird, as Sheriff-officer foresaid, but not against the present defender Thomas Dykes, as his cautioner in that office, in which capacity the blundered charge had been given in manner foresaid : Finds that the said Lockhart Baird, having made appearance in the said last mentioned action of reduction, maintained that the same

was excluded in respect of the previous action against him and his cautioners as a messenger; but finds that, on the 21st of February 1837, the said preliminary defences were repelled by Lord Cuninghame, Ordinary, 'in respect it is stated that the former action has been abandoned:'

Feb. 14, 1845.
Struthers v. Dykes.

Finds that defences were afterwards lodged both by the said Robert Struthers and by the said Lockhart Baird respectively, on the merits, in which they, inter alia, maintained that the said execution was valid, notwithstanding the blunder in the said charge: Finds it not alleged by the pursuer that any intimation was given to the defender Thomas Dykes, as cautioner for the said Lockhart Baird, as Sheriff-officer foresaid, of the institution of the said proceedings, or notice that he was to be held liable in relief thereof, in any form: Finds that the said Lockhart Baird having died, an action of transference was, on the 6th of January 1838, raised against his representatives, who, having lodged a minute renouncing the succession, were, on the 7th of December 1838, assolvied in respect of the said renunciation, and decree cognitionis causa tantum pronounced against them: Finds it not alleged that any notice of the institution of this action of transference or procedure therein was given to the said defender as cautioner foresaid: Finds that the said Robert Struthers having become bankrupt, the trustee on his sequestrated estate was, on the 30th of June 1837, sisted as a defender in his room and place: Finds that a record having been made up in the processes of suspension and reduction, which were conjoined, and the said sequestration having been declared at an end, the said Robert Struthers was, on the 18th of January 1839, reinstated as a defender in the said cause: Finds that the said conjoined actions having been remitted for trial by jury, the same was tried on the 9th of January 1840, when, notwithstanding the charge of the presiding Judge, to the effect that the said execution of charge was illegal, the jury found a verdict in favour of the said Robert Struthers: Finds that the said James M'Closkie having afterwards made a motion for a new trial, on the ground that the said verdict was contrary to law, such trial was accordingly granted by the Court on the 27th of February 1830: Finds that on the 11th of July, intimation was made under form of instrument to the defender, as cautioner foresaid, of the proceedings which had taken place, and calling upon the said defender to relieve the pursuer of all damages and expenses sustained or to be sustained in and through the foresaid blunder committed by the said Lockhart Baird; but that the said defender made answer that he did not recollect of his having become cautioner for the said Lockhart Baird, and that his interest could not be affected by the result of the said action, of the existence of which he stated that he was not aware: Finds that the defender, when intimation was thus made to him of the errors of the said Sheriff-officer, for whom he was cautioner, did not offer payment of the debt, or to repair the loss arising from the said blunder in any form: Finds, that the case having been tried a second time on the 23d of March 1841, the jury found a

No. 80:
Feb. 14, 1845.
Struthers v.
Dykes.

verdict in favour of the said James M'Closkie, and assessed the damages at one shilling; and finds that this verdict was afterwards applied by the Court, and expenses awarded in favour of the said James M'Closkie: Finds, that on the 27th of March 1841, the estate of the pursuer, Robert Struthers, was again sequestrated, and that he having made an offer of a composition, under reservation of his claim of relief against the representatives of the said Lockhart Baird, and of the defender, as cautioner foresaid, in respect of the proceedings in question, the said offer was accepted of, and the pursuer was afterwards discharged, and reinstated in his full rights: And, therefore, finds, that the pursuer is not barred by the proceedings in either of the sequestrations, or by the settlements made with his creditors, from insisting in the present action; and repels the first and second pleas in law stated in defence, and sustains the title to sue; and decerns: But in respect that no notice of any claim of relief was intimated to the defender, as cautioner for the said Lockhart Baird, as Sheriff-officer foresaid, prior to the 11th day of July 1840, finds that no part of the expenses incurred prior to that date in the judicial proceedings, to which he was no party, can be charged against him; and that the notarial intimation made to the said Lockhart Baird on the 7th of September 1836, and the circumstance of his being called as a party to the said conjoined actions, are not sufficient to supply the defect of notice to the said cautioner, so as to render him liable in the foresaid expenses;—to that extent assoilzies the defender, and decerns: But with respect to the liability of the defender for the amount of the principal sum in the foresaid bill, on which the erroneous charge was given in manner foresaid, with interest, and also for the expenses incurred subsequent to the said intimation of 11th July 1840, and the extent of the relief, if any, to which the pursuer may be entitled thereanent—appoints the cause to be enrolled, in order that the parties may be further heard thereon, reserving all questions of expenses.” *

* “NOTE.—The Lord Ordinary has no difficulty in sustaining the title to sue. The trustee under the first sequestration was sisted in the action, and after his discharge the present pursuer was reinstated as a party. In the second sequestration, the claim was expressly reserved from the offer of composition, and the pursuer being discharged, has now a right to insist in that claim which his creditors never adopted, and which he never assigned to them. The charges of fraudulent concealment and perjury, so lavishly made in the defences, are therefore wholly unfounded, and ought not to have been preferred.

“On the merits, the Lord Ordinary has only to observe, in addition to the finding in the preceding interlocutor, that although there are dicta by some of the Judges in the case of *Fraser v. Andrew*, 28th January 1831, (*Shaw*, 9, p. 345.) and of *Collier v. Wilson*, 6th December 1836, (*Shaw*, 15, p. 195.) referred to by the pursuer, to the effect that intimation to the messenger is equivalent to notice to his cautioners, yet the Lord Ordinary does not find that this has ever been expressly decided; and, on the other hand, there are contrary dicta to the effect that the cautioner is entitled to notice, so that he may have an opportunity

Struthers reclaimed, and stated the preliminary objection; that the Lord Ordinary, in finding that no part of the expenses incurred before the notarial intimation in 1840 could be charged against Dykes, in respect no notice of any claim of relief had been made to him prior to that date, had given effect to a defence which was not pleaded on the record. No. 80.
Feb. 14, 1845.
Struthers v. Dykes.

Rutherford, for Dykes, admitted that the fourth plea in law, which was intended to embrace the point decided by the Lord Ordinary, was not sufficiently explicit in its terms, and proposed to add a new plea, to the effect that, in the circumstances of the case, and from the want of intimation, the cautioner had been liberated from the claim of relief.

Solicitor-General, for Struthers, objected to the competency of adding the new plea in law. The want of intimation had not been stated as a ground of defence to the action.¹

Rutherford answered, that although not stated in the shape of a plea in law, the want of intimation had been pleaded as a defence. The pleas in law were not the defences. The whole facts necessary to raise the plea had been stated in the record, and the only error that the defender had committed was in not deducing the plea from them. Under the 11th section of the Judicature Act, it was competent for him to have the plea in law added "as fit to be discussed in relation to the facts already set forth."

Lord Justice-Clerk.—There is some nicety in this case, and we must have in view to prevent abuse of the provisions of the Judicature Act. The diffi-

of settling the claim and preventing useless litigation, from the expense of which he has in some cases been relieved. See *Macpherson v. Campbell*, 19th May 1825, (4 Shaw, p. 21.) There certainly was a great deal of very idle and useless litigation in support of the charge in this case, where the blunder was plainly fatal; and why the party did not admit the error, suffer decree of reduction to pass, tender nominal damages, and give a new charge for the debt, it is not easy to understand. The second trial was, if possible, still more preposterously persisted in by the present pursuer without a tender on his part. The Lord Ordinary thinks he is bound to presume, that if the cautioner had got notice, as seems to have been originally intended when the first action of reduction (afterwards abandoned) was raised, he would have at once admitted that the charge could not be supported; and, therefore, he exonerates him from the expenses so foolishly incurred in maintaining the reverse without his knowledge. But, on the other hand, when he did get notice, he did not offer to settle the claim, or take any step to prevent further expenses; and, on the contrary, pretended that he had forgot his cautionary obligation. How far he may be still liable for the debt, or for any part of the subsequent expense after notice given, has been reserved for future consideration, as well as the question as to whether a composition only can be demanded on the claim, or any part of it, if it can be insisted in to any extent."

¹ *Robertson*, 5th March 1844, (ante, Vol. VI. p. 944;) *Laidlaw*, 11th March 1831, (9 S. & D. p. 579;) *Miller*, 17th February 1835, (13 S. & D. p. 483;) *Thomson*, 18th November 1836, (15 S. & D. p. 32.)

² 6 Geo. IV. c. 120.

No. 80.

Feb. 14, 1845.
 Struthers v.
 Dykes.

culty I feel is, in drawing the line of distinction between the present and the case that might occur of a party at the close of a cause, and contrary to the understanding upon which it had previously been discussed, bringing forward a new plea in law founded upon matter which may have been in a measure stated on the record. Feeling the importance of strictness, and being desirous to maintain it, I am yet, in the whole circumstances, disposed to allow this plea to be added. This is a very special case. The want of intimation is, I think, stated as a ground of defence—the defences are so worded as to lead one to expect that a plea to that effect is to follow. It is certainly not sufficiently set out in the fourth plea in law, and this was very properly admitted to us; but still this plea may, in a sense, be said to refer to it. Nor am I disposed entirely to throw out of view the seventh plea, since the practice of the Court is to allow general pleas of the sort to be inserted. It is true that pleas of this description have been animadverted against in the House of Lords; but I am not aware that it has been ever the practice in the Outer House to dismiss actions in which such general pleas have been inserted. Then, we must give effect to the provisions in the 11th section of the Judicature Act, which declares explicitly, “that where any new plea or ground in law shall, after the completion of the record as before, be in the course of the case suggested, either by the Lord Ordinary or by the Judges in the Inner House, or by the party, as fit to be discussed in relation to the facts already set forth, it shall and may be competent, with leave of the Lord Ordinary, or of the Court, to add such plea to the note of pleas authenticated by the Lord Ordinary.” We certainly could not go the length of allowing a new ground in law to be added by a pursuer, which would go beyond his summons, or beyond the facts stated—and I can conceive a case where a defender might not be entitled to have a new plea added; but the facts on which this plea in law is founded are stated on the record. That is the material point, viz. that the facts are all stated, and this is only the addition of a plea in law; and, on the whole, I am inclined to allow it to be added. Indeed, I think effect would be denied to the provision in the Act of Parliament if, in this case, we refused to allow the plea to be added *in relation to the facts set forth on record*. I am aware that this may be capable of abuse; but I think that the Court are sufficiently on their guard against allowing records to be trifled with—and there is always, besides, the penalty of expenses.

LORD MEDWYN.—I concur. This case is so special, that it will not afford a precedent for any other. In the Judicature Act there is a distinction made between the facts of a case and the pleas. The facts, it is held, a party is bound to know and state upon record; while as to the pleas, although no doubt he is bound to state them also, yet, as it may sometimes happen that he may not exactly see what they ought to be, a permission was very properly given to the Court and the party to add them afterwards. But the Court are not in every case bound to allow this to be done. If the facts out of which the plea arises are sufficiently stated on the record, they have then to consider whether it is a plea fit to be discussed. If a proof has been taken, or a judgment has been pronounced, the Court may refuse to allow it to be added. The present case is not in that shape. Hitherto nothing has taken place, and this is the first interlocutor upon the merits of the case. The defender has stated on the record that no intimation was made to him. No doubt he has fallen into the error of not deducing the proper plea in law from that statement; but I see no reason why he should be precluded from now adding it.

LORD MONCREIFF.—I am of the same opinion. Each case must depend upon its own circumstances, for the Act of Parliament is very distinct, that the leave of the Court must be obtained. It must always depend upon the legal discretion of the Court, whether the plea is to be allowed or not. In the present case there are strong circumstances for allowing it. We cannot say that the plea is not fit to be discussed, when it was taken up and decided upon by the Lord Ordinary. I am clearly of opinion that it was founded upon in the defences. There is a wide distinction, drawn in the most pointed terms by the Act of Parliament, between matters of fact and law. It is only in the case of *res noviter veniens ad notitiam* that the introduction of new facts is allowed. It is different in regard to law—the introduction of a new ground in law is allowed where the justice of the case requires it. I am sensible that it is a very delicate matter, but I can see no ground for refusing the application. Should we allow it to be done in this case, it by no means follows that we are to do so in other cases.

LORD COCKBURN.—This is an application to the judicial discretion of the Court in a very delicate matter, in which I fear your Lordships have been influenced by a leaning to the side of humanity. I can see no reason for relaxing a rule, which owes its whole efficacy to its being rigidly observed. This precedent will certainly be drawn into an abuse. Before twelve months are over, your Lordships will have as many applications for leave to cobble up records. I think that permitting the proposed plea to be added will be dangerous, and that there is nothing in the case to warrant our doing it. This is an absolute defence upon the merits, which, if well founded, excludes all others. There is no intimation of this defence given either in the defences or in the record; or at least none with sufficient explicitness. It is true enough that you may throughout the papers find fragments of this defence lurking in the corners of rambling paragraphs, but it is nowhere substantively stated. I am afraid that we are just giving directions to the gentlemen of the bar as to how they may prepare their defences. Suppose a defence were given in to a case, containing not a word, but a catalogue of dates and sums, I do not see what is to prevent a defence of prescription being extracted out of it, though the word may never be once mentioned in the paper. Prescription is nothing but a comparison of two dates. Provided a party only stuffs his paper full enough of odds and ends of fact, he may always at the end of the day extract what plea from it he wants. In its honest meaning, the statute requires an exact summary of the defences. Is that given here? I can pay no regard to the seventh plea. I cannot call it a plea at all. It reminds me strongly of a case in which I was asked to answer a plea of this sort, that “every man ought to pay his debts.” To which, I think, I suggested as an answer,—“No man ought to be asked to pay a debt that is not due.” It would not be competent for the Court to give a pursuer a plea involving a new ground of action; and I cannot see that it can be competent to give a defender a plea which involves a new ground of defence. It is true that the Lord Ordinary has decided the case upon this ground, but I suppose that it was under the mistake that it somehow lay cowering under this seventh plea. I am afraid of mischief resulting from the course we are taking.

THE COURT pronounced this interlocutor:—“Find that the ground of decision, assumed in the interlocutor complained of, is not warranted by any of the pleas in law placed on the record by the defender; and having

No. 80.

Feb. 14, 1845.

Struthers v.

Dykes.

No. 80.

Feb. 14, 1845.
Struthers v.
Dykes.

heard counsel thereanent, find that, in the special circumstances of this case, an additional plea in law relative to the point in question may now be received and placed on the record."

Struthers then argued on the merits, that Baird, the principal, having been a party to the original proceedings, and intimation having been made to him, there was no necessity for intimation to his cautioner.¹

Dykes argued, that although the mere abstract want of notice might not of itself be sufficient absolutely to relieve the cautioner, yet, looking to the nature of the litigation which was carried on, and the preposterous conduct of the defence, coupled with the want of intimation, the pursuer was not entitled to charge the expense thus incurred against the cautioner. This was the view taken by the Lord Ordinary in his interlocutor, and he intended to go no further. Neither does the defender plead the case higher.

Upon that statement being made,

The LORD JUSTICE-CLERK said,—the Court think there is no longer a question before us for decision. The interlocutor has gone further in expression than the party contended, or (as he states) than the Lord Ordinary intended. The Court are with the defender to this effect, that we think that his argument on the merits is most important and relevant, but at present we give no opinion upon it; but we are of opinion that the want of intimation is not, per se, sufficient to liberate the cautioner. The interlocutor does find that, and therefore to that extent must be altered.

THE COURT accordingly pronounced this interlocutor:—"Recal the interlocutor complained of, in so far as 'in respect that no notice of any claim of relief was intimated to the defender as cautioner for Lockhart Baird, as Sheriff-officer foresaid, prior to the 11th day of July 1840,' it finds that 'no part of the expenses incurred prior to that date in the judicial proceedings, to which he was no party, can be charged against him; and that the notarial intimation made to the said Lockhart Baird on the 7th September 1836, and the circumstance of his being called as a party to the said conjoined actions, are not sufficient to supply the defect of notice to the said cautioner, so as to render him liable in the foresaid expenses, and to that effect assoilzies the defender, and decerns;' and find that the want of intimation is not of itself sufficient to free the defender from liability as cautioner, and remit to the Lord Ordinary to proceed with the cause."

JOHN CULLEN, W.S.—LOCKHART, HUNTER, and WHITEHEAD, W.S.—Agents.

¹ Mackintosh v. Lord Kinnoull, 12th November 1824, (3 S. & D. p. 270;) Fraser v. Andrew, 28th January 1831, (9 S. & D. 345;) Clason, 15th February 1842, (ante, Vol. IV. p. 743;) Collin v. Wilson, 6th December 1836, (15 S. & D. 195.)

JOHN SCOTT, Petitioner.—*Fordyce*.

No. 81.

Feb. 14, 1845

Scott.

Entail—Stat. 6 and 7 Will. IV. c. 42.—Held that the 6 and 7 Will. IV. c. 42, does not authorize the sale of entailed lands for payment of debts of an institute heir, contracted before the recording of the entail in the register of tailzies, but applies only to debts contracted by the entailer.

JOHN SCOTT, the heir of entail in possession of the estate of Scalloway, presented a petition to the Court for warrant to sell a portion of the estate for payment of the debts which affected, or might be made to affect it, in terms of the provisions of the 6 and 7 Will. IV. c. 42.

Feb. 14, 1845.
2D DIVISION.
Lord Murray.
R.

The Court, before answer, remitted to the Lord Ordinary “to enquire into, and take an account of the entailer’s debts and obligations, and other burdens, which affect, or may be made to affect, the said entailed estate, and to fix and ascertain the amount thereof.” The Lord Ordinary made a remit in these terms to Mr Patriek Irvine, W.S.

Mr Irvine returned an interim report, in which it was stated,—That the deceased John Scott, the maker of the entail, and the father of the petitioner, had died in November 1833; that the petitioner, the institute in the entail, had been infest in the estate, in virtue of the precept of sasine therein contained, in December 1835, but that the deed of entail (which had been executed in 1821) had not been recorded in the register of tailzies till May 1838, upwards of four years after the death of the entailer. Under these circumstances, the reporter suggested for the consideration of the Lord Ordinary the question, whether debts resting—owing by the petitioner, the present heir of entail, contracted previous to the recording of the entail in the register of tailzies, which affected, or might be made to affect the estate, did not fall under the provisions of the Act, as well as the debts due by the entailer himself at the time of his death. Reference was made to the preamble, and §§ 7, 8, 13, 15, and 19 of the Act.

The Lord Ordinary reported the point, adding the subjoined note.*

* A NOTE.—The petition for Mr Scott of Scalloway refers to his father’s entail of that estate, dated in 1821, and recorded in 1838, and, after referring to certain debts said to be contracted by the maker of the entail, quotes the 7th, 8th, 9th, 10th, and 11th sections of the 6th and 7th Will. IV. c. 42, and prays that an account should be taken of the debts which ‘affect, or may be made to affect, the said estate,’ and to fix the amount thereof, and to ascertain what portions sufficient to pay all such debts, &c., may be sold with the least detriment and injury to the remainder of the estate, and to order them to be sold, as directed by the statute.

“The Court, on the 30th May 1839, ‘before answer, remitted to the junior Lord Ordinary to enquire into, and take an account of, the entailer’s debts and obligations, and other burdens which affect, or may be made to affect, the said

No. 81.

Feb. 14, 1845.
Scott.

THE COURT pronounced this interlocutor :—"Find that no proceedings can take place under the petition of John Scott of Scaloway, for the sale of entailed lands, except for payment of the entailer's debts and obligations; and of new remit to the Lord Ordinary to proceed further in the said petition as to his Lordship shall seem fit."

GORDON, STUART, and CHEYNE, W.S.—Agents.

entailed estate, and to fix and ascertain the amount thereof, and interest if any, with power to hear parties, and do therein as to his Lordship shall seem just, and to report.'

"The Lord Ordinary appointed Mr Patrick Irvine, W.S., to enquire into the debts, &c. After proceeding a certain length with these enquiries, Mr Irvine made the interim report, which the Lord Ordinary has appointed to be printed, in which he has stated that various debts to a considerable amount, owing by the petitioner, the present heir of entail, have been contracted before the entail was recorded, and the question occurred,—Whether these debts, which affected, or might be made to affect, the entailed estate, fell under the provisions of the Act of Parliament, as well as the debts due by the entailer himself at the time of his death.

"It appears to the Lord Ordinary very clear, that the provisions of this statute apply to entailer's debts alone, and that no proceedings can take place under it with reference to debts contracted by the heir before the entail was recorded. The preamble of the statute bears, that 'whereas it is expedient that certain powers should be conferred upon heirs of entail in relation to granting tacks,' &c. 'and to selling portions of entailed estates for payment of the entailer's debts,' &c. &c.

"The 7th section bears, that 'for effecting the sale of portions of entailed estates for payment of the entailer's debts, be it enacted, that from and after the passing of this Act, it shall and may be lawful for the heir of entail in the possession of any entailed estate, liable to be adjudged or evicted for the debts or obligations of the maker of the entail, to apply by summary petition to the Court of Session, in either Division of the said Court, setting forth the entail, and the debts or obligations affecting, or which may be made to affect, the lands or heritages contained in the said entail as aforesaid, and praying the said Court that so much of the said lands or heritages may be sold as will produce a sum adequate to discharge the debts so affecting the said estate.'

"The subsequent sections of the statute contain provisions for carrying these enactments into effect. The proceedings under this statute for the sale of entailed estates are therefore limited to debts contracted by the entailer, and the Lord Ordinary has therefore reported the case, in order that the Court may pronounce a judgment to that effect, or pronounce such other interlocutor as may seem right in the circumstances of the case."

WILLIAM BETT and OTHERS, Suspenders.—*Sol.-Gen. Anderson—*

Cowan.

MUNGO MURRAY, Respondent.—*Rutherford—Arkley.*

No. 82.

Feb. 14, 1845.

Bett v. Murray.

Lease—Removing—Assignment—Mandate.—A tenant with the consent of his landlord made over his whole rights under his lease to assignees, but he still thereafter remained in the personal occupation of the farm; shortly before the expiry of the lease, he came under an obligation to the landlord to remove without warning or process of law;—Circumstances in which held that the assignees were the tenants in the farm, and that the former tenant had no power, in the character of manager or overseer for them, to grant the obligation to remove; and that therefore the assignees, not having themselves received any warning, were entitled to possess the farm by tacit relocation for a year after the expiry of the lease.

THE farm of North Corston and the lands of Teuchans were let by the trustees of Mungo Murray of Lintrose, to John Bett, under a lease excluding subtenants and assignees, without the consent of the landlord, for the periods of nineteen and fifteen years, from Martinmas 1824 and Martinmas 1828 respectively, the termination of the lease as to both farms being at the term of Martinmas 1843.

Feb. 14, 1845.
2D DIVISION.
Lord Wood.
R.

In the year 1837, John Bett having become embarrassed in his circumstances, executed an assignment of his right under the lease to his brother, William Bett, banker, Coupar-Angus, James Campbell, farmer at Balbrogie, and James Meall, farmer, Buttergask, who had agreed to assist him by pecuniary advances. This deed assigned and disposed to the above-named parties John Bett's right and interest in the tack during the whole years that were to run, with power to occupy and possess the lands, and do every thing which the tenant himself might have done; and also conveyed the furniture and plenishing in his house, and the whole horses, cattle, farm plenishing, and stock and crop of every description. The assignees were also taken bound to make payment to the landlord of the rent, and to implement the whole obligations and conditions of the lease during its currency, and generally were placed in John Bett's full right and place of the premises. This assignment was intimated to, and approved of by the landlord, Mr Murray. The assignees, immediately after the execution of this deed, expedited an instrument of possession, but they did not themselves enter upon the actual possession of the farms, which remained in the personal occupancy and management of John Bett as formerly. It was alleged by the assignees that John Bett acted merely in the capacity of their overseer.

The rents were thereafter paid to the landlord by the assignees. The subjects on the farm were also insured in their names, and the premiums paid by them. On the other hand, (it was alleged by the landlord,) John Bett remained in the apparent possession of the farm, and exercise of all

No. 82.

Feb. 14, 1845.
Bett v.
Murray.

the rights of tenancy ; his name stood as tenant on the rent-roll ; the carts used on the farm bore his name ; his name appeared as tenant on the roll of electors, and in the statute-labour roll of the parish ; the receipts for the assessed taxes of the farm were granted in his favour, and the accounts connected with the farm were charged against him. Further, there were no accounts as to the proceeds of the farm kept between the assignees and John Bett, as acting in the capacity of their overseer. This was established by the return under a diligence obtained by the landlord in the process to be immediately mentioned.

Some time previous to Martinmas 1843, at which time the lease expired, some communings had passed between John Bett and the landlord's factor as to a renewal of the lease ; but the parties not having been able to come to an agreement, John Bett, on 28th March of that year, addressed to the factor a letter, binding himself to remove from his farm at the term of Martinmas then next, and that without any warning or process of law to that effect, with which warning he thereby agreed to dispense. This letter, it was alleged by the assignees, was written without their knowledge or sanction, and was not communicated to them. Throughout these communings John Bett had acted and corresponded with the landlord as on the footing of his being the real tenant of the farm.

Shortly before the term of Martinmas the assignees intimated that, they being the tenants of the farm, who could alone dispense with warning, they did not hold themselves bound by the letter granted by John Bett, but were to retain possession of the farm until legally warned to remove.

In the July previous, the landlord had obtained decree of removing against John Bett. When about to put this decree into effect, the assignees presented a note of suspension.

They pleaded ;—

That they became vested with the exclusive right to the lease by force of the assignation in 1837 ; and as, on the one hand, they were responsible thenceforward for the whole obligations and prestations incumbent on the tenant in terms of the lease, so, on the other hand, it was with them alone as tenants that the landlord could lawfully transact in matters relative to the farm, or affecting the right of lease.¹ They being thus, from and after 1837, the tenants in the farm, the obligation to remove obtained from John Bett, without their cognizance or approbation, could not affect their right ; and as they came under no similar obligation, and had not been warned to remove, they became entitled, by tacit relocation, to continue in the farm as tenants from and after Martinmas 1843, till warned to remove.

¹ Ramsay v. Commercial Bank of Scotland, Jan. 20, 1842, (4 D. B. M. 405.)

Mr Murray pleaded ;—

That as the assignation was intended to cover an arrangement with John Bett's creditors, and was otherwise in trust for him, and as it was never completed by the assignees entering into actual possession of the farm, and as they were not in actual possession at the expiry of the tack, they were not entitled to plead tacit relocation. Further, on the supposition of their having been truly the tenants, they, by authorizing John Bett to act in all things regarding the farm as their factor or mandatory, and by permitting him to deal both with the landlord and the public as such, without their interference or control, were, in the circumstances of the case, bound by his letter of obligation to remove. The granting of this obligation was an act of ordinary administration, and was within John Bett's power, considered in the character of a factor, as at that time the landlord had it in his power to remove them by process of law; and no right had arisen in their favour by tacit relocation having taken effect.

The Lord Ordinary suspended the proceedings complained of, and interdicted, prohibited, and discharged the respondent as craved, finding him liable in expenses.

Mr Murray reclaimed.

Lord JUSTICE-CLERK.—I am constrained to concur in this interlocutor. That the assigners have taken sharp advantage of a piece of inadvertency on the part of the landlord, is true; but that really was the fact in almost all the cases which have occurred, where the landlord thought he had good cause to omit the legal form of removing. But they have only taken advantage of it to secure a benefit which law gives them.

The assignation assented to by Mr Murray, and effectual against him, conveyed to the assignees, with the concurrence of the landlord, the whole right and interest in the lease, with all the privileges, rights, and advantages of tenancy.

The assignees were liable in future for the rent. John Bett was not, under the assignation. The assignees were liable in all the conditions and prestations of the lease, and they were the parties who must have paid damages if its conditions had been violated. I am, therefore, of opinion, that in order to effect removing at the expiry of the lease, and exclude grounds for tacit relocation, the landlord was bound to proceed against or transact with the assignees.

The case stated on the record might have been very important in a sequestration of Bett, between his general creditors and these assignees, in order to prove, as in the recent case of *Roberts v. Wallace and Douglas*, that the assignation was clothed and followed by actual possession as to give them a preference over the landlord, who received the rent from the assignees to the last—who occurred in the transference of the right to them, by which John Bett was released of all claim and interest in the lease, the case stated on the record is quite sufficient to make out that the landlord was entitled to hold him to be tenant. Accordingly that view was given up; and it was argued, that as the manager in the whole matter of the farm for the assignees, although not the party against whom a removing could effectually have been directed, yet he had authority to

No. 82.

F.b. 14, 1845.

Bett v.

Murray.

No. 82. grant, without the knowledge and sanction of the assignees, the obligation to remove, without warning or process of law. I am clearly of opinion that the management ascribed to him, even by the landlord, could not imply any such authority.

Feb. 14, 1845.
Bett v.
Murray.

If the assignees had for years practically abandoned their assignation—no longer paid the rent—returned the beneficial occupation to the former tenant, and he had gone on paying the rents, and been fully retrocessed, although without any deed, I can easily understand that they might have been barred from attempting to come forward again, after leaving the landlord for years to transact with the cedent as the new tenant. But no such case is even stated on this record. The allegation that the assignees knew of, and were parties to the transaction with John Bett, and only came forward after they saw the advantage they could get, after truly leaving to him to transact with the landlord, has not been pressed to proof, and must be wholly laid aside.

LORD MEDWYN.—We must adhere. As the appearance of the assignees after the time for warning them was past, and when the landlord was not negligent, for he clearly thought he was dealing with the tenant, partakes much of the character of a trick, I was anxious to see whether, in this case, the plea could be stated, that, although no doubt an assignation, assented to by the landlord, had been granted to three friends of the tenant, one of them his own brother—from his occupation not likely to enter personally into occupation of the farm, and two other friends—each having farms of their own to attend to, in security for advances by them, yet in fact he remained ostensibly the tenant, and did not by any means hold the situation of merely griever or overseer under them. This view seemed favoured by what is established, that no actual change of possession took place. The instrument of possession is sufficient proof of that; for, unless followed by possession of the assignee, it is of no avail at all; and when so followed, it is utterly useless. In fact, such a proceeding is never resorted to, except when there is a real change of possession, and is a ceremony used to cover, if possible, the want of any such. And then, further, there is the want of any, I don't say settling of accounts, but even of any statement of accounts subsequent to that for crop 1833 which would have been kept if he had really been manager for the assignees. Bills for rent are given by the assignees, but it is not said they, and not the cedent, retired them. It occurred to me that, as this assignation was merely in security, and, moreover, that it distinctly bore that it was only to endure "during the whole years and space of the said lease yet to run, until its termination at Martinmas 1843," that if the assignees, even although still creditors of the tenant, allowed him freely to act as occupant of the farm, as I cannot say I see a single act which shows that they acted as his employers, and he as their manager, might have been inclined to hold that his agreement to remove would have been sufficient, and that the assignees, who had really never possessed under their security, now when it had expired, could not avail themselves of the right of removal, which the real tenant had waived, on the expiration of the assignation he had given of it. He was holding himself out as the tenant, liable to be removed by process of law, and it is clear he reckoned himself the tenant, entitled to dispense with formal warning. An overseer or griever knows well that no such process applies to him. But, as this was not the view taken by counsel of his position on the farm, I presume because the real facts did not admit of it, and I

he was only manager for the assignees, then I cannot hold that his implied mandate extended so far as to dispense with a process of removing against them, if they are to be viewed as the tenants. Therefore, the landlord has been misled as to the character and powers of Bett, and ought to have warned his assignees to remove, to prevent tacit relocation. No. 82.
Feb. 18, 1841
Kilgour v. Kilgour.

LORD MONCREIFF.—I have looked at this record to see if there is any ground on which we could support the plea of the landlord, as it is manifest that an unfair advantage has been taken of him. But the cases are so strong that I can see no legal ground for altering the interlocutor. If I could see any evidence of Bett's having granted the letter being known to the assignees, I would have had no difficulty. There is no evidence, however, that they knew of it. I am constrained to adhere.

LORD COCKBURN.—I do not think that the proceedings of the assignees can be called taking an unfair advantage; for if so, this might be said in every case of tacit relocation.

THE COURT accordingly adhered, with additional expenses.

J. S. DUCAT, W.S.—STORIE and BAILLIE, W.S.—Agents.

ALEXANDER KILGOUR and OTHERS.—*Inglis*—Cook.

MARY KILGOUR and OTHERS.—*Marshall*—G. Bell—Hector.
Competing Claimants.

No. 83.

Testament—Legacy—Vesting.—A testator directed his trustees to hold his whole succession for the life of his wife, should she survive him, with power to her to test on it to a certain extent, and on her death, or on his own, should he survive her, to divide the residue into two equal shares, and out of the one to pay a legacy of £200 to his niece, and the balance to his nephew, and to hold the second for the life of certain parties, and on the death of the longest liver to divide it among the children then surviving of one of them;—Held the legacy to the nephew vested in him by his survivance of the testator, though he predeceased his wife the life-rentrix.

JAMES KILGOUR executed a trust-disposition and settlement in 1830, Feb. 18, 1845, whereby he directed his trustees to hold his whole estate, heritable and moveable, for the life of his wife, should she survive him, and on her decease, or as soon after his own as might be convenient, if he survived her, to divide the whole residue into two equal shares, and to pay one to his nephew and niece, Alexander and Mary Kilgour, equally between them, and out of the other half to pay an annuity of £100 to his sister, Agnes Kilgour, and the annual produce of the remainder, and on Agnes' death, of the whole, to William Christie, his brother-in-law; and at the first term after the death of the longest liver of these two, to

1st DIVISION
Lord Cuning-
hame.
W.

No. 83. pay the capital to the children nominatim (ten in number) of the said
 Feb. 18, 1844. William Christie, or the survivors or survivor, equally among them, the
 Kilgour v. issue of a predeceaser taking the share of their parent
 Kilgour.

To this deed the testator in 1831 annexed a codicil restricting the right of Alexander and Mary Kilgour to a liferent allenary of the half of the residue, and giving the fee to their children; whom failing, to the children of another brother; and directing his trustees accordingly.

In 1832 he executed, with reference to the trust, a deed of corroboration and alteration, whereby, "with respect to the share or half of the free residue of my estate first directed to be applied in said trust-deed and settlement, and as altered by said codicil, I hereby still further alter the destination thereof as follows—viz. I direct and appoint my said trustees, out of the said share, to pay to the said Mary Kilgour the sum of £200 sterling, and that in lieu of the foresaid liferent provision in her favour: And I direct and appoint my said trustees to pay, assign, and dispoise the residue of the said share or half of the free residue of my estate first directed to be applied as aforesaid, to the said Alexander Kilgour, son of my brother David Kilgour, for his own right and use, and that at the first term of Whitsunday or Martinmas after the decease of the longest liver of me and my said spouse, and for that purpose I hereby revoke the liferent provision in favour of the said Mary Kilgour and Alexander Kilgour, and the destination of the fee in favour of their children, or the children of my brother John Kilgour, specified in the said codicil."

By a codicil annexed to this deed in 1833, the testator directed his trustees to pay such legacies as his wife might leave, not exceeding £600, out of, and before dividing, the residue of his estate.

The testator died in 1835, survived by his wife, who died in 1843. Alexander Kilgour died in 1842, having survived the testator, but predeceased his widow, the liferentrix.

The question thus occurred, Whether the legacy to Alexander Kilgour, which was directed to be paid at the first term after the decease of the longest liver of the testator and his spouse, vested *a morte testatoris*, or was contingent upon the event of his surviving the longest liver? This question was raised in a multiplepinding brought by the trustees under the settlement. In this process, the heir-at-law and next of kin of the testator appeared, and united in maintaining that the legacy to Alexander Kilgour had lapsed, though between them a separate question existed as to whether the share of the residue, which was the subject of it, was heritable or moveable.

Mary Kilgour, and Mary Lamb Murray, also appeared, and, on the other hand, united in maintaining that the legacy in question had vested *a morte testatoris*, though between themselves a separate question, unnecessary to be noticed, existed, as to which of them should be preferred to it. The legacy of £200 to Mary Kilgour was admitted on all hands, and her claim for it was unopposed.

The Lord Ordinary pronounced the following interlocutor:—"Ha- No. 83.
ving heard counsel in this multiplepinding, on the claims relative to the share of the residue and fund *in medio* bequeathed to Alexander Kilgour, Feb. 18, 1845.
Finds that the specific share of the trust-estate, directed to be paid to him Kilgour v.
by the settlement libelled on, vested in the legatee by his survivance of Kilgour.
the truster, notwithstanding his predeceasing the liferentrix; but before answer as to the competition between the different heirs and successors of the said legatee, Allows parties to be further heard in that question, after the judgment now pronounced is reviewed by the Court; and, in the mean time, reserves all question of expenses." *

* "NOTE.—The present question arises under the settlement executed by the deceased James Kilgour. By the first settlement executed by him, he directed his trustees, after the death of his wife, for whom the trustees were to hold the estate during her life, to divide the free proceeds or residue of his personal estate into two equal shares; the one of these shares to be equally divided betwixt Mary Kilgour and Alexander Kilgour, children of his deceased brother, David Kilgour; the other half he directed to be divided among the children of his brother-in-law, William Christie. The truster next executed a codicil, restricting his nephew and niece, Alexander and Mary Kilgour, to a liferent of the above half of the residue, and destining the fee to their children; but that appointment he, by a deed of alteration latterly executed by him, recalled, and directed his trustees, out of the said share, *i. e.* half of the residue, 'to pay to the said Mary Kilgour the sum of £300 sterling, and that in lieu of the foresaid liferent provision in her favour; and I direct and appoint my said trustees to pay, assign, and dispose the residue of the said share, or half of the free residue of my estate, first directed to be applied as aforesaid, to the said Alexander Kilgour, son of my brother David Kilgour, for his own right and use, and that at the first term of Whitsunday or Martinmas after the decease of the longest liver of me and my said spouse.

"The question is, If the share of the residue thus appointed to be paid to Alexander Kilgour on the death of the liferentrix, lapsed by his predeceasing that

17?
"It occurs to the Lord Ordinary that this provision would have vested, beyond dispute, upon established cases of the highest authority in the law, if it had been conferred by a trust settlement for the sole behoof of the testator's widow liferent, with a direction to make over the trust estate to his nephew, Alexander Kilgour, on her decease. A destination or direction in these terms would have brought the present case directly within the well-known precedents of *Lowke*, (Dict. p. 8092;) and *Wallace*, in 1807, (Mor. App. voce Clause, No. 1000;) *Selkirk and Crawford*, (2 Shaw, 682;) and, finally, of the latter case of *Black and Marchbanks*, decided by Lord Jeffrey, and by the Second Division unanimously, in 1836; and of *Maxwell*, determined by Lord Corehouse and the First Division in 1837, (15 Shaw, 1005.)

In these cases specific legacies and provisions, both of land and money, appointed to be held by trustees for behoof of one party in liferent, and to be paid over to another on the death of the liferentrix, were found to be vested in the beneficiary heirs at the death of the testator. Professor Bell, in reference to the case of *Marchbanks*, first cited, thus explains the views of the Court in cases of this class:—"Lord Jeffrey proposed, as a test in such cases, that where directions are given to trustees destinating the fee on expiration of the liferent to one individual, it should vest as in the common case; but that when the destination is to several persons successively, the construction must be, that the fee is to remain in suspense till the event of the liferenter's death. But it was held by the Court

No. 83. Alexander Kilgour and others, the heir-at-law and next of kin of the testator, reclaimed.

F.b. 18, 1845.
Kilgour v.
Kilgour.

LORD PRESIDENT.—I retain the first impression I had, viz. that the interlocutor ought to be adhered to. In the deed of corroboration and alteration there is a distinct provision in regard to the remainder of one half of the whole residue, after deducting the legacy of £200 to Mary Kilgour. The trustees are directed,

that the existence of the trust did not here suspend the vesting of the fee, and that no distinction is to be made between the cases, (of trust and direct conveyance.)

“ It has been argued, however, that the present case is ruled by certain other and later cases, particularly by those of Provan (14th January 1840) and Johnston (9th November 1840), in both of which cases judgments of Lord Moncreiff, Ordinary, were altered by the Second Division, and provisions under trust-settlements payable to the children of a certain class and the survivors, related to the testator, who might be alive at the death of the liferenters, were held not to vest till that event took place. These cases, which were very anxiously considered and discussed, fix the law in similar and analogous instances, in a manner not to be questioned in this Court; but they are not sufficient to rule the present dispute, under a settlement containing an express direction to pay over at the widow's death one-half of the residue to Alexander Kilgour, without any further destination or substitution. The authorities quoted may probably apply to the other half of the residue, which is appointed to be paid to the children of William Christie, and the survivors and survivor of them, at the death of the widow. But no question is raised here as to the half of the residue claimable by the latter parties.

“ It was argued, however, that if the half of the residue bequeathed to the Christies did not vest till the death of the liferentrix, it afforded a certain inference that the other half of the residue was meant to be suspended till the same period. But it is neither inconsistent, nor even unusual, for separate portions of the same residue to vest at different periods. All depends on the will of the truster, as manifested by the terms used in his deed; and if he leave one part of his estate to an individual in absolute and unqualified terms, and another portion to such persons of a class as might survive the death of the liferentrix, the condition of vesting, which is plain and unmistakeable in the one case, cannot be applied to the other.

“ The bequest of the half of the residue to Alexander Kilgour was of the nature of a special legacy. It became fixed by his survivance of the testator, just as all the other special legacies directed to be paid at the death of the widow vested in the legatees by their survivance of the testator, whether they predeceased the liferentrix or not. For example, the legacy of £200 payable to Mary Kilgour out of Alexander's half of the residue, vested without doubt by her survivance of the truster, and would not have lapsed by her predecease, either of the liferentrix or Alexander Kilgour; but that was to be paid out of Alexander's share of the residue now disputed. The inference is strong, that the framer of the deed understood that whole portion of the residue bequeathed to Alexander Kilgour to vest at the same period that the special legacy or burden imposed on it became a vested right in the person of his co-legatee.

“ It appears, that in the very recent case of Wright, (16th November 1843,) a settlement was the subject of construction before the Second Division of the Court, which bears a remarkable similarity in some of its clauses to the present. The Court in that instance found, that a direction by a truster to pay the share of a residue to the children of a brother-in-law at the death of two liferenters, did not vest till the death of the liferenters; but with respect to the other half of the residue, directed to be paid (on the same event) ‘ to my brother, John Douglas, the Judges unanimously held that that share vested *a morte testatoris*.’

on the death of the longest liver of the testator and his spouse, to pay it to Alexander Kilgour for his own use. There is no remainder over in favour of any one. I know that, by the codicil to this deed, the testator, with reference to the whole estate, gives his wife power to bequeath legacies to the extent of £600. But that just removes from the other provisions what she may dispose of in the exercise of that power. We are not informed whether she did exercise it or not. It makes a contingency as to the amount of the succession, as the legacies left by the wife must be taken off the first end of it. Applying the general principle of finding the testator's intention, we have a clear indication that he meant from the first his whole succession to be liferented by his widow, and Alexander Kilgour's share of the residue to be paid at the first term after her death. The payment of that share was thus merely postponed till the occurrence of an event certain, and so, according to established principle, vested *a morte testatoris*. I think the case that comes nearest to this is the case of Maxwell, in 1837,¹ where Lord Corehouse and the Court gave effect to a provision of this description.

LORD MACKENZIE.—In this case there is room for difference of opinion, and I rather incline to a different opinion from your Lordship. The principle in this class of cases is, that the question is to be determined by the will of the testator. That is admitted in every case. There is no absolute legal presumption established that can overcome it. From that I draw this inference, that there must be an expression of that will; we cannot otherwise exclude the heir-at-law. I mean, it must be expressed either directly or by implication from what is expressed. A question may occur, whether it is enough that the words used should make the evidence of intention to vest preponderate, or whether there ought not to be reasonable certainty to exclude the heir? I am willing to hold, that if, on the whole, the expression used affords a preponderance of probability that the testator intended it to vest, that is enough. But, beyond that, I cannot extend the favour for vesting. The *onus* of making out that must lie on the party pleading the will. In this case, I am not able to find any thing in favour of vesting, or any thing to afford reasonable ground for holding that the testator contemplated vesting. One half of the succession is disposed without vesting—that is conceded. A liferent use of it is given to two persons, and the fee to the surviving children of one of them, on the death of the longest liver; so there is no vesting there. How then can you rest on the testator's expectation of not dying intestate by vesting, when it is certain that as to one half of his succession vesting was not intended? Then, if we can rest nothing on that, there is nothing else. He appoints trustees, which is a material circumstance, for it supersedes the necessity of vesting in any other person; and he directs them after a certain time—after the death of the longest liver of himself and spouse—to pay over a part of the residue to Alexander Kilgour. Suppose the case rested there, the question would occur, whether, when a man names trustees, and appoints them, after the death of another, to pay a sum to a party, that creates an immediate vesting? I see no ground for holding that it does. It is not expressed, and is it implied? Can they not pay the sum without vesting, as well as with it? The trustees are not directed to hold the sum for the party, nor is it given to heirs and assignees. There are a great many things which imply vesting, though it is not expressed, as a grant of liferent and fee, which the trustees are directed to make immediately, or a grant to a man's heirs and assign-

¹ 15 S. 1005.

No. 83.
Feb. 18, 1845.
Kilgour v.
Kilgour.

nees. The fair meaning of vesting is nothing more than that the subject goes to a man's heirs and assignees. I see none of these things which imply vesting here. Therefore, I am not able to adopt your Lordship's view, from want of sufficient evidence. I think the evidence is the other way; for I think it appears that the testator had no contemplation of any right in the legatee till the trustees came to pay. First, the trustees are directed to hold for the liferent of the wife, if she should survive; but they are not directed to hold the fee for the legatee. Then it is provided that, after the liferent expires, they are to pay a large number of legacies, and part of them very remarkable; for the wife has power to leave legacies out of the fee to the extent of £600, and the trustees are directed to pay them. That does not look as if the funds were to be vested before her death. It looks rather as if the testator had viewed her death as substituted in place of his own. Then, after that, the trustees are directed to divide the estate into two parts, and to dispose of them in the way mentioned. All these things look as if he did not consider that there was to be any vesting. The case does not stop there, for the settlement goes on to the disposal of the other half, in such a manner that it is not maintained that it vested immediately. Does that not create, I do not say a certainty, but a strong probability, that he did not intend the first half to vest either? What is given to certain parties, or the survivors or survivor of them, on the death of an individual, could not possibly vest. It is clear that, until the death of the liferenters after the widow, there could be no vesting. If that is certain as to one half, does it not create a strong probability that the testator did not contemplate immediate vesting of the other?

I do not know, that much can be founded on the alteration giving Alexander and Mary Kilgour only a liferent; but it is something; for the testator left the other part of the deed standing, and gave this brother and sister a mere liferent, and he afterwards brought it back to a fee.

Such are the principal views which strike me, and create in my mind a doubt. I am inclined to hold that there is not in this case sufficient evidence derived from the will of the testator, that there was an intention on his part that there should be vesting before the trustees were directed to pay, and that, on the contrary, the preponderance of evidence is against such intention.

LORD FULLERTON.—Though after the opinion just delivered I ought to give mine with some diffidence, I must confess I never had a doubt that the interlocutor of the Lord Ordinary ought to be adhered to. For I think that the present case stands quite clear of all those specialties, which raised the difficulties in the greater number of those questions concerning the vesting of legacies, which have lately engaged the attention of the Court.

In the first place, I think that the true character of the rights of these parties must depend exclusively on the deed of corroboration and alteration, dated the 24th of November 1832, affected in so far as it can by law be held to be affected, by the later codicil of the 16th of August 1833. In ascertaining the true import of these deeds, we can receive no assistance from the trust-deed and settlement of 7th July 1830, and codicil of 22d January 1831, because the testator, by the deed of corroboration and alteration of the 24th of November 1832, expressly revoked those previous deeds in so far as regards the share of the residue now in dispute.

- The third clause of the last deed provides for the disposal of that share. "Thirdly, with respect to the share or half of the free residue of my estate first directed to be applied in said trust-deed and settlement, and as altered by said codicil, I hereby

still further alter the destination thereof as follows." He then proceeds to direct the trustees in the terms which have given rise to the present question; and he concludes, "and for that purpose I hereby revoke the liferent provision in favour of the said Mary Kilgour and Alexander Kilgour, and the destination of the fee in favour of their children, or the children of my brother, John Kilgour, specified in the said codicil." All former directions then, in regard to this share of the residue, are extinguished. There is no room for the application of the principle, that the whole deeds of the party are to be taken as forming one settlement. That rule can only hold in regard to deeds which remain existing and unrevoked expressions of his intention; but here all the deeds prior to that of 24th November 1832 are extinguished; and it is upon this latter deed, and any subsequent deed which may by law affect it, that the rights to the share of this residue must depend.

2dly, With regard to the import of the third clause of the deed of 24th November 1832, I really cannot entertain a doubt that it gave a vested right to Alexander Kilgour from the moment of the death of the testator. The third clause follows immediately one containing various legacies, all directed *to be paid* "at the term of Whitsunday or Martinmas, which shall happen after the decease of the longest liver of me and my said spouse." And I do not understand that the vesting of these legacies from the death of the testator is disputed. Now, the third clause is expressed exactly in the same terms, only that it is a share of the residue instead of a specific sum:—"With respect to the share or half of the free residue of my estate first directed to be applied in said trust-deed and settlement, and as altered by said codicil, I hereby still further alter the destination thereof as follows—viz. I *direct and appoint* my said trustees, out of the said share, *to pay* to the said Mary Kilgour the sum of £200 sterling, and that in lieu of the foresaid liferent provision in her favour: And I direct and appoint my said trustees *to pay*, assign, and disburse the residue of the said share or half of the free residue of my estate, first directed to be applied as aforesaid, to the said Alexander Kilgour, son of my brother David Kilgour, for his own right and use, and that at the first term of Whitsunday or Martinmas after the decease of the longest liver of me and my said spouse; and for that purpose I hereby revoke the liferent provision in favour of the said Mary Kilgour and Alexander Kilgour, and the destination of the fee in favour of their children, or the children of my brother John Kilgour, specified in the said codicil."

I cannot conceive any terms more clearly indicative of a mere postponement of payment, as distinguished from a postponement of a vesting of the right. It is a direction *to pay* at a particular term, which, though not absolutely fixed in date, is certain to exist at one time or other; and consequently there is no ground whatever for converting this into a condition. For here, if the legacy is not held to vest *a morte testatoris*, it must lapse altogether. It is not conceived in favour of heirs, or any set of substitutes, failing Alexander Kilgour. There is no person in whose favour it can be supposed that the vesting was suspended; so that there is no middle term between holding the legacy to vest, or holding it to be lapsed, as conditioned on Alexander Kilgour's survivance of the liferentrix. This just brings the case to the point where it must stand. Does a legacy or order to pay a sum at a future term certain to arrive, imply as a condition of the right that the payee must survive the term of payment. For I do not see how the existence of the trust affects the question. The trust had no other object than the protection of the rights of the liferentrix. In regard to the legatee, the trustees were just the

No. 83.

Feb. 18, 1845.
Kilgour v.
Kilgour.

No. 83.

Feb. 18, 1845.
 Kilgour v.
 Kilgour.

holders of a fund, for which, from the period of the testator's death, they were bound to account to the legatee, at a term postponed indeed, but certain to arrive. And I must consider that direction as of itself sufficient to vest the legatee's right; because, agreeably to the ordinary rule of law, a postponed term of payment does not of itself import as a condition of the right that the payee shall survive the term. The right vests, though the time for enforcing it is postponed.

Accordingly when I put the question to the counsel, whether there was any one case in which it was held that the postponement of a legacy to one individual until the death of another, rendered the vesting of the legacy conditional on the survivorance—I was answered very fairly that there was not. Indeed, in the only question in which the point seems to have been raised, it was decided the other way—I mean in one of the branches of the case *Wallace v. Wallace*. There the direction to the trustees was—"After the decease of the longest liver of me and my said spouse, I hereby appoint my said trustees to content and pay or assign, and make over to the persons after named, the respective sums of money after specified—viz. to Alexander Wallace, banker in Edinburgh, my nephew, the sum of £1000 sterling." The words are almost identical with those used in this settlement; and the Court found "that the legacy of £1000, left to Mr Alexander Wallace, vested in him at the death of the testator Alexander Houston, and now belongs to representatives of the said Alexander Wallace;" and I never understood that the authority of the judgment on this particular point of the case of *Wallace*, has been in any degree shaken by any of the later cases, in which questions as to the date of vesting have been determined. On the contrary, in that of *Maxwell*, May 25, 1837, the same effect was given to nearly the same form of words; and that founded on the authority of the case of *Wallace*. And in all of the later cases decided against the vesting, there were expressions employed in addition to, or in explanation of, the postponement of the term of payment, which the Court held to imply in a sound construction of the deed, the testator's intention that the right should not vest, or, in other words, that the right of disposal in the first-named legatee should be withheld for the benefit of certain other objects which he had in view. Thus in the case of *Provan*, January 14, 1840, the direction was after the death of the liferentrix, Mrs Jane Telfer, "to *uplift and divide* the principal sum among her children equally; and in *case any of them shall have predeceased*, leaving heirs of their bodies, the share of such deceased child or children to be paid to their heirs." The case of *Johnston*, June 9, 1840, was something of the same kind. There was a direction to the trustees on the death of the liferenter, "to pay the sum of £500 equally among the children of the said Jean Wait; and in *case any of the children of my said sisters, Elizabeth and Jean, shall happen to die* before their said parents, and leave children behind them, the *respective shares* of those so predeceasing *shall be equally divided amongst such children*." In both of those cases the rights of the children were held not to vest *a morte testatoris*; but then the judgment of the Court went upon the special terms of the provisions, which were held sufficiently to express the intention of the testator, that the disposable rights of the children should emerge only when the power of division on the part of the trustees, and the number of the sharers were ascertained at the death of the liferenter. I do not think that those cases, or any of the others, touch, or were intended to touch, the general proposition established in the case of *Wallace*, that a legacy to be paid to one individual, after the death of another, does, unless controlled by

indications of a different intention in other parts of the deed, vest *a morte testatoris*, notwithstanding the postponement of payment. No. 83.

3dly, If such be the true import and effect of that clause of the deed which creates the right, I do not think that the character of the right is affected by the codicil of 1833. By that codicil the testator directs the trustee to make over the household furniture to his spouse and liferentrix, and to pay such legacies as she may leave, not exceeding £600, "out of, and before dividing the residue of my estate." Now, there is here clearly a power given to the liferentrix to diminish the residue, but it does not appear to me that that can be held to affect the right of the legatee as dating from the testator's death. That right was the right to demand from the trustees, on the death of the liferentrix, an account and payment of one-half of the free residue of the estate; and that right I consider to have vested in Alexander Kilgour from the death of the testator, and to have been transmissible to his disponees. And although, by the nature of the codicil, and the exercise of the faculty given to the liferentrix, the result of that accounting might have been affected, and the residue diminished, still there was nothing in that which affected or impaired the character of the right conferred on the legatee, of the half of the residue by the original settlement. I think the case is exactly the same in a legal point of view as if the testator had inserted among the legacies of the deed of 1832, "such further sums as my widow, the liferentrix, shall leave by will to the amount of £600;" and then proceeded and directed the residue to be paid to Alexander Kilgour at the death of the liferentrix. The circumstance of the possible diminution of the amount of the fee at the discretion of a third party, does not affect the vesting of the fee subject to that variation of amount. Nothing can so clearly illustrate that as the decisions pronounced in the cases of *Servwright v. Dallas*, and *Marchbank's Trustees*, respecting the rights of children to a particular sum vested in trust, with a power of division conferred on the father or mother. In those cases the right of each child was found to vest, and consequently to be transmissible, though the amount was variable, in a very wide range indeed, at the discretion of the father or mother. Upon the whole, then, I am clearly of opinion that the Lord Ordinary's interlocutor ought to be adhered to.

LORD JEFFREY.—I am of the opinion last delivered; and though I regret that there should be any difference of opinion, I am the less disturbed by it here, inasmuch as this belongs to a class of cases in which we are not determining abstract principles of law, but applying principles of a very loose kind to the circumstances of particular cases. But for that difference of opinion, I should have thought this one of the clearest of the class to which it belongs. Looking to the cases, I think that almost all the considerations which *separatim* have been held to import vesting, concur here, as to the half of the residue given to Alexander and Mary Kilgour. With regard to the other half, though no doubt from it being left to survivors at the end of the liferent, vesting was postponed, yet it is remarkable, that the persons named as the children who were then to take, amount to no fewer than ten in number; so that there was scarcely any chance of the bequest lapsing in that family. In that view, one quite understands that the testator took his risk, which was next to nothing, of intestacy with regard to that half. Therefore I scarcely think it an exception to what would otherwise appear to have been the *enixa voluntas* of the testator, to make a vested settlement of his whole succession. In that view, every

Feb. 18, 1845.
Kilgour v.
Kilgour.

No. 83.

Feb. 18, 1845.
Kilgour v.
Kilgour.

thing concurs to imply an intention of vesting. First, the only alternative is that of taking the whole as vested, or leaving the part in question to go to an unknown heir-at-law. Then there is no destination over, but a destination to Alexander Kilgour, a favoured person, only. And, finally, you have a great number of special legacies, and the precise words of *liferent* and *fee*, which, when a trust is created, are generally held to vest the right in the heirs, *simul ac semel*, with that in the *liferenters*. I hold it to be impossible to separate the condition of the legacy now in question, from that of the other special legacy to Mary Kilgour. But if these are held to be in *pari casu*, it does appear to me to throw a strong light on the question of intention, which alone we are now considering. There is a special legacy, and then the residue is given to Alexander Kilgour.

After what has been stated by Lord Fullerton, in which I entirely concur, it is not necessary for me to go into the principles or cases. It is fixed that mere postponement of payment does not affect vesting. I shall make only one remark as to the effect to be given to the last codicil, giving the widow power to diminish the residue to the extent of £600. That power creates a risk of *the amount* of the residue being diminished; but does not affect the question of vesting. The amount must always be uncertain up to the period of distribution. It is liable to be diminished, or even extinguished, by the failure of investments, burning of houses, falling of stocks, and various other contingencies. Personal estate is always exposed to these risks: And this is adding just one more to the category, or list of casualties—to the chapter of accidents, in short, to which all residues are exposed.

Therefore, on the whole, I entirely concur in the view first given, and in that of Lord Fullerton.

THE COURT adhered, and remitted the case to the Lord Ordinary, with power to decide all questions of expenses.

LAMONT and NEWTON, W.S.—A. P. SCOTLAND, S.S.C.—THOMSON, ELDER, and BURN, W.S.
—DAVID DOUGLAS, W.S.—Agents.

JAMES CLELLAND, Pursuer.—*Maitland*.
MRS ANN BAILLIE OR WEIR, Defender.—*Penney*.

No. 84.

Feb. 18, 1845.
Clelland v.
Baillie.

Process—Transference—Succession.—Decree of transference refused to be pronounced against the widow of a deceased defender, who had received a liferent of his heritable property and a bequest of certain moveables, his heir and executor having both entered to his succession respectively.

THE late William Weir died proprietor of the lands of Shottsburn, and was also possessed of a valuable lease under the Duke of Hamilton, current till the year 1858, of the farm and inn of Shotts, with the right of livery customs at the Shotts market. He also left moveable property to a considerable extent. By special deed, Weir bestowed upon Mrs Ann Baillie or Weir, his widow, the liferent of the lands of Shottsburn, in the event of her remaining unmarried; and also bequeathed to her, in absolute property, all his household furniture, bed and table linen, silver plate, china, and plenishing in his house at the time of his decease.

Feb. 18, 1845.
2D DIVISION.
Lord Wood.
T.

John Weir, brother of William, took up his heritage as heir, and his sister, Mrs Mary Weir or Fleming, confirmed executor, and gave up an inventory of effects to the value of about £1400, the inventory including the household furniture and moveables bequeathed to the widow.

An action at the instance of James Clelland was in dependence against William Weir at the time of his death. Clelland then brought a transference, in which he called Mrs Ann Baillie or Weir, the widow, and John Weir, as "executors decerned and confirmed, or heirs served and returned to the said deceased William Weir, at least as lawfully charged to enter and confirm heirs and executors to him within forty days, conform to Act of Parliament; or as having accepted of a deed left by the deceased with the provisions therein in their favour, and intromitted with the property, heritable and moveable, which belonged to him; or as otherwise representing him on one or other of the passive titles known in law."

Decree of transference was of consent pronounced against John Weir; but Mrs Weir, the widow, objected to the process being transferred against her.

Clelland, the pursuer, pleaded;—

1. The defender, as sole disponent of her late husband, and having unqualifiedly accepted of the disposition and settlement granted by him in her favour, with the whole property and effects thereby conveyed, and having otherwise intromitted with his moveable estate, has no ground for opposing the conclusions of the action of transference—more especially seeing that the pursuer's debt against the deceased exceeds in amount

No. 84. the value of all the property, both heritable and moveable, that belonged to him.

Feb. 18, 1845.
C'lland v.
Baillie.

2. The defender, while she accepts and abides by her late husband's conveyance in her favour, and holds possession of his property, is bound, as one of his representatives, to take upon herself a liability for his debts, to the extent and effect, at least, of having the original process, in dependence at the time of his death, transferred against her in statu quo.

3. The defender is bound to submit to decree of transference being pronounced, as above, or to renounce the succession conferred upon her by her late husband's disposition and settlement.

Mrs Weir gave a minute into process in the following terms :—“ That, in the event of the action being dismissed as against her, she was willing to hold that any verdict and decree to be obtained by the pursuer against the executor and heir of her late husband, in the original action now sought to be transferred, should, in any question with her, be conclusive as to the amount of the pursuer's debt against the estate and representatives of her deceased husband, reserving all questions as to her liability as a beneficiary of her husband, and the extent of that liability ; and further, that, in the event of the pursuer obtaining such decree, the said defender should not object to any accounting competent to the pursuer to ask for the proceeds and profits of the portion of her husband's estate possessed by her, on the ground of the same being fructus bona fide percepti et consumpti, but reserving to her all other lawful defences.

She pleaded ;—

1. The defender, Mrs Weir, not being the legal representative of her deceased husband, this action of transference is incompetently and improperly directed against her. There is no legal warrant for compelling a mere legatee or party having a special provision, far less a creditor of the deceased, (as the defender, as his widow, truly is,) to assume the place and liabilities of defender in a transference.

2. Even supposing that the defender were liable to the creditors of the deceased in quantum lucrata, yet this would be a mere subsidiary liability to that of the legal representative, and would not warrant the defender's being called, along with the representative in the transference, as a proper defender therein. The defender has satisfied every legitimate interest on the part of the pursuer, by agreeing to hold any decree which may be obtained against the legal representatives as a conclusive constitution of the debt.

3. In any view, the pursuer is not entitled to decree against the defender, in the general terms concluded for in the summons.

The Lord Ordinary “ assoilzies the defender, Mrs Ann Baillie or Weir, from the conclusions of the action, and decerns ; and finds her entitled to expenses.” *

* “ NOTE.—In the circumstances, the Lord Ordinary does not think there is

Clelland reclaimed.

No. 84.

Feb. 18, 1845.

Clelland v.

Baillie.

LORD MEDWYN.—I concur in the view, that we are not to take into view the minute lodged by the widow. If the pursuer is entitled to have the action which he raised against her husband transferred against her as a joint defender with his heir and his executor, any thing she undertakes by that minute will not deprive the pursuer of his right. Indeed, I do not see that she gives up any thing by it, except the right to urge a plea I should think not very pleadable; for, if the debt has been constituted against the representatives of her husband, doing their duty to resist the demand when they come against her, I do not see that she could object to the constitution of the debt, if unjust. We have thus the naked case to dispose of, whether, when a defender has died *pendente processu*, the pursuer is entitled, besides having the process transferred against the heir and also executor of the deceased, if these are different persons, both having taken benefit by his succession, also to have it transferred in the same process, and at the same time, against his widow, to whom he has given a *liferent* of part of his heritage, to terminate, however, on a second marriage, and a gift of his household furniture, and even putting her in front as the principal defender. She avers that this *liferent* is not of greater value than her legal provision; and, at all events, as the heir has succeeded to a valuable lease, current till 1858, and the executor has given up the moveable succession at £1400, these are the legal representatives of the deceased, who are liable in the first instance; and it is only after they have been discussed, and in an action founded on other media, that she can be called upon for payment of the surplus remaining unpaid. The deceased has not disinherited his heir, nor has he named another as executor, leaving his property to an heir of provision. It might be competent to obtain a transference in such a case against the heir of provision. But it is quite new to me, that where there is both an heir and executor, and a transference raised against them, and both admitting succession and intromission and liability, that transference is also sought as in this case against another, “as having accepted of a deed left by the deceased, with provisions therein, in her favour.” The widow is not an heir, nor by this deed made so; she is a mere *liferentrix*; even heirs are liable in a certain order for the debts of their predecessor, and the heir of line must be discussed, unless in regard to obligations regarding a particular subject, or which are specially to be paid out of

any ground on which the pursuer can insist in a transference, in the manner and to the effect concluded for. And although the concessions made by the defender in the minute lodged by her might not be sufficient to prevent decree of transference being pronounced, were the pursuer otherwise entitled to it, the Lord Ordinary has the less difficulty in assailing the defender, when he considers the terms of that minute, by which the defender not only removes the possible inconvenience which the pursuer alleges he might sustain by the defender afterwards attempting to question the validity of any decree of constitution that might be obtained by him—the defender agreeing that, whatever decree shall be pronounced in favour of the pursuer in the original action, shall, to all the effects of a decree of constitution, be binding on her—but also states that, in any claim of accounting against her for the proceeds and profits of the property made over to her, which might follow on such decree, she will not defend herself on the ground of the same being *fructus bona fide percepti et consumpti*.”

No. 84.
Feb. 18, 1841.
Cleveland v.
Baillie.

it. She can only be liable *subsidiarie*, and after the other parties have been discussed, and the property taken up by them exhausted. Suppose no action had been raised in the husband's lifetime, could the pursuer have raised an action against his widow for his debt as a lucrative successor, when he had both an heir and executor intronitting with his property, and liable for his debts. I humbly think his action would not be well laid, and that he would be obliged to call the representatives of his debtor, and constitute his claim against them. If they were unable to pay, he might have a claim against the widow, in so far as she could not protect herself as a creditor of her husband, but this only by ulterior proceedings. Now, can the pursuer have any higher right when he wishes to transfer the action raised against the debtor against his representatives, who have succeeded, and do represent him. When he brings them into the field, and the action is transferred against them, he has got all he is entitled to ; he has in the field those *qui sustinent personam defuncti*, with his property disposable for his creditors. But here the pursuer not only insists upon having the widow also in the field, who does not represent the deceased, but places her in front of the battle. She is first called; she must fight not merely her own liability, so far as her bequest may exceed her legal provision, or what it might be competent for him to settle on his widow, but be at the expense of defending the process throughout. The pursuer may use diligence against her in the mean time, and, if he obtains decree against her as a joint defender, he may cause her to pay the whole claim and the expenses of process, without discussing the legal representatives of her husband, and leave her to seek her relief by a process against those who were the true debtors. This, I think, is contrary to any proper system of pleading, and I must be of opinion that it is not supported by any authority in our law.

LORD MONCREIFF.—I am of the same opinion. I can see no trace of a right to transfer against this special donee. We have here both the heir and executor who have entered, and the pursuer persists in bringing a mere *liferentrix* into the cause. She is not an heir of provision. It would be a dangerous precedent.

LORD COCKBURN.—I am of the same opinion. There is no authority for bringing a person into the field who is not a representative. She is neither heir in heritage nor in *mobilibus*. Though not a legatee in form, she is *quoad hoc* in substance. She does not represent the deceased.

LORD JUSTICE-CLERK.—I will not differ, although I think there are more difficulties in the case than have occurred to the rest of the Court. I should give more effect to the fact, that a party is a special donee of the heritage, and so far from seeing danger in the course proposed by the pursuer, it seems to me to be consonant to justice, and to save expense, and prevent the donee making away perhaps with the only fund for payment.

THE COURT adhered, with additional expenses.

WOTHERSPOON and MACK, W.S.—CLASON and CLARK, W.S.—Agents.

Authority for Pursuer.—Erskine, III. 8, 51.

JOHN CHANTER and COMPANY, Pursuers.—*Rutherford—Moncreiff.*
 WILLIAM THOMS, Compearer.—*Sol.-Gen. Anderson—G. Dundas.*

No. 85.

Feb. 20, 1845
 Chanter v.
 Thoms.

Process—Compearance.—Where the defender in a reduction had consented to decree being pronounced in terms of the libel, rather than incur the expense of a jury-trial,—Circumstances in which the Court refused to allow a party having an interest to support the deed under challenge, to appear and defend the action.

PETER BORRIE, of the Tay Foundry, Dundee, entered into a contract with Messrs John Chanter and Company, by which he engaged to furnish them with six locomotive engines by a specified time. William Thoms came under an engagement as cautioner for Borrie, for the delivery of three of these engines on board of a vessel bound for London. Some differences arose between Chanter and Company and Borrie, as to the manner in which the latter had implemented his part of the contract, with regard to the completeness of the engines, and the time at which he had delivered them; but a deed of agreement, by which all these disputes were settled, was subsequently entered into between them. Chanter and Company having thereafter brought an action of payment and damages for non-fulfilment of the contract against Borrie, and also against Thoms the cautioner, the defenders founded upon this agreement as excluding the action. To obviate this plea, Chanter and Company, pending the action of payment and damages, brought an action against Borrie for the purpose of reducing the agreement, on the ground that the agent who had acted for them in making the arrangement, had exceeded his powers. Thoms, who had not been a party to the deed, was not called as a defender.

Feb. 20, 1845.
 2d Division.
 T.

After a record had been prepared in the action of reduction, and issues adjusted, and the cause had been set down for trial, a joint minute of compromise was given in for Borrie's trustee, (he having in the mean time been sequestrated,) and Chanter and Company, in which the former stated that he was willing, under certain conditions, that decree should be pronounced in terms of the libel, rather than incur the expense of going to trial; and the latter having consented to the above, craved the Court to pronounce decree of reduction accordingly.

Upon this Thoms appeared in the process, and gave in a minute, stating, that in his record in the leading action of payment and damages, he had founded upon this agreement, his interest to support its validity being, that if it were found to be a valid and subsisting deed, it settled all the questions between the principal parties, and had consequently the effect of relieving him as cautioner; that the proposed compromise would thus seriously affect his rights and interests, and he had been advised that

No. 85. the reasons of reduction were ill-founded ; he therefore craved the Court to withhold interposing its authority to the minute of compromise, and to allow him to sist himself as a defender, in order that he might support the validity of the deed of agreement.

Feb. 20, 1845.
Chanter v.
Thoms.

LORD MEDWYN.—My difficulty is this, whether this cautioner, not being a party to the action of reduction, can be affected by what is done between these parties. I think we must pronounce decree of reduction, but I think there ought to be some reservation of his interests.

LORD MONCREIFF.—I do not think that we have any thing to do with that. We have nothing but this application before us. If he is entitled to have his interests protected, the law itself will reserve them for him.

LORD JUSTICE-CLERK.—The first question is, whether this party can appear. If he cannot, I do not think he is entitled to ask any qualification of the decree. Let us see what his interest is. The leading action is one by Chanter and Company against Borrie for non-fulfilment of the contract, and against Thoms under his guarantee. This agreement, which Thoms seeks to support, is not an act done by Chanter and Company before the period for fulfilment of the contract; it was not entered into till after that date. Both of the defenders found upon this agreement. Chanter and Company then bring a reduction. They do not make Thoms a party to this action, although certainly they were aware that he had stated a plea founded upon the agreement. Neither does Thoms then propose to sist himself. Indeed when Chanter and Company, after the bankruptcy, propose to him to consent that the verdict to be obtained in the reduction should be held as binding on him, he does not agree to the proposal. He refuses to become a party, and having taken this course, and having left the case in the hands of Borrie's trustee, he now wishes to appear and plead his interest under the agreement. I think it is too late for him to come forward now. It would be a bad precedent to allow a party to appear in these circumstances. I think that we must pronounce a decree of reduction, and allow the decree to be used according to its effect in law.

LORD MEDWYN.—All that I was anxious for was, that his interests should be reserved entire from the effect of this private compact. But it is clear that he cannot appear.

LORD COCKBURN concurred with Lords Justice-Clerk and Moncreiff.

THE COURT accordingly pronounced an interlocutor, reducing in terms of the conclusions of the summons.

BELLS and CUTHBERTSON, W.S.—J. S. DUCAT, W.S.—Agents.

THOMAS HUTCHISON and OTHERS, (Armstrong's Assignees,) Pursuers. No. 86.

—*Rutherford—Penney.*

THE NATIONAL LOAN FUND LIFE ASSURANCE SOCIETY, Defenders.—Feb. 21, 1845.

Sol.-Gen. Anderson—G. Grant.

Hutchison v. ;
National Loan
Assurance
Society.

Insurance—Warrandice—Process—Issues.—The proposal for a life insurance and relative declaration, which formed the basis of the contract in the policy subsequently granted, contained a declaration that the party had no disease, or symptom of disease, and was then in good health, and ordinarily enjoyed good health, and that no material circumstances or information touching health or habits of life, with which the insurers ought to be made acquainted, was withheld:—Held that this imported a warranty only to the effect that the declarant was and had been, according to her own knowledge and reasonable belief, free from any disease, or symptom of disease, material to the risk, and did not import a warranty against any latent imperceptible disease that could only be discovered by *post mortem* examination, or from symptoms disclosing themselves at an after period of time.

In April 1843, Mrs Armstrong, Leith, effected an insurance upon her Feb. 21, 1845.
life for £499, 19s. with the agent in Edinburgh for the National Loan 1st DIVISION.
Fund Life Assurance Society of London. She died on 28th October Lord Wood.
following, having assigned the policy to Thomas Hutchison and two W.
others. These parties raised action upon the policy against the Insurance Company, who defended upon the ground of breach of warranty on the part of the insured, alleging that, at the date of the insurance, she was of intemperate habits, and labouring under disease of the liver, which resulted in dropsy, of which she died.

This being denied by the pursuer, the case was sent to the issue-clerks, who returned the following issues :

“ It being admitted that, on the 4th April 1843, the defenders granted a policy of insurance, No. 5 of process, whereby, in consideration of a certain premium, and on certain conditions therein set forth, the defenders agreed to pay to the executors, administrators, or assignees of the said Mrs Ann Paton or Armstrong the sum of £499, 19s. after her death, that the right to the said policy is now in the pursuers, as assignees of the said Mrs Ann Paton or Armstrong :

“ It being also admitted that, on the 28th October 1843, the said Mrs Ann Paton or Armstrong died :

“ Whether the defenders are indebted and resting-owing to the pursuers the said sum of £499, 19s., contained in the said policy, or any

No. 86. part thereof, with interest thereon from the
1844?

day of February

F.b. 21, 1845.
Hutchison v.
National Loan
Assurance
Society.

“ Or,

“ Whether, by fraudulent misrepresentation, or undue concealment as to the health or habits of the said Mrs Ann Paton or Armstrong, the defenders were induced to grant the said policy?”

The defenders were dissatisfied with the counter-issue, and proposed the following instead :—

“ Or, Whether, on the part of the said Mrs Armstrong, there was a breach of the conditions on which the said policy was granted, or by fraudulent misrepresentation, concealment, or non-communication of information touching the health and habits of the insured, the defenders were induced to grant the said policy?”

The Lord Ordinary made avizandum with the record (unclosed) and issues to the Court, who remitted back to his Lordship to hear parties further on the first two pleas in law maintained by the defenders. These pleas were as follows :—

1. Mrs Armstrong, in whose right alone the pursuers stand, undertook a legal warranty that the statements and allegations contained in the proposal, declaration, and relative documents, were true, by agreeing that they should form the basis of the contract between her and the defenders.

2. The policy libelled is void, in consequence of a breach of this warranty.

The statements, the legal import and extent of which formed the question between the parties as to the terms of the issues, were contained in the answer to the tenth query in the “ proposal for insurance,” a printed form of the society, and in the declaration by the insured appended thereto. The query was—“ Has the party an habitual cough, or any disease or symptom of disease?” and the answer was “ No.” The declaration appended was in these terms :—

“ I do hereby declare, that the age of me, the above-named, does not now exceed forty-three years ; that I am now in good health, and do ordinarily enjoy good health ; and that in the above proposal I have not withheld any material circumstance or information, touching the present state of health, or habits of life, of me the said Ann Armstrong, with which the directors of the National Loan Fund Life Assurance Society ought to be made acquainted. And I do hereby agree, that this declaration and the above proposal shall be the basis of the contract between me and the said society ; and that if any fraudulent or untrue alle-

gation be contained herein, or in the proposal, all monies which shall have been paid on account of such assurance shall be forfeited to the said society, and the policy void.—Dated this 28th day of March 1843.

“ANN ARMSTRONG.”

“Witness—John Henderson.”

No. 86.
Feb. 21, 1845.
Hutchison v.
National Loan
Assurance
Society.

The policy recited the proposal and declaration, and contained this provision :—

“Provided always, that in case any fraudulent or untrue allegation be contained in the said recited declaration, or in the proposal therein referred to, or in any of the testimonials or documents addressed to and deposited with the said society in relation to the said assurance, then this policy shall be void, and all monies paid thereunder shall be forfeited to the said society.”

The statements as to health, the pursuers maintained, amounted only to this, that the insured was free from any apparent or sensible disease, or symptom of disease; while the defenders, on the other hand, maintained that they amounted to an absolute warranty, not only that the insured had never felt herself to be affected with any complaint, or exhibited any symptom of complaint requiring to be disclosed, but that, whether felt or not, no disease in any form existed in her constitution; and contended that they ought to be allowed an issue, under which they would be entitled to a verdict,* upon proving that, at the date of the insurance, such disease existed in the constitution of the insured, whether she knew, or could possibly have known of it, and whether it had the effect of shortening her life or not.

The Lord Ordinary ordered minutes of debate, and made avizandum therewith to the Court, issuing the subjoined note.†

* The authorities for the parties will be found at the end of the report.

† “NOTE.—The state of the proceedings is so far explained by the interlocutors of 19th March, and 12th and 18th June, 1844. It is only necessary to add, that the record was afterwards closed on the 5th July, and that it was considered to be advisable that the argument of the parties upon the question raised by the defenders on the warranty in the contract of insurance should be put into writing. This has been done, and the Lord Ordinary now reports the case to the Court.

“One thing is quite clear, that in determining the question of law, which it was thought should be decided before the trial, with a view to which the issues formerly reported were prepared, the Court cannot be in the slightest degree influenced by the consideration thrown out by the defenders, that insurance companies are not in the custom of taking objections to payment of a policy on the ground of slight deviations from the statements or declarations embraced by the warranty in which the contract is founded, and that it is only where they have reason to suppose that there has been some degree of fraud or improper practice in effecting the insurance, that they avail themselves of the strict rules of warranty in resisting compliance with a demand for implement. Whatever may be the leaning of in-

No. 86.

F. b. 21, 1848.

Mutchison v.

National Loan

Assurance

Society.

LORD PRESIDENT.—If I thought the view pressed by the Insurance Company was the law, I should say there was an end to all life insurance in time to come.

insurance companies to liberality in dealing with claims upon them, the Court, in deciding whether the plea on which the defenders rely be well founded or not must look only to what the principle contended for by them, in point of law would go, and what it would give them a right to, and not to the way in which they might be disposed to act upon it.

“The present case, in so far as now brought before the Court, relates entirely to a question of law arising upon the warranty in the contract which was entered into with the defenders.

“It will be observed, that there is no point raised with respect to the law of the contract in the matter of warranty, where, in answer to a general query—such as, ‘whether the party whose life is insured has any disorder tending to shorten life’—the party has made a false statement, either in the knowledge of its untruth, or without excusable ignorance of its untruth, where, in answer to such query, or contrary to the terms of the declaration, the party has withheld, either wilfully, or by negligence, or inattention, or from an innocent belief it may be, that they were unimportant, facts which the insurers allege ought to have been communicated to them, and the statement of which, in the one case, or the non-communication in the other, they contend infers a breach of warranty. In these cases, it is not disputed that it must be left to the jury—with such directions as the Court may think necessary—to say whether the facts referred to were of such materiality, that their suggestion or suppression ought to vacate the policy.

“Further, there is strictly no point here raised with regard to the legal rule applicable to the case, where, in reference to any of the specific things made the subject of special enquiry, and receiving a special answer by the insured, (as, for instance, in relation to the particular diseases mentioned in query 9 of the proposal to which the declaration refers,) an untrue answer shall have been returned not only not knowingly, but in excusable ignorance of the real state of the fact. The law as to this may bear upon the law of the matter actually presented for disposal, but that matter itself is wider in its scope, and affects more extensively the rights and interests of parties under contracts of insurance on lives.

“The tenth query in the proposal for insurance on the life of the late Mr Armstrong is, ‘Has the party an habitual cough, or any disease, or symptom of disease?’ The answer is, ‘No.’ Then, in the declaration appended to the proposal, Mrs Armstrong declares, *inter alia*, ‘that I am now in good health, and do ordinarily enjoy good health;’ and it concludes as follows, ‘and I do hereby agree that this declaration and the above proposal shall be the basis of the contract between me and the said society: and that if any fraudulent or untrue allegation be contained herein, or in the proposal, all monies which shall have been paid on account of such assurance shall be forfeited to the said society, and the policy void.’ In the policy issued upon this proposal and declaration, the declaration is embodied, and amounts, it is said, to a conditional warranty, which must be strictly true or complied with, and upon the truth of which the whole contract depends.

“The defenders allege that there has been a breach of the warranty thus undertaken by the insured. And, without going into the details, it will be found that their plea upon the warranty results in this, that if it shall be proved that, at the date of opening the policy, Mrs Armstrong was not healthy, or free from disease, but was affected by a particular disease, (not being, however, one of those particularly mentioned, and in regard to which a special query was put and answer given,) this amounts in law to a breach of warranty, although, to all appearance, and so far as her knowledge went, she was at the time in perfect and robust health, and had no disease whatever; and, although there may have been no ne-

But I conceive that the doctrine of warranty is pushed by them to an extravagant length. Though there are equivocal expressions in the authorities, I think

No. 86.

Feb. 21, 1845.
Hutchinson v.
National Loan
Assurance
Society.

negligence or want of attention to render her actual ignorance inexcusable, the disease alleged to have existed never having exhibited itself, and being, while present in the frame, entirely undiscernible to all ordinary, or even the most skilful observation. The plea of the defenders seems truly to amount to this, and it is upon it—with certain qualifications (to be immediately adverted to) as to the nature and extent of the disease, which the defenders seem to be disposed to admit may still be left to the jury, under the direction of the Judge who tries the cause—that the opinion of the Court is desired; and it is impossible to disguise that, whatever may be the difficulties involved in it, it raises a point of immense importance to all those interested in life insurances, taking it apart, as it must be taken, from the feelings of liberality by which insurance companies may generally be influenced in settling claims made upon them.

"The doctrine of warranty, as it seems to be recognised in England, is a very strict and stringent one. Warranty, it is said, is a condition precedent, and whether the thing warranted was material or not, whether the breach of it proceeded from fraud, negligence, misrepresentation, or any other cause, the contract is binding if the warranty be complied with, but not otherwise; and, in the compliance with warranties, there is no latitude to, no equity; the only question is, has the thing warranted taken place or not?"

"Holding this to be the doctrine generally, the question is, how and to what effect it operates in its application to the present case?"

"It will be kept in view, that the defenders, in relation to the general warranty as to the party having any disease, or symptom of disease, and being in good health, and ordinarily enjoying good health—which, they contend, applies to unknown and entirely latent diseases—explain that the warranty must be taken in a reasonable sense; that in that sense the statement of the party must be true, and if not, there is a breach; and that, according to that reasonable sense, 'any disease or symptom of disease,' in the above query, is to be held 'to mean any disease which would tend to shorten life, or to make the life of the party insuring not an average risk, or not an insurable life, on the ordinary rates of premium.'—Defenders' Revised Case, p. 29.

"It seems, indeed, to be clear, upon the English authorities, that a general warranty as to health, or having no disease or symptom of disease, in those cases to which it applies—(whether it does apply to the case of an ordinary latent disease or the point here in dispute)—is sufficiently true, if the party be in a reasonable state of health, and not labouring under any disease tending to shorten life, that is, a disease which has in general that tendency, so that the party's life may be insured on the common terms for a person of his age and condition, and not any disorder, however trifling, with which the most healthy may occasionally be affected; for although, in one sense, every disease may tend to shorten life, and no person is without the seeds of some disease in his frame, no policy could stand were mere existence of either to be held to be a violation of the warranty, inferring the avoidance of the contract. But the warranty has not received that construction, which has been considered to be contradicted by the plain meaning of the parties entering into the contract, whose intention must be found out by reference to the subject-matter. Marshall on Insurance, p. 70; Ellis, p. 107; Willis, & Burke, 660.

"If, then, the part of the warranty referred to applies at all to latent diseases, it is not every disease, but only a disease of the description which has been explained, which will make a breach of the warranty; and it thus appears, that the warranty is so far subject to construction, and to the principle of construction, that it is to be taken in a reasonable sense. In this there is no departure from the

No. 86. it is impossible that it could be meant in any of them to be laid down, that what is called a warranty in regard to the person effecting an insurance, is more than

F.b. 21, 1845.
Hutchison v.
National Loan
Assurance
Society.

strict doctrine of warranty. It only grants what is perfectly consistent with that doctrine, that the statements in the proposal and declaration, with regard to health or disease generally, are open to construction; and that, according to a sound construction of them, with reference to the subject matter, the warranty undertaken is no more than a warranty to the above effect. And that being the case, it is equally true that the plea of the pursuers upon the warranty, by the foresaid statements in the proposal and declaration, that it does not extend to entirely latent diseases, does not import a repudiation of the legal doctrine of warranty, or that what is warranted must be literally and strictly fulfilled. It only raises a question upon the true meaning of the contract, and the extent of the warranty, which by these statements is undertaken.

"If a disease having the effect mentioned, that is, tending to shorten life in the sense in which that is understood in a contract of insurance, or having an influence upon the value of the life of the party insured, which would affect the terms of the contract, or preclude its being entered into, he proved, to the satisfaction of a jury, not merely to have existed at the date of the policy, but to be in operation, in such a way that the party must either have had actual knowledge of it, or must in law be held to have had knowledge of it, it cannot be disputed that a breach of the warranty would be incurred. But the defenders contend that the warranty is to this extent, that if a disease of the nature, and having the influence upon the value of the life of the party insured above mentioned, existed at the date of the policy, the warranty is broken, notwithstanding that the disease was not the cause of death, and was absolutely and most innocently unknown, being one of an entirely latent kind, although it may have been silently doing its work upon the constitution, so that all that is to be left to the jury is its existence at the date of the policy. The pursuers, on the other hand, contend that the warranty, according to a sound construction, does not comprehend, and is not broken by existence of, a disease of the above description, and having the effect mentioned, if it was a disease which had never exhibited itself, and which was not only not known to the party, but of which—there being no cause to give a knowledge of it—the party was not only actually but innocently ignorant.

"This being the state of the question, the whole matter turns upon the relevancy of a statement and offer of proof in relation to the bodily condition of the party insured, as respects disease or health at the date of the contract—which contains no averment of knowledge, or inexcusable ignorance equivalent to knowledge, by the party, of the alleged disease or state of health—as a ground on which the contract can be found to be voided, in respect of a breach of the warranty undertaken by the insured by the answer to the last portion of query ten, and the declaration that the insured was then in good health, and ordinarily enjoyed good health.

"Now, holding that in construing the warranty, the intention of the parties must be found out by reference to the subject-matter, it is difficult to see how the declaration of the party insured, that 'I am now' (that is, at the date of the policy,) 'in good health, and do ordinarily enjoy good health,' can be held to import a warranty or undertaking by the party that he is free not only from any disease which has positively affected his health, but from any latent disease tending to shorten life, although it has never sensibly affected his health; and that the declaration must be true in the latter sense in order to support the policy. Such a declaration, it is thought, in its natural and obvious meaning, imports an answer to an enquiry capable of being answered by the party at whom it is made; and, therefore, has reference to the apparent and known condition, present or past, of the individual as respects his actual enjoyment of good or bad health, or to his

warranty of what was known to the person, or should have been known, unless he was guilty of gross and inexcusable negligence. I think it is impossible to conceive

No. 86.

F.b. 21, 1845.
Hutchinson v.
National Loan
Assurance
Society.

positive experience in regard to health, and not to the possible existence of some disease, which, however injurious in its character, has had no perceptible influence upon the health, or no influence which can impeach the truth of the declaration—applying it to the feelings and experience of the party—that he is in good health, and ordinarily enjoys good health. To extend the warranty undertaken by such a declaration, so as to make it embrace the latter case, would be an excessive stretch of its meaning, if, indeed, it will by any violence admit of that meaning being put upon it. But the defenders are not in a position to entitle them to ask that the warranty shall receive any strained construction against the insured. If they meant the declaration to be made in the sense which they seem to contend it bears, they ought to have taken care, that by the words used no doubt of their meaning was left.

“But to the query, ‘Has the party an habitual cough, or any disease or symptom of disease?’ Mrs Armstrong answered ‘No.’

“It may be that where the non-existence of a particular disease, or the non-existence or existence of a particular thing, which must either be known to the party insured, or the knowledge of which, from its nature, he may be supposed either to have or to be able by due enquiry to obtain, is made a condition of the contract, there will be a breach of warranty voiding the contract, if the statement of the party in relation thereto be not strictly and literally complied with, without regard to the materiality of the disease or thing, as affecting the terms of the contract, or to the views on which they may have been introduced. It may be enough to release the insurers, that, as a condition precedent, the statement had not been falsified by the insured. Some of the English authorities, however, seem even in each case to recognise a certain relaxation of the severity of the rule; that is, they recognise the admission of the consideration of whether the variance in fact, from the thing as stated in the proposal or declaration, is such as be at all substantial, or of any moment, with reference to the matter on which information was desired by or given to the insurers.

“But be that as it may, it is a grave question whether, in the case of a statement in regard to a disease specifically mentioned, and still more in the case of a statement in regard to diseases generally, the warranty could be construed or held to apply to an entirely latent disease, the insured's ignorance of which was not attributable to negligence, but was perfectly innocent and excusable. At the same time, it is not to be denied that the English cases, as reported, afford at least indications of opinion that the insured, by such a warranty, takes the risk of the existence or not of any disease specifically mentioned; and that if it turns out to have existed, although latent and unknown, there is a breach of the warranty. Nay, further, there is a like indication of opinion even with regard to a warranty in reference to disease generally, such as is here undertaken by the answer to query 2^d, if it shall be proved that, at the date of the policy, the insured was affected by disease, latent though it were, tending to shorten life, in the sense of these words, in a contract of life insurance.¹

“Several of the cases apparently cited by the defenders, as going this length by direct decision, certainly cannot be founded on to that effect: 1st, Because the point involved in them either related to the non-disclosure of facts known, and turned upon the materiality of the facts; or, 2^dly, Because they were cases of

¹ *Ross v. Bradshaw*, (1 Bla. 312;) *Watson, Manwaring*, (4 Taunt. 763;) *Hackett v. Williams*, (2 Compton and Mason, 348.)

No. 86. that the warranty goes farther. The doctrine pressed by the Insurance Company just amounts to this, that when a person insured dies, a *post mortem* examination

Feb. 21, 1845,
Hutchison v.
National Loan
Assurance
Society.

insurance by a third party on the life of another; and while it might be true that ignorance of the alleged disease existed on the part of the individual making the insurance, it was not said that the party whose life was insured was not aware, or was excusably ignorant of its existence, and that *quoad* him it was actually, or in a legal sense, a latent disease; and it was held that the ignorance of the insured was immaterial, if there was actual knowledge of the disease, or its equivalent, by the party whose life was insured. And it is to be observed that several of the passages in the opinions of the Judges founded on by the defenders are the less to be relied on as supporting their plea, seeing that they occur in cases of the description last adverted to, and where the point turned upon the effect of the ignorance of a party making insurance upon the life of another; a remark which applies to the case of *Duckett v. Williams*, which came before the Court a second time in 1834, upon a claim by the insured for return of premiums, and which is appealed to by the defenders as containing, in the law as there laid down, by the present Lord Chancellor, then Chief Baron, decisive authority in their favour.

“At the same time, taking the whole of his Lordship’s opinion as reported, there is nothing in the course of reasoning on which it proceeds, or the way in which the argument is put, which necessarily excludes its application to a case of ignorance in a party affecting an insurance upon his own life; and if it was meant to apply to that case, then it announces a doctrine which would go all the length contended for by the defenders. But in considering whether it was so meant or not, it is always to be recollected that the actual case before the Court related to the effect of the ignorance of a third party insuring upon the life of another—that it was with reference to his ignorance that the opinion was delivered—and that it does not appear from the report whether, although he might be ignorant, and innocently ignorant of the existence of the alleged disease, it was not a disease known to the party whose life was insured, or of which he could not be excusably ignorant, so that it may be, that when his Lordship stated the knowledge of the party to be clearly immaterial, he referred merely to the knowledge of the third party effecting the insurance, and had not in view the case of a disease, the existence of which was altogether and innocently unknown to every one, and therefore did not intend to lay it down as law, that the declaration as to the state of health and absence of disease is untrue in the sense of the policy, and a breach of the warranty consequently incurred, if a disease tending to shorten life exists, although it be entirely latent, and not within the knowledge of the party himself said to be afflicted by it.

“After a careful examination, the Lord Ordinary is by no means satisfied, that from the cases decided in England, it can be held that the doctrine maintained by the defenders has been there clearly and unqualifiedly recognised, and he entertains the greater doubt of this being really the true import of what is reported to have fallen from the Bench, from seeing that in the case of *Sweete v. Fairley*, in 1833, (6 Carrington and Payne, p. 1.) where the insurance was by a third party on the life of another, who had signed the declaration along with the party effecting the insurance—Lord Denman, in charging the jury, after remarking upon the evidence relating to the materiality of the facts, in regard to the state of health of the insured, which had not been communicated, observed, ‘But it does not appear that Mr Abraham,’ (the party whose life was insured, and who had signed the declaration,) ‘was aware of the facts, and this will raise a very important question of law, if you should think that there was concealment of facts material to be communicated, and therefore the two questions which I shall leave to you will be, first, whether you think Mr Abraham represented truly the state of his health, according to the question put to him; and, secondly, if he did not, did he know the state of health in which he had been, so as to furnish a proper answer to that question?’

is warranted, and if any thing should be found that indicates an incipient latent disease, though there were never any symptoms, and there is no insinuation of

No. 86.

Feb. 21, 1845.
Hutchison v.
National Loan
Assurance
Society.

"The result is thus reported:—'The jury said they thought that Mr Abraham was not aware of what had taken place, and could not therefore communicate it, and they found a verdict for the plaintiff.'

"The Lord Ordinary does not find that this verdict was followed by any further proceedings; and, looking to what was stated by Lord Denman, it must be presumed that the point, which his Lordship suggests, would—if it arose upon the facts—raise a very important question in law, was not a point then definitively settled and ruled by prior decisions; and the only later one that has been referred to is that of *Duckett v. Williams*, which had been previously tried before Lord Lyndhurst, Chief Baron, and, as already noticed, afterwards came on in 1834 in another shape for judgment, when the opinion relied on by the defenders was delivered by his Lordship.

"Considering the question upon its merits, the Lord Ordinary, as at present advised, is unable to concur in the plea upon the warranty which is maintained by the defenders. He cannot think that it can be held to be the meaning and intention of the parties to the contract—collecting it by reference to the subject-matter—that the words in the last portion of query ten, and the answer and the relative declaration, mean, truly or untruly, without regard to the knowledge of the party making the statement, and that if the party made the statement in ignorance, and in innocent ignorance of the existence of any disease tending to shorten life, it is nevertheless untrue in the sense of the contract, to the effect of vacating the policy, if such disease did *de facto* exist at the time—that is, that the warranty applies not merely to known diseases, or diseases of which, in the circumstances, if the party was ignorant, he was not excusably so, but to latent diseases; and that if it shall ultimately turn out that the insured had a disease upon him tending to shorten life, which, if it had been known at the time, might have prevented the contract being entered into, the policy is vacated, no matter how latent the disease may have been, no matter although the party's death proceeded from another cause altogether unconnected with it, (for the defenders' plea goes that length,) it is enough that it existed at the date of the policy, although not apparent, by its effects upon the health, or discernible by any ordinary care or attention to the matter, or even by the most careful examination of persons of skill. To suppose that this is part of the basis of the contract would be to render the contract not one of certainty, and for insuring payment of a particular sum of money in the specified event, which is the real nature and object of the contract, but a contract of absolute uncertainty, on which no reliance can be placed that it will be productive of that for securing which it was entered into, the result depending upon certain facts beyond the reach of mortal ken, by which all the hopes and views of the insured may be irreparably defeated. The common rules of law and the warranty, without being so construed, appear to be quite sufficient for the protection of insurers: For it is always to be recollected, that although the warranty shall not be construed, as contended for by the defenders, it is still a question for the jury not merely whether the alleged ignorance of the party was actual, but whether, under all the circumstances—including the duration of the disease, its mode of operation, and the interval of time between the issuing of the policy and the death—it was an ignorance without negligence, and which was entirely innocent and excusable. The plea of the defenders, therefore, humbly appears to the Lord Ordinary to be opposed to the whole scheme and purpose of such contracts, and to require for the insurers a protection which is not necessary in order to put them upon fair terms in adjusting the contract, and to afford which would relieve them from a risk which, consistently with the nature of the contract, ought to be run by them.

"The Lord Ordinary shall only add, that if he has taken an erroneous view of the meaning of a warranty, expressed as in the contract of insurance in question,

No. 86.

Feb. 21, 1845.
Hutchinson v
National Loan
Assurance
Society.

fraud or gross negligence, there is a breach of the warrandice, which voids the insurance. I can arrive at no such conclusion. Such a doctrine is not deducible from the strongest of the authorities. If a person is not guilty of any negligence in acquiring knowledge of his own condition—if this is not established, there is no breach of the warranty. It appears to me extravagant to maintain that an insurance may be voided upon an inquisitorial investigation into latent evils in the constitution of the party, who has no indication of disease at the time of the insurance;—upon a latent defect in the constitution, which, though not the cause of death, might have been. I am of the opinion expressed in the Lord Ordinary's note.

LORD MACKENZIE.—This is not a case of ordinary absolute express warrandice, like that of the right to an estate granted to a buyer of it. That has no dependence on the knowledge or *bona fides* of the party, or his power of having such knowledge. The less the thing is, or can be known, the more necessary is the strict warrandice. But here the contract says nothing of warrandice or warranty. It only proceeds on a declaration, and stipulates, as a condition of the policy, that the declaration shall not be “fraudulent or untrue.” Now, I think the reasonable interpretation of these words must be “knowingly or blamably false.” I think the very nature of a declaration is, that it is true in the belief of the party, and was, as far as the party knew, or can know, not that it is absolutely true; and that the after discovery of some latent fact respecting the matter cannot make the declaration be justly called a fraudulent or untrue declaration, or consequently void the contract. I think this the meaning that must be entertained by both the parties in such a contract. For otherwise, I think no person would ever insure a life, or take a declaration in such a contract. It would afford no safety—nothing like that assured provision which is the object of this contract. This is the stronger, because the failure of the condition here implies not only the loss of the policy, but the forfeiture of the premium—such a stipulation as that, for mere innocent error, I think, would really be a *pactum illicitum*.

LORD FULLERTON.—The question which has been raised in these papers is one of great importance in its practical consequences; but it certainly comes before us in a very inconvenient form, viz. a discussion on the comparative merits of the issues proposed by the pursuers and defenders. And what increases the inconvenience is, that the mere adoption of either the one or the other would not settle the question on which the parties seek our decision.

The issues differ only in the additional words proposed to be inserted by the defenders in the counter-issue:—“Whether, on the part of the said Mrs Armstrong, there was a breach of the conditions under which the said policy was granted?”

and the state of the law be as contended for by the defenders, then certainly the sooner it is promulgated the better, in order that parties insuring may be aware of the footing upon which their contract stands, and the grounds on which their claim may be successfully resisted, if the insurers shall act upon and enforce the contract, agreeably to their legal rights when they may chose to exercise them, uninfluenced by those motives of liberality by which it is said they are generally guided.”

No. 86.

Feb. 21, 1845.
Hutchison v.
National Loan
Assurance
Society.

Now, these words would still leave the matter quite open ; because the adoption of them would determine nothing as to the true legal import of the conditions in the policy, which is the main subject of dispute between the parties. Then I cannot help thinking that these expressions are quite superfluous, and form no necessary part of a counter-issue, considering the nature of the point raised on the leading issue taken by the pursuers. After the admission of the terms of the policy, granted on certain conditions, it puts the question, whether the sum claimed under the contract be resting-owing ? Now, it appears to me that it requires no counter-issue to enable the defenders to prove the violation or non-performance of the conditions of the contract. When a party founding on a contract or obligation, qualified by conditions, claims payment or performance, he must bring *prima facie* evidence, at least, that the conditions have been observed ; and surely his adversary would be entitled, without any counter-issue, to negative the averment of their fulfilment.

The mere adoption, then, either of the one issue or the other, will leave undecided that point which we have here argued, and which it is most desirable to settle before the trial.

That question arises on the legal import and extent of the conditions contained in the proposal of insurance, and the declaration of the insured on the subject of his freedom from disease and general good health.

The tenth query in the proposal is, " Has the party a habitual cough, or any disease, or symptom of disease ? " Answer, " No." And the declaration of Mrs Armstrong bears, that " I am now in good health, and do ordinarily enjoy good health." The pursuers hold these expressions to denote merely the good health of the declarant in the ordinary sense of the term ; that is, freedom from any apparent sensible disease, or symptom of disease ; while the defenders maintain that these expressions amount to an absolute warranty, not only that she never felt herself to be affected with any complaint, or exhibited any symptom of complaint, but absolutely, that whether felt or not, no disease, in any form, existed in her constitution. This is a proposition rather startling, and it is necessary to examine, with some attention, the grounds on which it rests. It all turns on the meaning which, in such a contract, shall be attached to the term " good health." Does it mean external sensible health, and the absence of any external sensible symptom of ailment ; or the total absence of any defect or disorder in the constitution, whether felt, rendered sensible, or not ?

At the outset, let us enquire how far this construction of the words " good health," as denoting not the consciousness of good health, but the absolute non-existence of any morbid affection in the system, derives any support from the tenor and evident import of the other disclosure and declaration which a party is called on to make. All the other questions in the proposal clearly relate to matters of external ailment, truly matters of fact, on which the party can give, or ought to be able to give, a decided answer, and on many of which other persons may give evidence. The evident object of all those questions is to procure for the insurers, before entering into the contract, all the information on the subject of the health of the insured which he himself possesses.

Then comes the declaration, " That I am now in good health, and that I have not withheld any material circumstance or information touching my past or present state of health or habits of life with which the directors ought to be

No. 86. made acquainted." The passage must be read together. Its object is to guard against concealment of every thing essential, in so far as known to the party making the declaration. That is clearly the meaning of the latter member of the sentence; and, by the fairest construction, it serves to explain what goes before. But the defenders separate the two, and maintain that, by the words "I am now in good health, and ordinarily enjoy good health," there is meant an absolute warranty against any disease, however latent; though not in the slightest degree affecting at the time the perfect feeling and conviction of health by the party. The defenders are loud in proclaiming their liberality in construing the policy, but only on the points which do not happen to apply to the matter in dispute. Let a fair, not to say a liberal construction, be applied to the terms "good health," on which the whole plea of the defenders is rested. It occurs in the description of the state of a living individual—which state, in so far as evident to others, or perceptible by himself, can alone form the subject of description—and when so employed, does it denote any thing more than the absence of any ostensible, or known, or felt symptoms of disorder? Would any man, however scrupulous in the use of terms, hesitate to declare himself, on soul and conscience, in perfect health, so long as he felt himself in the perfect and healthy exercise of all the functions by which health could be tested; and was utterly unconscious of any derangement by which those functions were likely to be impeded? Or could it be, with any show of reason, charged against him as an untruth, because, for any thing he knew, there *might*, by *possibility*, exist at the moment some hidden defect, or malformation, or morbid derangement, inoperative externally for the time, but sure, at some future period, to prove fatal? If this were requisite to justify the declaration of "good health," it is clear that such a declaration never could with certainty be made; and this goes far to settle the point in dispute. The point is the meaning of a term in a contract, and the term occurs in a declaration asked by one party and given by the other. Now, if in one sense of the term it admits of being declared in the negative or affirmative, and if, in the other sense, it never can be the subject of an affirmative or negative, can there be a doubt in which sense the term is used? But that is the very case here. If the term "good health" means the perfect, conscious enjoyment of all one's faculties and functions, and the conscious freedom from any ailment affecting them, or any symptom of ailment, the question may be asked and answered; but if the term is construed as meaning an absolute freedom from all defect or derangement, imperceptible as well as perceptible, the declaration is one which cannot be made, and which it would, therefore, be absurd to ask. And when the defenders represent it as a warranty, nothing is gained in the enquiry, because the question occurs, What is it which was warranted?—"Good health;" and that just leads to the same enquiry in what sense that term was employed; for, it will be observed, there is here no express warranty by which a party may, and often does, take the risk of events or circumstances, on which he possesses no present information. Here the warranty is at best only implied from the term of a declaration, asked by one party and given by the other, and which is made part of the contract; and as the term is used in mere declaration, its sense must be determined by that which it evidently bears in the passage containing it. The provision, that the declaration shall form the basis of the contract, may be held to render the declaration equivalent to a warranty; but still the point, what is declared, and consequently what is warranted, depends on the construction of the declaration, and in choosing between

Feb. 21, 1845.
Hutchison v.
National Loan
Assurance
Society.

the two senses of the disputed term—according to one of which a party may declare, while, according to the other, it would be absurd to ask, and impossible to give a declaration—the former sense must, according to every rule of construction, be adopted.

Such appearing to me to be the obvious and necessary construction of the term “good health,” as used in the declaration of Mrs Armstrong, I should require very clear and decisive authority indeed, to compel me to take a different view; but I do not think there is any such authority. Indeed it rather appears to me that the *dicta* referred to on the part of the defender, have only an apparent relation to the point in dispute, and truly refer to a matter totally different. They all occur in the reports of cases, in which the insurances were effected by parties on the lives of others. Such was the case of Lord Mar, and such was the case of Dockett v. Williams, mainly relied on by the defenders. In those cases the question arose, whether the policy was voided by the untruth of the statements of health made or adopted by the party effecting the insurance, though such party made it in good faith, and was ignorant of the actual condition of the life forming the risk.

But those cases do not touch the present question. I do not see any question raised in them as to what should be the force of the term “good health” occurring in a declaration to that effect: but only whether the third party making the insurance was bound to warrant the truth of the declaration, which, it would appear, had turned out false.

We must take the *dicta* of those cases along with the circumstances to which they apply.

Thus, in the case of Dockett v. Williams, Lord Lyndhurst states, in the passage quoted in the revised minute for the defender:—“It was contended, on behalf of the plaintiffs, that the words must mean ‘truly or untruly, within the knowledge of the party making the statement, and that if the party insuring ignorantly and innocently makes a misstatement, he has not to forfeit the premiums under the clause in question.’ We are of opinion, however, that this is not the real meaning of this clause. A statement is not the less untrue, because the party making it is not apprised of its untruth.”

But it is evident that the whole force of the legal maxim ascribed to the learned Lord, in its application to the present case, must depend on the particular ground on which he held the statement to be construed. If it could be shown that the representation of “good health” was held to be untrue, because the party, though to all appearance free from every symptom of disease, was found afterwards to have had some internal morbid affection, which had never manifested itself externally, that would be an authority in the present case. But there was no question of that kind raised there. The only question seems to have been, whether the life, described as a good one by the party affecting the insurance, was not truly a bad one in the ordinary sense of the term, and not in the new and critical sense maintained by the present defenders. This is evident from the other parts of the Report, in which the question is described as one whether, at the time of making the insurance, it was truly an insurable life or not? Now, what does an insurable life mean but a life which is free from any of those symptoms of illness, which would deter, in sound discretion, an office from taking the risk? The very term necessarily implies external and perceptible health, and nothing else. The question of insurable life or not never could, according to the reasoning of the

No. 86.

Feb. 21, 1845.
Hutchison v.
National Loan
Assurance
Society.

defenders, be stated as a question of fact existing during the lifetime of the party. It never could be solved till her death had rendered the enquiry utterly nugatory. All that seems to have been decided, then, in the case of *Duckett v. Williams*, was, that when one party makes an insurance on the life of another, representing his health as good, he will be held to warrant the truth of that statement, and will not be permitted to urge that he was ignorant of its untruth; and nothing more seems to have been determined in any of the other English cases alluded to.

Now that principle does not in the least affect the view which I have of the present case. It may be quite correct to lay it down, as was done by Lord Lyndhurst, "that a statement is not the less untrue because the party making is not apprised of its untruth." But, in my opinion, the statement in the declaration here was, in its sound construction, true, if the party making the declaration never had any consciousness of ailment, and never had exhibited any symptoms of ailment. According to the ordinary and only intelligible sense of the term in the circumstances in which it was used, she was in "good health," if she neither was conscious of, nor exhibited the slightest symptoms of, disease.

While I think, then, that it is not of much importance which of the issues be adopted, I think it is of importance, that in whatever way the issue is framed, there should be an expression in the form of a specific finding of the opinion of the Court, on the question argued in these minutes.

LORD JEFFREY.—I concur in the whole views which have been delivered. Life insurance is understood as a contract of indemnity against a risk; and it is therefore assumed, that in entering into it, the insurers proceed on a knowledge of facts sufficient to enable them to calculate the amount of the risk. It is incumbent on the insured to make a due and fair disclosure of all the facts experience has shown to be those on which averages may be calculated. But a party cannot be held to peril his insurance against risk upon the result of a fact unknown, and which could not be known to him. Nothing short of an Act of Parliament would induce me to put a different construction on such a contract. It is admitted that the terms of the contract must be construed with a view to what the parties must have understood when they entered into it. Our institutional writers say, in needlessly strong language, that there is no equity in warranty. I think there are many cases where their words must be softened; but I pass over these, and come to the meaning of "good health" in the warranty here. These words are used in their common sense. A person says he is in good health, because from his youth he has been strong and lusty; and because it turns out, upon *post mortem* examination, that there was the germ of some trouble, which, though it had never indicated itself by any symptom, might ultimately have shortened life, is it to be said that the statement is untrue?

Untrue has two meanings—a moral and a physical. In the latter, a statement is untrue when the person is the victim of imposition. It is only untrue in the former sense, that will invalidate a policy of insurance—when the insured declares what he knows to be untrue, or might have known by due care and enquiry, or conceals the truth in the same manner. He declares that he has no disease, or *unease*. This must only mean so far as he knows, or can possibly know. Let us bring this to a practical test. If the defenders' construction of the warranty be the true one, can they deny that it would be but fair to set forward its tenor accordingly? Now I should like to see those offices that would *de futuro* insert their intention in their policies thus:—Persons insuring in this office will please

No. 86.

Feb. 21, 1845.
 Hutchison v.
 National Loan
 Assurance
 Society.

take notice, that though they have always enjoyed good health, and the doctors on their examination could discover nothing amiss, still if, at any future time, it shall turn out that they had in them the germ of a disease of a serious nature, which, if known to the office at the time of insurance, would have made them hesitate to insure, the policy shall be void. If they are honest, they should put this in their policies; for it is proper for persons insuring to know that this is the state of the law. It is clear, that in the knowledge of this no one would ever insure. I think that is sufficient to determine the present question. The Insurance Company know they have no case. They brandish before our eyes a set of English cases, which I always approach with distrust. I was startled with the introduction of the word *warranty*, which, according to our notions, has nothing to do with the matter. *Condition* is the better word. After what Lord Fullerton has said, I shall not go into the cases. The view of the Insurance Company is, that the declaration of the insured is a counter insurance; that he gets insured on the one hand, but on the other insures against the risk arising from a thing unknown, and which could not be known. They construe his declaration as of this kind—"I positively declare that I have not in the interior of my skull, heart, or any where else, the seeds of a fatal malady." To make such a declaration would be impious, and yet it is the only shape in which the guarantee contended for could be put. Marshall says that the insured should be careful to ascertain the truth of the fact. That implies, that by due care the fact may be ascertained. Two remarks occur on the authorities—1st, That there is no statement in any of them that undiscoverable maladies void insurance; 2d, That they have reference to third parties, who come forward and say that the life is a good insurable life. I hold the whole case to be made out *a fortiori* by that of Abraham,¹ before Lord Denman. There the jury found for the pursuer, because they thought that the deceased at the time of the insurance could not know of the malady. That is the last case, and appears to me conclusive on what I am surprised and grieved should be thought a point doubtful in this branch of the law. I agree with Lord Fullerton, that we ought not merely to approve or disapprove of the issue, but that we must not shrink from positive decision of the point.

THE COURT pronounced the following interlocutor:—"Find that whatever issues may be granted for trying this case, the proposal of Mrs Armstrong, and declaration therein referred to, form the basis of the contract in the policy of insurance in question, and import a warranty only to the effect that the declarant was and had been, according to her own knowledge and reasonable belief, free from any disease or symptom of disease material to the risk, and that they do not import a warranty against any latent and imperceptible disease, that could only be discovered by *post mortem* examination, or from symptoms disclosing themselves at an after period of time; and remit the case to the Lord Ordinary to proceed further as to him shall seem fit."

ALEX. HUTCHISON, S.S.C.—R. W. JAMIESON, W.S.—Agents.

Purner's Authorities.—Park on Insurance, p. 649; Marshall on do. p. 773;

¹ *Sweete v. Fairley*, (6 Carr. and Payne, 1.)

- No. 86. *Ross v. Bradshaw*, (1 Blackstone, 312;) *Willis v. Poole*, (Park, p. 650, and Marshall, p. 774;) *Sweete v. Fairley*, (6 Carrington and Payne, 1.)
 Feb. 21, 1845. *Defenders' Authorities*.—*Ellis on Insurance*, pp. 30, 99, 105, 106, 110; *Magistrates of Campbeltown v. Galbreath*, shall on do. p. 772; *Park on do.* (8th Edit.) pp. 660-1; *Lee v. Veitch*, (mentioned by Park, p. 468;) *Sir Wm. Forbes and Co. v. Edinburgh Life Insurance Co.* March 9, 1832, (10 S. 451;) *Everett v. Desborough*, (5 Bingham, 503;) *Duckett v. Williams*, (2 Compton and Mason, 348.)

- No. 87. **MAGISTRATES OF CAMPBELTON, Pursuers.**—*Rutherford*—*G. G. Bell*.
D. S. GALBREATH, Defender.—*Sol.-Gen. Anderson*—*Macfarlane*.

Prescription—Harbour.—The Magistrates of the burgh of Campbeltown, who had a grant of free-seaport over the loch of that name, brought an action against a proprietor who had built a pier upon his lands within the limits of their grant, to have it found that they were entitled to levy there the dues and customs set forth in certain minutes of Council and relative tables of dues. By these tables, a lower rate of dues was imposed upon certain articles when brought to the quays of the burgh, than when shipped or landed at other parts of the loch. It having been found by the verdict of a jury, that the dues exigible at the burgh quays had been levied by the Magistrates there for forty years from the date of the tables, and that they had from time to time asserted their right to levy at the defender's pier;—Held, that the defender not having established in his own favour a prescriptive immunity from dues, and the Magistrates having levied at their head-port the dues exigible there, this entitled them to levy these dues at the defender's pier, and over the whole precincts of their grant; but that, having failed in their proof of a continuous use to levy the higher dues in the tables applicable to the defender's pier, they were not entitled to claim them.

- Feb. 21, 1845. **SEQUEL** of case reported ante, pp. 220 and 255. For a statement of the nature of this action, the issues, verdict, and procedure at the former discussions, see the previous Reports.
 2D DIVISION. Lord Justice-Clerk. *Jury Cause.*

A discussion now took place as to the application of the verdict.

The Magistrates of Campbeltown contended, that they were entitled to decree in terms of the conclusions of their summons, or at least to decree for the same rate of dues which they had levied at the quay of Campbeltown. It was now finally fixed, that Dalintober was within the limit of the pursuers' grant of free-port, and also that, for forty years, they had levied the duties under the tables at the quay of Campbeltown. The case was therefore in the same position with, and must be regulated by, the law laid down in the *Magistrates of Edinburgh v. Scot of Trinity*, 10th June 1836,¹ where it was held that the prescriptive exercise of the right of levying dues at the head-port alone, was sufficient to keep up the right as to all other parts of the precincts over which the grant of free-port

¹ 14 S. & D. p. 922.

extended, unless it could be shown that a counter prescriptive immunity No. 87
 had run in favour of the party claiming exemption. The Magistrates, Feb. 21, 18
 therefore, were not bound to have levied at Dalintober in order to pre-Magistrates
 serve their privilege—it was enough that they had exercised it at Camp-Campb. 101
 belton. In this view of the case it was not necessary that the pursuers Galbreath.
 should have taken the second issue; and it could not place them in a
 worse situation, or preclude them from maintaining their present argu-
 ment, that they had taken it, and only succeeded in proving it in part.
 Although the result of the verdict was, that they had failed to prove a
 levy of the full dues at Dalintober, it still showed that they had not en-
 tirely abandoned them.

Mr Galbreath contended;—The pursuers were barred by the shape of
 the case from maintaining their present argument. There had been
 ample admissions made on the record, and in the minute given in by the
 defender before issues were adjusted, to have enabled them to raise this
 point. They had, however, taken upon themselves in the second issue,
 the onus of disproving the prescriptive immunity from dues which the de-
 fender alleged, in regard to the pier at Dalintober. Having failed upon
 this issue, and the verdict having established dereliction on the part of the
 pursuers, and immunity upon that of the defender, he was entitled to absol-
 vitor. The grant in favour of the Magistrates did not fix either the rates
 of the dues, or the bounds within which they were to be levied. All that
 their charter gave them power to do, was to levy dues as freely as in other
 royal burghs. It was a power to levy according to use and wont. To
 entitle them to the dues claimed at Dalintober, (the quayage and shore
 dues,) it was necessary that these should be shown either to have been
 conform to use and wont at the date of the charter, or to have been
 required since by prescriptive possession. But both as regarded the
 place of levying and the rate, these dues had been for the first time im-
 posed by the recent tables of 1795 and 1799—the quayage dues having
 been made leviable at other places than the quays of the burgh by the
 table of 1795, and the higher rate of shore dues applicable to the whole
 burgh having been only imposed by that of 1799. The pursuers also had
 failed in proving prescriptive possession of these dues, by levying them
 at Dalintober. Taking into consideration the nature of their grant, the
 practice of exacting dues at Campbelton only was not sufficient to pre-
 serve possession of a right to levy at Dalintober, or over other parts of
 their grant. A decision to this effect had been given in similar cir-
 cumstances in the Magistrates of Linlithgow v. Mitchell, 21st June
 1822.

LORD JUSTICE-CLERK.—We are now, upon a consideration of the effect of the
 verdict, and of the minute of admission by the defender, lodged before the issues
 were prepared, to pronounce the judgment to which the pursuers may be in law
 entitled.

No. 87.

Feb. 21, 1845.
Magistrates of
Campbelton v.
Galbreath.

This is an action by the Magistrates of Campbelton, setting forth their grant from the Crown of harbour and free sea-port, and that, in virtue of that grant, they have levied dues, taxes, customs, and so forth, within the bounds and liberties of the burgh, "and within the bounds of the said sea-port and harbour, and shores thereof, described or referred to in the grant." Then certain tables of their dues are set forth—the latest being on 14th September 1799, rather more than forty years before the institution of the action. Then it is stated that payment of the dues had been refused at Dalintober, which is said to be within the sea-port, by the defender, the proprietor of the lands, and others shipping at the pier of Dalintober; and therefore the action concludes—(His Lordship read the conclusions of the summons.)

Dalintober is very near the burgh of Campbelton, and within the bay, and at the head thereof.

The defender, Mr Galbreath, at an early stage of the discussion, gave in a minute, stating that he did not dispute the pursuers' claims to the anchorage dues, or to the dues relating to the quay of Campbelton, for which they were at liberty to take decree—but only in so far as these claims applied to his own lands and quay of Dalintober.

By this minute, the pursuers are entitled to decree for the anchorage dues on all vessels within the bay, although their destination is for the pier of Dalintober, and not for the actual port of the burgh of Campbelton; and, of course, the anchorage dues may be levied at the pier of Dalintober.

The minute was not sufficiently precise as to Campbelton, and did not admit the use of levying there to the extent averred, which it was material to establish under the various tables condescended on. Other defenders at that time also resisted the right to levy at the port of the burgh.

The following issues were adjusted:—(His Lordship read the issues quoted at p. 107.)

Neither from the record, nor from any discussion before us, does it appear that the attention of the defender, and perhaps not of the pursuers, had been sufficiently directed at that time to the claim actually made under the table 1799, as to the dues to be exigible at Dalintober; viz. that that table introduced for the first time different and much higher dues for Dalintober, and other parts of the shores of the harbour, than those exigible at the quays and port of the burgh.

If these were to be insisted in, and established, of course the issue of the use to levy the same was essentially necessary, as the general right over the whole bounds of the sea-port to the dues exigible at the port of the burgh would not have given the pursuers what they claimed—and hence that issue was necessary for the special object of the pursuers. And, although the pursuers failed in proving that they had acquired an uninterrupted use of levying the additional dues, yet the negative of the issue would not necessarily decide the counter allegation and plea of entire immunity acquired by prescription for the pier of Dalintober, although within the precincts of the sea-port and grant of harbour.

The defender, in the first instance, maintained that Dalintober was not situated within the limits or boundary of the grant of harbour. The verdict settles that point—the law raised on the bill of exceptions, in regard to the construction of the grant, having been decided in full Court against the defender.

No. 87.

Feb. 21, 1845.
Magistrates of
Campbelton v.
Galbreath.

We have, then, two facts clearly established :—

1. That the quay of Dalintober is situated within the limits or boundary of the grant of harbour belonging to the pursuers.

2. That the grantees have, at the proper and ancient port of the burgh—that alone established by them under their charter, and in virtue of the tables referred to, levied the various duties on the goods enumerated in the schedules shipped or loaded at the quay of Campbelton for forty years and upwards.

We have then, 1. A grant of harbour and sea-port ; 2. Regular dues established and levied by the grantees at the regular port ; and, 3. A part of the shore at which a quay has been built, which is within the limits of the harbour—and to which the grant extends, and over which it must take effect in all its legal consequences, privileges, burdens, and restrictions.

On this state of the facts, and if no specialty had been raised, the law of the case of the Magistrates of Edinburgh v. Scot, 10th June 1836, is directly applicable. Neither has the law of that case been impeached. That case, following the common law of Scotland applicable to all such grants, found that the grantees of a sea-port and harbour, who had immemorially exacted dues at the port which they had constructed within the bounds, were entitled to levy these dues on all vessels and goods within the bounds or precincts of the grant ; and, further, that persons whose lands came down to the shore had no right to land goods for their own use on such property without payment of these dues ; and “ no right whatever (these are the terms of the judgment) to land or receive goods of others thereon, except under the grant of free port belonging to the pursuers, and as regulated by them, and subject to the payment and condition of their right of harbour.”

The same law was stated by Craig, and all the institutional writers ; and it is necessary to enlarge on the general doctrine, which, indeed, is not contested in the present argument.

But then the defender maintains that the verdict on the second issue has introduced a specialty, in respect of which he is entitled to absolvitor as to his pier at Dalintober. On that second issue the verdict is one for the defender, with the final finding—(Reads finding of jury.)

The defender maintains that this verdict establishes, not only that the higher or different rates proposed by the table of 1799 to be exacted at places beyond Dalintober had not been levied at the quay of Dalintober, but that he has acquired prescription, and by the dereliction of this pier on the part of the Magistrates, acquire immunity, although within the precincts of the harbour, from all the dues and established dues of the port belonging to the grantees, and that all and sundry are entitled, by the effect of this verdict, to land and ship goods at Dalintober free of all dues whatever.

The defender further says, that he understood the second issue was only to try the point. If so, he has made a great mistake.

This issue was absolutely necessary, not for the application of the general law, for the pursuers did not confine themselves to a claim for the same dues at Dalintober as those payable at Campbelton ; but was necessary, specially and specially, to give to the pursuers the higher dues they claimed right to exact at Dalintober and other places within their grant, but beyond the burgh. There was a distinct special and direct object for this issue ; and without it, and a ver-

No. 87.

Feb. 21, 1845.
Magistrates of
Campbellton v.
Galbreath.

dict in their favour on it, the pursuers could not obtain the higher dues which the table 1799 introduced for places outwith the burgh; and, accordingly, as they have not got a verdict, so they cannot obtain judgment for these proper dues. But a verdict negating the second issue might have been quite consistent with the fact, that the proper port-dues had been levied at Dalintober. The pursuers could only have obtained a verdict for themselves on that issue by proving that the higher dues for places beyond the burgh, introduced for the first time by the table of 1799, had been levied for forty years at Dalintober.

2. The defender would have been the pursuer of any issue of dereliction or immunity, on which he meant to contend that, holding Dalintober to be within the grant of harbour, the right at law to levy the dues belonging to the port had been lost and abandoned at Dalintober. The case of Linlithgow shows that, by the rules of practice, the defender must have been the pursuer of such an issue.

3. Such an issue must have proceeded on the very opposite basis from the general defence against the action; viz. it must have admitted that Dalintober was within the precincts of the harbour.

4. Such an issue could have been granted only on a very special and positive averment of dereliction, as well explained by Lord Mackenzie in the case against Scot of Trinity. No such case is made on this record. The averment on record is, indeed, partly law and partly fact; but still the only averment, that the grant itself was limited to one place by the possession which followed—that no dues had ever been exacted any where but at the burgh, because no other place was within the port; and then there is an averment, that for forty years the defender and others had never paid dues at Dalintober. (Reads Art. 8, p. 43 of record)

This is the only averment. Now, on examining the Session papers in the case of Scot, I find that the averment he made was as nearly as possible in the terms employed by this defender, and that he had a plea of dereliction founded on the alleged non-usage. On that record the Magistrates of Edinburgh asked for judgment, assuming the defender's averments to be proved, and they obtained judgment, no proper case of dereliction being averred on which proof was necessary. In the present case, I do not think that a proper case of dereliction is averred—that is, of the Magistrates abandoning Dalintober, although within their grant, a place at which they had acknowledged an immunity from the conditions of the grant. The defender, it will be remembered, has no grant of free-port; and therefore, in terms of the judgment in the case of Scot, he has no right to load goods on his pier, except under the grant of free-port to the pier, which includes Dalintober within its limits; and, therefore, only subject to the conditions of that grant. And that being the principle, a very special case indeed must be averred to support a plea of dereliction.

5. If the defender had relied on this second issue as intended to settle his plea of dereliction, I think, in the circumstances, he ought to have asked for a special verdict, if he had thought the facts would lead the jury to return one in his favour, establishing and affirming the facts on which he thought his plea of dereliction could be made good. It is plain that a negative answer to the second issue did not of itself make out such a case, and it would have required a very special case indeed to prove dereliction, after it had been found that the pier of Dalintober was within the boundary of the grant of harbour.

The case of Linlithgow, referred to by the Solicitor-General, very clearly illu-

times how special the case is, which a party within the privilege of the grant has to establish, in order to prove immunity. The second edition of Shaw's Reports, by quoting the note of the Lord Ordinary, clears the case entirely of the doubts which were raised by the Solicitor-General at the argument respecting the import of the case—for the Lord Ordinary says expressly, that the measure of the grant was, by its terms, the *custom and use* of exacting tolls at its date; and if for forty years and upwards, or time immemorial by our law, no toll had been exacted at the ford of Jinkabout, that was proof *retro*, that by the use and custom of exaction at the date of the grant, to which use the right conferred was restricted, payment had not been exacted at Jinkabout; and, therefore, Jinkabout was free at the date of the grant.

No. 87.
Feb. 21, 1845.
Magistrates of
Campbellton v.
Galbreath.

But the defender strongly urged that he had relied on this issue being taken as one calculated to bring to a definite result his plea of dereliction.

I am willing so to consider it; and equally in that light I apprehend it to be quite clear that the verdict cannot be a foundation for the plea of dereliction. The verdict negatives the averment of the pursuers, that they had levied the higher dues at Dalintober, introduced by the table 1799; and I hold it substantially negative also, when coupled with the special finding, that the port dues generally, to any extent, had been in point of fact levied at Dalintober for forty years, or even for any continuous period. But that is not sufficient to establish immunity, whether dereliction, by the granters, of the right and benefit of the grant as to a place within the boundary of the grant of harbour, and therefore clearly within the operation of the grant as to all legal conditions and effects of the same. Very much, indeed, is sufficient to exclude a plea of dereliction, and to show that there had been no recognition of Dalintober as a place at which it was acknowledged that the granters of the right of harbour had no right to exact dues. I doubt if any negative verdict would be sufficient to make out such a case; but, at all events, the slightest facts might be sufficient to exclude a case of dereliction, or recognition of immunity, and I think that the verdict is sufficient to prevent us holding that such a case of dereliction has been found by the jury.

This fact contained in the special finding is not to be taken as at all of the nature of a levy, having the character of *possession*, if possession is necessary in law; it is not to be taken as at all continuous for any period of time, nor as of *frequent collection*—nor, in short, as at all of the nature of the *positive* character which would be requisite if the *pursuers* were called upon to prove *possession*, so far as they claim a right to levy at all places within the precincts of their grant the proper dues established for the port and harbour. But the facts so found are quite sufficient to exclude, in the absence of every thing else, the defender's case of dereliction by the Magistrates of Dalintober as a place at which they acknowledged an immunity to exist.

I am further of opinion, that the admission of anchorage dues within the whole bay for vessels going to Dalintober, is important on this question.

The quayside dues clearly cannot be claimed. By the first tables they were due only for vessels loading and unloading at the quays of the burgh. By the tables of 1795 and 1799, they were declared to be due on vessels loading or unloading; also along other places within the harbour. But then the verdict negatives any such possession, and, by the established tables for the regular port, they are not exigible, if the vessel does not load and unload at the quays of the burgh. The

No. 87. nature of the due imports also that it is for the special benefit derived from the use of the quay. Hence it was not comprehended, as I think, within the terms of the second issue, which is limited to dues on goods; and as it was not intended to include the undisputed anchorage dues on vessels, so also I think it was not intended to include the quayage dues, which could only be claimed on vessels when using the quay; and, at the trial, my conviction is, they were not claimed.

Feb. 21, 1845.
Magistrates of
Campbelton v.
Galbreath.

The result then is, that the pursuers are entitled to decree, first, for the anchorage dues in the table 1799; and, secondly, for the dues payable on goods landed or shipped at Dalintober, which are exacted at the burgh of Campbelton, in terms of the table 1799, unless where there is any exemption made in respect of the quay being the quay of the burgh. Such exemption the defender cannot claim.

Then as to the third conclusion, I think the pursuers are entitled to decree in terms of it.

As to the second,* I think we must pronounce a judgment, giving the power to enforce payment by detention, and according to use and wont, and as competent in law, as we have no special data before us on which we could sanction any particular mode of enforcing the right of detention or of exaction for payment.

LORD MONCREIFF.—I will not go into detail, as your Lordship has already done, and as I am of the same opinion. 1. The first question in this case is, whether, under the verdict, the pursuers are entitled to a decree against the defender, Mr Galbreath, with reference to the quay or shore of Dalintober, under the terms of the first conclusion of the summons, to one extent or another—and to what extent.

Understanding that the pursuers have declared that they will be satisfied with a judgment, entitling them to levy the same dues which it is established by the verdict on the third issue they have been in use to levy at the quay of Campbelton, I am of opinion that they are entitled to a decree to that effect.

The verdict upon the first issue settles it as matter of fact, that the quay of Dalintober is situated within the limits or boundary of the grant of harbour in favour of the Magistrates of Campbelton; and this being a fixed point, it is not necessary for the Court now to define the precise limits comprehended in the grant of harbour, as was done in the case of Scot against the Magistrates of Edinburgh.

But when it is settled that Dalintober is within the boundaries of the harbour, it appears to me that the decision in the case of Scot establishes in point of law, that the burgh, holding such a grant, are entitled to levy the dues which they may have been in the use of levying for above forty years, at any place within the bounds, unless the other party could produce either another grant in his own favour, or, at all events, clear proof of total immunity at one particular point or quay for above forty years.

No opposite grant has been alleged in this case; and, with regard to the case of immunity, it is, in the first place, not a little doubtful whether, even though it had been established in the most unqualified manner, it would have been relevant to prevent decree in the case as it now stands; but according to the verdict taken altogether, there is no case of absolute immunity here proved.

* This conclusion was for declarator of a right to operate payment of dues upon vessels, goods, and other property, not only by stopping and detaining, but also by seizing and selling the same, with or without judicial authority.

No. 87.

Feb. 21, 1845.
Magistrates of
Campbelton v.
Gallbreath.

It was observed that, in the view now urged by the pursuers, the defender had been taken by surprise; because, before trial, he was willing to concede all, or nearly all, that is proved by the verdict. I am not sure that this is correctly the state of the fact on the record. But, at any rate, concurring in the views expressed by the Lord Justice-Clerk on this subject, it further appears to me, that this is not at all a correct view of the questions raised between the parties. The pursuers, founding upon their grant, and upon the fact that Dalintober is within the limits of that grant, may have had a case in law, entitling them to judgment, declaring their right to exact such dues at Dalintober as they could show they had been in use to exact at Campbelton during forty years. But this matter of law being disputed by the defender, as he still disputes it, the pursuers, besides, condescended upon a case of fact, which they maintained to be sufficient, if proved, to exclude any such plea in law by the defender, and to render the discussion of it unnecessary. But their averments, in point of fact, were expressly denied by the defender. The case of the pursuers was, that they not only had the grant extending to Dalintober, but that they had had an immemorial use for above forty years of levying the dues of their tables at the quay of Dalintober specially. The defender, on the other hand, denied that they had any use of levying dues at that place, and averred that he had possessed that quay for above forty years, with entire immunity from the exaction of any such dues.

As the case of fact stated by the pursuers, if proved, would have superseded the question of law upon the grant singly altogether—and as the case of fact averred by the defender, so far as relevant, might have established a defence of immunity—it was evidently necessary that the case should go to a jury upon the disputed facts, according to the ordinary rule of practice, before the Court could correctly take it up as resolvable upon law alone.

But, although the pursuers have failed in their case of fact thus raised by the second issue, not having proved an immemorial use of levying the dues at Dalintober, so that the verdict on that issue is entered for the defender, subject to the special finding, it does by no means follow that they are shut out from the whole law of the case, as it may stand independent of any such averment of immemorial use. I am of opinion that it is entirely open to them, and that, being open, it is sufficient for judgment; unless it is taken off by a separate case for the defender, to be made out on the want of such immemorial use, and the effect of such failure, even qualified by the finding in the verdict upon that issue.

The case of Scot appears to me to be decisive on the question of law. It appears to have been well considered, and I think the decision sound in principle. There is, indeed, one fact founded on, which is said to distinguish this case from it—viz. That here it is implied in the issues and verdict, that there had been a quay at Dalintober for above forty years, whereas Mr Scot was only engaged in meeting a pier. But I apprehend that this case makes no difference in the application of the principle declared in that case, unless it can be said correctly, in fact and in law, that the defender has established by prescription an absolute immunity from the operation of the burgh's grant at the quay of Dalintober; because it would just come to this, that the burgh had not at all times enforced their rights at all places within the boundaries at which they might have enforced them.

I very much doubt the relevancy of this to deprive the pursuers of the full effect of their grant. The case of Linlithgow in 1822, with which I was well acquainted,

No. 87. was a very special case; though not having been able to find the papers in it, I cannot enter into the details of it. But it greatly depended on the construction of a very special grant, the extent of which expressly rested on use and wont, and which, relating to a running stream, seems to have been held by the Court to be limited by the actual usage which could be proved. And it is satisfactory to find, that it is accordingly so explained by Lord Cringletie's note, in second edition of Shaw. At any rate, the case of *Scot*, of a more recent date, is much more directly applicable to the present case; and, by the judgment, it is clear that immemorial possession at any one place was sufficient to preserve the grant over all places within the boundaries.

Feb. 21, 1845.
Magistrates of
Campbelton v.
Galbreath.

But even this is not necessary to the result in this case. For, though the pursuers have not proved the positive acquisition of a special right by prescription, they have proved an actual use of levying dues at Dalintober, from time to time, since the date of the table of 1799, and this in assertion of their right to exact the dues expressed in that table. This appears to me to be quite sufficient to obviate any difficulty which could arise from the existence of a quay at Dalintober, and the failure to prove a constant and continuous levying of duties at that place. Nor do I think the particular rate or extent of the actual payments made material in this state of the case, as long as a precise and definite use of exaction at Campbelton for above forty years has been established.

The judgment on the first conclusion of the summons must be limited, to give only the right to levy the duties found to have been levied at Campbelton, as agreed to by the pursuers.

I have hesitation in giving decree in terms of the third conclusion. Seeing the pier has existed for forty years, it should go no further than to prevent loading or unloading, without paying the duties, when duly demanded.

I agree with the Lord Justice-Clerk, that the pursuers are not entitled to the quayage duties at Dalintober.

2. The only other question relates to the mode of enforcing this right. As the pursuers limit their demand to a right to enforce by detention of the vessel, I think that they are entitled to decree to this effect.

LORD COCKBURN.—I entirely concur. My opinion is just this. Here is a grant of harbour given to the Magistrates, with a district attached to it, and Dalintober is within the boundaries, and the operation of the grant. It has been fixed that the Magistrates have never relinquished their right as to the dues leviable at the quays of Campbelton. They have levied at Dalintober, too, in assertion of their right. Nothing is more common than for parties who have a grant of harbour, not to levy at every part of the grant. And it is not uncommon that full dues are not levied upon all articles, and at all places in the grant. Duty was occasionally paid at Dalintober on two articles. So far from there being dereliction on the part of the Magistrates, there was the very reverse. I think the result is, that the Magistrates are entitled to have their grant carried into effect as to all places within it.

LORD MEDWYN was absent.

THE COURT accordingly pronounced this interlocutor:—"In respect of the verdict on the third issue, find, decern, and declare against the defender, David Stewart Galbreath, in terms of the conclusions of the libel, as to the

whole dues contained in the table dated 14th September 1799, in so far as regards the levy of the same at the quays of Campbeltown: Further, in respect of the minute, No. 24 of process, and the verdict on the first and second issues, find, 1st, that the pursuers are entitled to exact, levy, and uplift the anchorage dues, specified in the table of dues dated 14th September 1799, from the persons therein mentioned, upon all vessels dropping anchor within the loch of Campbeltown, whether their destination is for the pier of Dalintober or the burgh of Campbeltown; and further, find that the pursuers are entitled to exact, levy, and uplift the shore dues, specified in the said table, from the persons therein mentioned, upon all the goods and other articles enumerated therein, which shall be shipped or unshipped, either at the pier of Dalintober, or at any other point upon the shores of the said loch of Campbeltown, but that only at the rate or rates prescribed by said table for goods and other articles brought to, or shipped off from, the quays of the burgh of Campbeltown, as set forth in said table, but without the exemption granted as to some of the same when shipped or landed at the quays of the burgh, in respect of the causeway maill then and there payable: Find that the pursuers are not entitled to exact or levy any quayage dues at the quay of Dalintober, and to that effect assoilzie the defender from the conclusions of the summons: 2d, Find that the pursuers by themselves and their tacksmen are entitled to enforce payment of the said anchorage dues and shore dues by detaining the vessels or goods and other articles, in respect of which the same are exigible, until the dues shall have been paid, and otherwise to enforce payment according to use and wont: 3d, Find that neither the said defender, nor those deriving rights from, or through him, have right to load or unload goods belonging to them, or for their own use, of any description, from or upon any of the shores of the said seaport or harbour as before described, or any part thereof, without payment of the anchorage, shore, harbour, and other dues, exigible by the pursuers as above specified, and that they have no right whatever to land or receive the goods of others thereon, except under the grant of free-port belonging to the pursuers, and subject to the conditions of their right of harbour, and to the payment of the various dues referred to in the preceding findings; and to the effect above specified, find, decern, and declare against the defender."

FERRIES and DUFF, W.S.—LOCKHART, HUNTER, and WHITEHEAD, W.S.—Agents.

No. 88.

MRS M. A. HOBBS or BAIRD, Pursuer.—*Sol.-Gen. Anderson—
Houstoun.*F. b. 22, 1845.
Hobb. v.
Baird.MRS S. B. BAIRD or MONRO and HUSBAND, Defenders.—*Rutherford—
D. Mackenzie.*

Husband and Wife—Aliment.—Annuity of £60 awarded to a widow against the heir-at-law of her husband, the free rental being £240 ;—Question raised, but not decided, whether such annuity should continue during viduity only?

Feb. 22, 1845.

1st DIVISION.
Lord Cuning-
hame.
W.

THIS was an action for aliment by a destitute widow against the sister of her deceased husband, who had succeeded to his heritage as heir-at-law. The parties agreed that the free rental should be held to be £240. The pursuer claimed an absolute annuity of £100, while the defender offered one of £60, and only during viduity.¹ The pursuer ultimately agreed to accept of £60, provided it was not restricted to viduity, and that her right to apply for an increase, in the event of an increase of rental, was reserved.

It was stated that the report of the case of Harvie was erroneous, inasmuch as the interlocutor of the Court did not restrict the aliment to the period of viduity. It was read, and was in these terms :—“ Find the pursuer entitled to an aliment, modify the same to the sum of £25 sterling annually, out of the estate or subjects in question, payable at the terms and in the proportions mentioned in the libel.”

LORD JEFFREY.—I think the safer course is simply to give aliment, so as not to find ultimately that the party is entitled to an annuity during all her life. But I would reserve to either party to apply for an increase or diminution upon any material change of circumstances. I think it reserves itself.

LORD PRESIDENT.—I am not for excluding any such application, but at the same time I am not for giving any encouragement to it.

THE COURT accordingly found the pursuer entitled to an annuity of £60, payable half yearly, “ to continue until the same be recalled or altered by the authority of the Court ;” and found no expenses due to either party.

F. J. BRINGLOE, W.S.—W. A. G. and R. ELLIS, W.S.—Agents.

¹ Lowther v. McLaine, Dec. 15, 1786, (Hailes, p. 1012 ; N.B. at end of report;) Harvie v. Harvie, Jan. 23, 1829, (7 S. 305.)

JOHN SCOTT, Pursuer.—*Sol.-Gen. Anderson—Pyper.*
 ANDREW DUNLOP, Defender.—*Rutherford—A. S. Logan.*

No. 89.

Feb. 22, 1845.
 Scott v.
 Dunlop.

Process—Consignation.—Motion for an order upon the defender in an action of count and reckoning to consign a sum over which he claimed a right of retention, refused, without deciding upon that right, on the ground that the sum was arrested on the dependence in bank, where it had been lodged by the defender in his own name.

ANDREW DUNLOP, while he held certain iron company shares under a latent trust for Edward Henderson, became cautioner for him in a suspension. Henderson died in 1840, and his widow as his executrix qualified herself in the process, which was ultimately carried by appeal to the House of Lords. Henderson's estates were sequestrated under the Bankrupt Act, and John Scott, W.S., appointed trustee. In 1844, Dunlop, with the knowledge and approbation of Scott, sold Henderson's shares in the iron company, and lodged the price (£892) in the Royal Bank in his own name. Scott subsequently brought an action of count and reckoning against him, on the dependence of which he arrested all the money in the Royal Bank in Dunlop's name. In the course of the process, the pursuer moved the Lord Ordinary for an order upon the defender to consign the price received for the shares.

Feb. 22, 1845.
 1st Division.
 Lord Murray.

This motion was opposed by the defender, in respect, 1st, That the money being arrested in bank consignation was unnecessary; and 2d, That having become cautioner for Henderson in the process of suspension, now depending in the House of Lords, while he held the shares, he was entitled to retain them in security, and the price coming in their place, he was, in like manner, entitled to retain it.¹

The pursuer answered, that the defender's security over the shares or their price in relief of his cautionary obligation, undertaken in a totally different matter, was not admitted, and pending the discussion of that question he must consign.

The Lord Ordinary reported the motion to the Court.

LORD FULLERTON.—It is fixed by the cases of Tait and Mackenzie, that where a party is entitled to retain a fund in security, he cannot be called on to consign. It must, therefore, in the first place, determine the question, whether the defender is entitled to retain or not, for on it depends the question of consignation.

LORD MACKENZIE.—I see a distinction between this and the case of Tait, for there the right of relief was not disputed, and the Court was clear and in a condi-

¹ *Queensberry's Executors v. Tait*, May 23, 1822, (1 S. 428;) *Mackenzie v. Mackenzie*, May 29, 1827, (5 S. 725.)

No. 89.

Feb. 22, 1845.

K. r. v.

M'Kechnie.

tion to be so upon the right of retention. But here, unless we determine the whole merits of the action, we cannot be clear upon that. We may have an opinion that a trustee holding for another may retain for any debt; but we cannot well decide that here. According to the argument of the pursuer, the defender is not entitled to retain, but only to draw a dividend in the sequestration. This makes a difference between the present case and that of Tait, where there was no question about the right of relief. But it is a question notwithstanding, whether we should order consignation. There is no *vergens ad inopiam*—that is one thing, and another is, that there is an arrestment in the hands of the bank. If the arrestment affords a sufficient security, I do not see why we should decide a difficult point. It is only as a matter of necessity that consignation is ever ordered.

LORD JEFFREY.—On the grounds last stated, I am inclined *hoc statu* to find that the pursuer has no right to demand consignation. I am principally moved by the effect of the arrestment. I should not be prepared to discharge the arrestment on the ground that the right of retention is to be held so clear that it ought not to be allowed to stand. I don't see that we can refuse some kind of security; and, had there been no arrestment, I should have hesitated to refuse the motion for consignation.

LORD PRESIDENT.—I am of the same opinion. I think we should find that, in respect of the arrestment, consignation is unnecessary.

THE COURT accordingly instructed the Lord Ordinary to refuse the motion for consignation *hoc statu*, in respect the fund had been lodged in bank, and had been attached by arrestment at the pursuer's instance.

JOHN WALKER, W.S.—SANG and ADAM, S.S.C.—Agents.

No. 90.

ROBERT DOW KER, (Dunlop's Trustee,) Appellant.—*Maitland—Cowan.*

JAMES M'KECHNIE, Respondent.—*Rutherford—Penney.*

Partnership—Debtor and Creditor—Novation.—A customer of a banking company, shortly after the death of a partner, signed a docket at the end of his account in the company's books, which bore that the account was settled, and the balance in his favour paid to him; the balance was not in reality paid to him, but he received at the time a credit receipt from the banking company for the amount.—1. Held that he had discharged the old company, dissolved by the partner's death, and consequently had no claim against the deceased partner's estate. 2. Circumstances held to import knowledge of the death of a partner equivalent to intimation.

Feb. 22, 1845.

1st Division.

Ld. Fullerton.

N.

ALEXANDER DUNLOP of Keppoch was a partner of the Renfrewshire Banking Company till his death in December 1840. James M'Kechnie Glasgow, kept an account current with the branch of the company there and, at the date of Dunlop's death, was its creditor to the extent of £1300

The company having failed in 1842, indebted to M'Kechnie upon his account current to a somewhat larger extent, he lodged a claim in Dunlop's sequestration (his estates having been sequestrated under the clause in the Bankrupt Act anent deceased debtors) for £1300, under deduction of 4s. 9d. in the pound as the estimated value of the claim on the banking company's estate. To this claim it was objected that M'Kechnie had discharged the old company, dissolved by the death of Dunlop, one of the partners, and commenced an account with the new, by which the business was carried on. The following were the facts upon which this objection was founded:—M'Kechnie had kept an account with the Renfrewshire Banking Company for about twenty years prior to Dunlop's death. This account had been regularly balanced in April annually, and occasionally docketed by M'Kechnie in the bank books. These dockets bore, that the account was settled, the vouchers exchanged, and the balance carried to new account. In April 1841, however, which was the first balancing period after Dunlop's death, M'Kechnie subscribed a docket in the bank books in these terms—"This account settled, and the balance of £1348 : 1 : 6 *paid to me.*" He at same time took a credit receipt from the bank for £1340. He stated, and proved by the bank clerks, that the sum of £8 : 1 : 6 only had actually been paid over to him, the receipt having been taken for the rest. He averred that he had received no intimation of Dunlop's death, and did not know of it. Special intimation was not alleged on the other side, but it was maintained, that being an event well known in the place where M'Kechnie resided, he must be held to have known it;¹ and that he did so, appeared from the new mode of settlement adopted at the first settling period thereafter.

The trustee rejected the claim, "in respect that the date of lodging was subsequent to the bankrupt's death."

M'Kechnie appealed to the Sheriff, who pronounced the following interlocutor:—"In respect that the appellant had, for many years antecedent to 1841, kept an account-current with the Glasgow agency of the Renfrewshire Banking Company, the balancing of which account was in April yearly; in respect that at the balance in April 1841, it is proved that no money was then paid to the appellant except the sum of £8 : 1 : 6, and that the remaining £1340 was placed to his credit in the bank books on a continued account-current, and was not entered in the book kept for moneys received on deposit receipts—Finds that the docket in the ledger of date 20th April 1841, stating the whole £1348 : 1 : 6 to have been of that date paid to the appellant, which is contrary to the fact, cannot be held as effectual in the circumstances to relieve the estate of Mr Dunlop of Keppoch, as a partner of the Renfrewshire Banking Com-

No. 90.

Feb. 22, 1845.
Ker v.
M'Kechnie.

¹ Aytoun v. Dundee Banking Company, July 19, 1844, (ante, Vol. VI., p. 1409.)

No. 90.
 Feb. 22, 1845.
 Ker v.
 M'Kechnie.

pany, down to his death in December 1840, from responsibility for the appellant's claim against said company at the period of such decease, and therefore reverses the trustee's decision on the appellant's claim, and ordains the same to be ranked on the defunct's estate, as craved in the minute of appeal: Further, finds the said estate, and the respondent as trustee thereon, liable in the appellant's expenses, for which, and the dues of extract, decerns."

The trustee appealed to the Lord Ordinary on the bills, who pronounced the following interlocutor:—"Alters and recalls the deliverance complained of, and sustains the decision of the trustee; finds the appellant entitled to expenses." *

M'Kechnie reclaimed.

LORD PRESIDENT.—I do not think there was novation or delegation in this case. None of the cases approach to the very narrow grounds on which it is here maintained that there was. All the witnesses are decidedly of opinion that there was no real payment as appears from the books, except to the extent of £8:1:6. There is an acknowledgment on the face of the books that the whole sum was paid over to the party, and of the same date he gets a receipt for it from

* "NOTE.—Even on the assumption (of which the truth is not now disputed by the trustee) that no advance in cash beyond the sum of £8:1:6 was made to the petitioner, on the settlement of accounts in April 1841, the question still remains whether the writings which passed between the parties on that occasion must not be held to import such a *delegatio debiti*, as to extinguish the debt in regard to the estate of the deceased partner, and the Lord Ordinary feels himself compelled to put on those writings that construction which, indeed, seems to him the only one of which they admit.

"It is true, as is found in the interlocutor of the Sheriff, 'that the appellant had for many years kept an account with the Renfrewshire Banking Company, the balance of which was in April yearly;' and if the settlement of April 1841 had been in terms of those of the preceding years, the presumption would have been that nothing more was intended than the carrying on the balance.

"But the settlement in 1841 was something quite different, and very specific in its terms. On the one hand, the appellant signed in the ledger a docquet, bearing that 'this account was settled, and the balance of £1340 paid to me,' and on the other hand, he took from the company, that is the new company, a receipt bearing 'that they had received from him the sum of £1340, which is placed to the credit of his account.'

"The Lord Ordinary is bound to hold that these documents were consistent with the intention of the parties, and therefore must give them their legal effect; and he cannot discover what other intention or effect they can be held to express, than that of extinguishing the debt due by the former company, of which the deceased had been a partner, and consequently adopting the new company as the sole debtor.

"It is true *novatio* or *delegatio* is not to be presumed; but it certainly may be proved; and the Lord Ordinary thinks it is proved by these writings.

"Though no money was actually paid but the £8:1:6, the writings clearly showed that, in regard to the sum of £1340, the money was held by the creditor to have been paid, and to have been replaced by him in the hands of the new company."

the bank ; but when it is not true, in point of fact, that he did receive that sum, how can I hold that there was a new arrangement ? The entry in the books bears that he received payment of the whole sum ; but that is a mere fiction, as is now admitted. I do not find in any of the cases that have been referred to, authority for holding novation upon any thing like so narrow grounds. The question in these cases was, whether, by the act and deed of the party himself, he gave his consent to the novation, and accepted the new company as liable for his funds. I cannot hold that there was any such intention here.

LORD MACKENZIE.—I have great doubt ; but, on the whole, I cannot differ from the Lord Ordinary. In the first place, I must hold that Dunlop's death was known to M'Kechnie. I think the form of the transaction, in the absence of any counter proof, affords an insuperable presumption that it was known. Then M'Kechnie goes to the bank, and knowing that Dunlop was dead, and the company dissolved, he knew that something must be done—that he could not go on as before, because it was a new company. It is probable that he went for the purpose of having a continuance of his account with the new company. Then look to see what are the circumstances. The old account was not closed as a year's account had ever been before ; on the contrary, he gets a new receipt, which he never did before, and would not have done then had it been an ordinary transfer of the balance as formerly. What was the use of the new receipt if there was no change ? Would he not ask the reason of it ? And if so, he must have been told. But the case does not rest there, for the party signs a docquet, such as there never was before, bearing that the whole balance had been paid to him. How could that fail to attract his attention ? How can we help being satisfied that he was perfectly conscious of making a change ? His plea is, that, if there is a novatio, it is reducible on the ground of error. He could not succeed in such a deduction. It was a matter of small importance at the time, this *novatio* that sounds so formidable now that the event is known ; for he says he had no suspicion of the bank. Did he not then do just what any one would have done in the circumstances ? The death of a partner would never induce any one to take away his custom from a prosperous concern. There was nothing, therefore, the least strange in this *novatio*. When he took the money out of the old, he must have put it into a new bank ; and having no suspicion of the new concern carried on by the remaining partners of the old, it was most natural to deposit it there. I don't, however, deny that this is a pretty narrow case.

LORD FULLERTON.—I remain of the opinion which I entertained when the case was before me as Ordinary. The very principle of *novatio* is, that there may be a change of debtor without the intervention of an actual payment. Actual payment puts an end to the debt, and there can be no room for the doctrine. Here the party was taking the credit of the new company, and discharging the old. As he did so without any inducement, the *novatio* must of course be proved ; but it is proved and proved *scripto*. He settles the account, and instead of adopting the ordinary form, he signs a docket, bearing that the balance had been paid to him, and he takes a new deposit receipt therefor. What other form could he have adopted, if he had wished to put the money into the new company ? Though no money was paid, he signs a writing, implying that the money was paid, and he does not attempt to reduce it. In the case of the ranking of Allan's creditors, less than this was held to discharge the old company.

No. 90.

Feb. 22, 1845.
Ker v.
M'Kechnie.

LORD JEFFREY.—I concur in the opinion of the majority. The only doubt I had, was on the principle that novation implies a voluntary innovation on the part of the party against whom it is ultimately objected; and I was not satisfied that the death of the partner here was within the party's knowledge. But looking to the case of *Aytoun v. the Dundee Banking Company*, where we held that unless some extraordinary circumstances could be alleged, the death of a partner could not be held unknown to a person residing in the same place, and dealing with the company, I cannot hold the partner's death to have been unknown. Holding it to have been known to the party, the only point is, was he aware that he settled an old, and commenced a new account, taking a receipt binding only on the new company? I think the whole transaction abundantly clear; and I am quite convinced that there must have been an intention finally to discharge the debtors in the old account, and take new parties bound.

It is not worth while arguing, whether it was a short hand payment or not; and the entry and the result would have been precisely the same, if payment had been made and the money paid back. All the witnesses say that this was the effect of what was done. It would have made the matter more complete if there had been a draft; but the witnesses say that the bank was in the habit of paying under such dockets without a draft. I have not the least idea, that if there had been a draft, more than the money he carried off with him would have been handed over. The thing is done *brevis manu* in the ordinary course of business. Up to that date he was a creditor of the old company; but he settles the account with it by a docket which says that the account is settled, and the balance, not carried to new account which is the former entry, but "paid to me;" and then the next entry is in the books of the new company. In short, I think there is complete evidence of what is the principle of novation—the *animus* of the party to change his debtor, and take a new debtor and document. Therefore, on the ground that he intended to innovate the vouchers on which he intended to found his claim of debt in future, I am for adhering to the interlocutor. Having no doubt at the time of the solvency of the establishment, what could he have done in the circumstances but what he did? I cannot penetrate into the recesses of an ignorant mind, and hold that he proceeded on an erroneous idea.

THE COURT adhered with additional expenses.

ANDREW HOWDEN, W.S.—GRAHAM and ANDERSON, W.S.—Agents.

DAVID SMITH, Pursuer.—*G. Bell.*
JAMES HAMILTON, Defender.—*Deas.*

No. 91.

Feb. 22, 1845.
Smith v.
Hamilton.

Prescription, Triennial.—Held that prescription ran from the end of each year upon the claim of a writer's clerk engaged at so much per week.

King v.
King.

ACTION raised on 28th November 1843, by a writer's clerk against his employer for nine years' salary, down to 15th November 1843, at the rate of fifteen shillings a-week, under deduction of certain sums paid to account. The defender pleaded prescription, except in so far as related to the salary for the three years' immediately preceding the action. The pursuer answered that the weekly salary came in lieu of fees for writings, and that therefore his claim was to be viewed as a continuous account like a writer's or merchant's, on which prescription ran only from the date of the last item.

Feb. 22, 1845.*
1st DIVISION.
Ld. Robertson
N.

The Lord Ordinary "sustains the defender's plea of prescription, except in so far as relates to the salary of the three years, ending November 1843, being the last date of the account."

The pursuer reclaimed, but

THE COURT adhered.

JAMES BELL, S.S.C.—ROBERT MACKAY, S.S.C.—Agents.

JOHN KING, Petitioner.—*Arkley.*
MRS KING, Respondent.—*Ogilvy.*

No. 92.

Process—Poor's-Roll.—Application by a husband to be admitted on poor's-roll, in order to raise and carry on an action of divorce against wife—refused, in hoc statu, the applicant being in receipt of wages at the rate of £1 per week.

Feb. 22, 1845.
2d DIVISION.
T.

JOHN WALKER, S.S.C.— — — Agents.

* Decided 24th January.

No. 93.

JOHN MUNRO, Pursuer.—*Rutherford—Crawford.*

Feb. 25, 1845.

Munro v.
Taylor.HARRY MUNRO TAYLOR and OTHERS, Defenders.—*Sol.-Gen. Anderson*
—*Neaves.*

Reparation—Public Officer—Procurator-Fiscal—Wrongous Apprehension—Process—Summons.—1. Summons of damages against a procurator-fiscal, setting forth that he had applied for, and obtained a warrant of apprehension against the pursuer without sufficient ground or probable cause, held to be irrelevantly laid, in respect it did not also libel that this had been done maliciously. 2. In an action of damages against a procurator-fiscal, on the ground that, in the course of executing a criminal warrant, the officers to whom he had committed that duty had imprisoned the pursuer in a cruel and oppressive manner;—Held that, as it was not alleged that the wrongous act complained of had been done by the defender's instructions, or with his knowledge, or that the general directions he had given to the officers were other than proper and suitable in the circumstances, it was to be regarded as the individual act of the officers, which he could not in the circumstances have anticipated or guarded against, and for which he was not in law responsible.

Feb. 25, 1845.

2d Division.
Lord Ivory.
T.

JOHN MUNRO, ditcher in Invergordon, raised an action of damage against Harry Munro Taylor, the procurator-fiscal for the eastern district of Ross-shire, and John M'Bean and certain others, messengers and criminal officers. The summons set forth, that a petition had been presented by Taylor to the Sheriff-substitute of Ross and Cromarty, setting forth that the pursuer Munro had formed one of a mob which had assembled at Invergordon, and had been actively engaged with them in deforcing an officer of the law in the execution of a warrant, and rescuing from him a prisoner whom he had apprehended, and craving a warrant to apprehend the pursuer, which was granted by the Sheriff in terms of the prayer of the petition: That "the said petition was presented without sufficient ground or probable cause, and the statements made therein, in so far as regarded the pursuer, were contrary to the fact: That Taylor employed John M'Bean, messenger in Inverness, the deceased John Munn, superintendent of police at Elgin, Alexander Stewart, sheriff-officer at Tain, and John Finlayson, criminal officer, residing in Dingwall, to apprehend the pursuer on the charge set forth in the petition: That these parties, with assistants, all acting under Taylor's employment and authority, apprehended the pursuer on the night of the 4th, or very early in the morning of the 5th of October 1843, and took him to a house at Invergordon, which had been formerly employed as the office of the Commercial Bank, and was then used as a guard-house by a party of military who were stationed there: That there were two strong and well-secured rooms, of a considerable size, in this house, the security of which was further increased by the presence of the soldiers

who were keeping guard in one of them : That the pursuer, upon being brought in custody to this house, or old bank-office, was not placed in either of these rooms, but was by the above-named officers and their assistants, "acting under the employment of the said Harry Munro Taylor, illegally, oppressively, cruelly, and maliciously forced or thrust," along with five other individuals, into a stone chamber of small dimensions, which had been used formerly as a safe for keeping the cash and books of the bank, and the construction of which was such as "to render it utterly unfit for the confinement even of a single human being." The summons then described the suffering endured by the pursuer and the other prisoners, from want of air and otherwise, while they were locked up in this chamber, which were alleged to have been very severe. It then proceeded to set forth,—that the pursuer was subsequently taken to Tain jail ; that the warrant for his committal to jail was irregular and illegal, and that he was illegally and oppressively committed to prison on the said pretended warrant ; and that, after remaining in prison for several days, he was liberated on bail : that in presenting the said petition, and obtaining the said warrant for apprehension against the pursuer, the said Harry Munro Taylor acted wrongfully, and without any sufficient ground or probable cause : that, in the apprehension of the pursuer, the said Henry Munro Taylor, and the said John M'Bean and others, acting under his employment, acted illegally and oppressively ; and that in the incarceration and confinement of the pursuer in the safe as aforesaid, and in the treatment of the pursuer during his confinement as aforesaid, the said Harry Munro Taylor, and the said John M'Bean, and others acting under his employment, acted illegally, oppressively, cruelly, and maliciously. The summons then concluded against Taylor and the others for £500 as damages and solatium.

In his defences, Taylor admitted that he was at Invergordon during the time the pursuer was confined there, although he was not personally present when he received the treatment complained of, which indeed was alleged by the pursuer. He stated the following objections to the relevancy of the summons as directed against him.

He pleaded ;—

1. That the action was irrelevant, in so far as founded on any objection to the warrant under which the pursuer was apprehended and incarcerated, no sufficient grounds being set forth on which the defender could be held liable for having obtained or used it.
2. That it was irrelevant, in so far as relating to the alleged execution of the warrant of apprehension, or the undue confinement of the pursuer under it, there being no sufficient statement to implicate the defender in the proceedings complained of.
3. That it was irrelevant, in so far as relating to the warrant of commitment or incarceration, to which no specific objection was stated.

The Lord Ordinary ordered minutes of debate.

No. 93.

Feb. 25, 1815.

Munro v.
Taylor.

No. 93.

Feb. 25, 1845.
Munro v.
Taylor.

The pursuer pleaded;—1. That although the defender might not be liable in damages for the mere procuring of a warrant without probable cause, unless malice was averred, yet when the warrant so obtained had been unlawfully and oppressively executed, and this had been set forth, it was not necessary to libel malice, or other improper motive, in order to support the action.¹ 2. The wrong complained of having been inflicted by the officers while acting under the employment of the defender as procurator-fiscal, and in the execution of a warrant committed by him into their hands, he must be held liable for their acts. This liability also attached to him upon the ordinary principles applicable to master and servant, and employer and employed. According to the law relative to this class of cases, the mere fact of his not having been present, and not having specially ordered the wrong to be done, was not sufficient to relieve him from responsibility.² Similar responsibility existed in the case of a creditor for the wrongous and oppressive execution of diligence on the part of a messenger.³ The plea that the defender was bound to entrust the warrant to the officers of law, within whose province the execution of it fell, did not take the responsibility off him. This had been held in the analogous case of a creditor employing a messenger.⁴ On the contrary, it afforded him protection by placing the execution of warrants in the hands of a limited class, who were instructed and licensed, and had to find security for the discharge of their functions. Two of the officers, whom the defender had employed, were not Sheriff officers in the county of Ross, and he was under no obligation to employ them unless he thought proper. The position of the defender as a pro

¹ Arbuckle, (3 Dow, 181;) Milhollan v. Bertram, Dec. 21, 1826, (5 S. & D. p. 170;) Strachan v. Stoddart, Nov. 13, 1828, (7 S. & D. p. 4;) M'Crone v. Sawers, Feb. 10, 1835, (13 S. & D. p. 443;) Swayne v. Fife Bank, June 22, 1835, (13 S. & D. p. 1003.)

² 1 Hume, p. 51; 1 Hale, 4; 1 Hawkins, 1, 14; Clarkson v. M'Donald, Dec. 15, 1829; Bell's Sup. Notes to Hume, p. 8; Boyd, 7th January 1842; Brown v. M'Gregor, February 26, 1813, (F.C.); Low v. Keith, June 10, 1812, (F.C.); Hill v. Merriks, November 30, 1813; Hume's Decisions, p. 397; Fraser v. Dunlop, January 22, 1822, (1 S. & D. p. 258;) Baird v. Hamilton, July 4, 1826, (4 S. & D. p. 790;) Aitken v. Douglas, January 5, 1836, (14 S. & D. p. 204; Hunter v. Union Canal Company, March 16, 1836, (14 S. & D. p. 717;) Sword v. Cameron, February 13, 1839, (ante, Vol. I. p. 493;) Linwood v. Hathorn, May 14, 1817, (F.C.); Bushe v. Steirman, (1 Bos. & Pul. p. 404;) M'Kenzie v. M'Leod, June 14, 1834, (10 Bing. p. 385;) Evans' Pothier, Vol. I. p. 304.

³ Paterson v. Philip and Cusine, February 26, 1811; Hume's Decisions, p. 278; Gordon v. M'Coll, December 13, 1826, (5 S. & D. p. 123;) Cowan v. Watt, July 12, 1833, (11 S. & D. p. 999;) M'Donnell v. Bank of Scotland, July 27, 1835, (13 S. & D. p. 701;) Cleland v. Weir, July 21, 1835, (13 S. & D. p. 1143;) Pearson v. Anderson, July 18, 1833, (11 S. & D. p. 1008;) M'Leod v. Buchanan, June 10, 1837, (15 S. & D. p. 1113;) Brock and Fergusson v. Kemp, February 22, 1844, (ante, Vol. VI. p. 709.)

⁴ Anderson v. Ormiston, January 3, 1750, (M. 13949;) M'Pherson v. Entlie, February 28, 1787, (Hailes, 1021.)

erator-fiscal, did not exempt him from the responsibility for damages, which would attach to him by the above principles of law were he a private party.¹

No. 93.

Feb. 25, 1845.

Munro v.

Taylor.

The defender pleaded, 1. That the summons, so far as laid upon an allegation that he had presented the petition, and obtained the warrant for the pursuer's apprehension without probable cause, was irrelevant, as the pursuer had not also alleged malice.² 2. The pursuer did not allege that the acts complained of had been done by the officers under the defender's special instructions, or with his knowledge. The question then was, whether the defender, a public officer, was answerable for the alleged wrongful acts of the officers under his general employment of them to apprehend the pursuer upon a legal warrant, there being no allegation of blame or error in the instructions that he gave to them, or of his having contemplated or sanctioned the wrongful acts complained of? The nature of the defender's duties compelled him to employ other public officers to execute the warrants of the law, which it was his duty to obtain. It was the case of one public officer passing on to another public officer in employment, which both of them in their several provinces were required to perform; and there was no authority for holding that, without fault of his own, the defender should be liable for the fault of other officers in another department, where a different duty had to be performed. The case of a creditor doing diligence for his private debt was wholly different; but even in that case, the limits of responsibility had not been extended to wrongs and irregularities which could not reasonably have been foreseen and provided against.³ Further, the acts on the part of the officers were charged in the summons in terms inferring against them personal delinquency. In this view of the case, there was no ground of liability against the defender, as a master or employer was never liable for the delinquency of his servant or agent.⁴

The Lord Ordinary pronounced this interlocutor:—"Primo, In so

¹ Hume, Vol. II. pp. 134, 135, *foot note*; Alison, Vol. II. pp. 92, 93; Beattie *Fiscal of Dumfries*, December 10, 1842, (Broun's Reports, p. 463); Gilchrist *Fiscal of Perthshire*, July 15, 1843, (Broun's Reports, 570); Sharp v. Dykes, January 28, 1843, (Broun's Reports, 521); Prentice v. Bathgate, June 19, 1843, (Broun's Reports, 561); M'Crone v. Sawers, February 10, 1835, (13 S. & D. 607); Richardson v. Williamson, June 1, 1832, (10 S. & D. 607); Nimmo v. Stewart, July 18, 1832, (10 S. & D. p. 844); Findlater v. Duncan, July 18, 1837, (10 S. & D. p. 1304); June 19, 1838, (16 S. & D. p. 1150); reversed, 23d August 1839, (1 Rob. App. Cases, 911); Mone v. Anderson, February 25, 1842, (13 S. & D. p. 786.)

² Ar buckle v. Taylor, July 10, 1815, (3 Dow's Reports, 150); Young v. Leitch, July 8, 1822, (1 Sh. App. Cases); Hallam v. Gye, 27th December 1835; Stewart v. Currie, 22d February 1839; Marianiski v. Henderson, 17th June 1841, (13 S. & D. p. 551.)

³ Stewart v. M'Donald, July 6, 1784, (M. 13989.)

⁴ Miller v. Harvie, (4 Murray's Reports, pp. 385, 388.)

No. 93.
 Feb. 25, 1845.
 Munro v.
 Taylor.

far as the action is laid upon an allegation that the said defender presented a petition against the pursuer, and obtained warrant for apprehension thereon, without any sufficient ground or probable cause, Finds, in respect that malice is not also alleged, that the summons is not relevantly laid, and that the said ground of action cannot be maintained. Secundo, In so far as the action is laid upon the pursuer's actual apprehension, and the treatment which he received while in custody under said warrant;—in respect it is not alleged that the defender's interference, or any instructions, employment, or authority given by him, went beyond the mere delivering over of said warrant into the hands of the legal officers proper for carrying the same into execution, and in order to the same being so executed by them in the ordinary and regular discharge of their duty as such officers;—in respect, further, that the defender's employment of these officers was not a mere voluntary act, impelled by his own interests, or directed or tending to his own ends, but was a proceeding directed to the public interests, and necessary and incumbent on him in the discharge of his public duty as procurator-fiscal;—in respect, moreover, that the functions to be performed by the said officers, after the warrant had been committed to them for execution, as said is, were not such as directly or indirectly fall within the defender's own official department, or the powers or duties connected therewith, and attaching to himself as procurator-fiscal, and consequently not such as he could legally have performed in his own person, or by delegation to others, in the capacity of his servants or agents; but, on the contrary, were functions peculiarly pertaining to a distinct department of legal officers, whose business it is to perform the same as a separate branch of public duty, and by virtue of powers which the law itself confers, and which no delegated authority derived from others can affect—Finds, in the total absence of all allegation directly implicating the defender in his own person as a party to the alleged illegal proceedings of the said officers, that as regards this branch of the case also, the summons has not been relevantly laid, and therefore that neither can this ground of action be maintained. Separatim, Finds that the proceedings alleged on the part of the officers being expressly charged as having taken place 'illegally, oppressively, cruelly, and maliciously,' and this charge not being so averred as to extend to or reach the defender personally, the defender is not responsible, in respect of his mere general employment of the officers to execute the warrant, for any acts of wrong wilfully and maliciously committed by them, no such liability by law attaching even in the case of an ordinary master for the wilful wrong or malice of his proper servant, or in that of an ordinary principal for the wilful wrong or malice of his proper agent or other delegated representative. Tertio, In so far as the summons sets forth, that 'the alleged warrant for the committal of the pursuer to jail was irregular and illegal, and the pursuer was illegally and oppressively committed to prison under the said pretended warrant,' finds that there is no corresponding conclu-

sion in the summons connected therewith ; and, therefore, as well as in respect that no specific or intelligible statement of the alleged grounds of illegality has been given either in the summons or even in the minutes of debate, finds, as regards this head likewise, that the summons is not relevantly laid, and that the action cannot be maintained. Upon the whole matter, sustains the objections to the relevancy, as pleaded in the three first pleas contained in the defences for this defender ; and, therefore, as regards the said defender, dismisses the action ; but, in the circumstances of the case, finds no expenses due, and decerns.” *

No. 93.

Feb. 25, 1845.

Munro v

Taylor.

* “NOTE.—1. As to the first finding of the interlocutor, there seems to be no real question between the parties, and it is at all events borne out by the case of Arbuckle, and others of that class.

“2. The second finding involves matter of greater difficulty, and for which there is no direct precedent. But, after full consideration, the Lord Ordinary has formed a clear opinion on the subject.

“The fundamental doctrine, upon which the constructive liability of one person for the act of another will be found to rest, involves generally an application, more or less direct, of the maxim, *qui facit per alium facit per se*. Accordingly, the more familiar and proper instances of such constructive liability occur in the relations of master and servant, or principal and agent. And in such cases the rationale of the liability is plain ; for the servant or agent only doing that which but for the delegated authority derived through his master or principal, the latter must or might have done for himself, the act of the servant or agent comes truly to be regarded as equivalent to the act of the master or principal—and so draws after it all the responsibilities which would naturally have attached to such master or principal, if acting in propria persona.

“But this is a principle which cannot, strictly speaking, be extended to the case of a party whom the law itself has laid under a disability to perform the particular function out of which liability arises, and where another and a totally disinterested party has been declared alone competent to execute the duty. For in this case, so far as regards the act to be performed, there is no delegation of authority from the former to the latter, and the latter does not execute, as in the right or place of the former, a duty which it properly belonged to the former to have executed for himself ; but, on the contrary, acts entirely in his own independent right, and as the recognised master of proceedings which fall within his own proper and official province.

“In one class of cases, the distinction now pointed at has not perhaps been carried out in its full rigour ; and the pursuer, availing himself of this, has accordingly stated the main strength of his argument upon the analogy of certain decisions, whereby a private party who employs a messenger, or other legal officer, in the execution of diligence, &c., has occasionally been subjected in liability for the consequences of irregularity committed by such messenger or officer.

“It may, however, be questioned whether the Court have not already gone sufficiently far in such an extended application of the principle of constructive liability, and, influenced, it may be, by considerations of expediency, where the act to be performed, originating as it did in the voluntary employment of the party, was at the same time wholly and entirely directed to his own individual ends. In such a case it might not perhaps be going much out of the way to hold the impulsion of the employer's interest, and the private benefit thereby sought to be secured, as sufficient to attach to the whole proceedings the character of his proper act. But be this as it may, the Lord Ordinary, while he will at all times be ready to follow the authority of these precedents, where he finds them to have a precise application, cannot help thinking that it deserves serious consideration how far their

No. 93. The pursuer reclaimed.

Feb. 25, 1845.
Munro v.
Taylor.

At the debate which took place in the Inner-House, the pursuer admitted that, under the expressions "acting under the employment" of

operation should be further extended, on the strength of any mere supposed analogies, to other cases where the identity is not so clear.

"In the present question, more especially, he would certainly hesitate to extend their authority to a case, where the act of employment had no such implication of private interest, and did not partake in the same sense of a spontaneous and voluntary proceeding; and where, on the contrary, the effect would be to extend the responsibilities of a public officer, acting in the compulsory and unavoidable discharge of his public duty, and solely and exclusively for the public behoof, without any other moving cause. To do so would be, in great measure, to paralyze the exertions of an important public functionary, and thereby operate a serious discouragement to the public service.

"But, fortunately, none of the authorities have as yet carried matters this length. And, indeed, there would be almost more plausibility in holding the Sheriff answerable for the ministerial acts of his officers, than in subjecting the procurator-fiscal. In England, accordingly, it does appear that the law looks to the Sheriff, and to him alone, for the acts of his officers, he being identified with them in every case, even to the effect of being responsible for their wilful misconduct or deliberate fraud. The principle of respondeat superior is, in such case, held to apply. But there is no room for extending such a principle to the case of a Scots procurator-fiscal. The sheriff-officer is no subordinate in the procurator-fiscal's department. The act of the officer is not, even delegatione, the act of the fiscal. It is an act peculiarly the officer's own, in the discharge of his proper official duty; and in this the procurator-fiscal is no more his superior officer than he is his proper principal or master. The authority which the officer obeys is, in truth, the warrant of the law itself, as embodied in the Sheriff's deliverance, and the procurator-fiscal is no otherwise connected with it than as the hand through which it goes, in passing from one distinct department of the public service to another.

"In the absence of any direct Scotch authority, the defender has resorted for collateral lights to the sister country, and not unnaturally, seeing the law of both countries, as regards this description of question, rests substantially on the same basis of principle. The Lord Ordinary may notice one or two additional illustrations. For example, there is the case of Milligan, 12 Adol. and Ellis, 737, where a butcher, having employed a licensed drover to drive home some bullocks from Smithfield market, and the drover having employed for the purpose a servant of his own, through whose negligence a bullock injured the plaintiff's property, it was held that the butcher was not liable, as having merely 'employed another who is recognized by the law as exercising a distinct calling.' Again, in Quarman, 6 M. and Wels. 499, the owner of a carriage having hired horses from a stabler, and the latter having also provided the driver, through whose negligence an injury was inflicted, it was held that the owner of the carriage, though employer in the first instance, was not liable, and that recourse must be had against the stabler as the party alone responsible for misconduct within his own province. So, in the case of a pilot; as to which, by a recent decision, it appears to be settled—and this 'upon the principles of reason and justice, and independently of the express provisions of the statute (6 Geo. IV. c. 125, sec. 55.) that the compulsory taking of a pilot does, on general principles, release the person so taking him under compulsion from all responsibility for his acts;' the distinction being, that where there is no compulsion to employ such an officer, the pilot, being employed voluntarily, and on the mere motion of the shipmaster for his own guidance, is to be regarded as a proper servant; but that, when forced upon the master by the requirement of some local regulation, (be it statutory or otherwise,) he is not a servant, but is

the defender, used in the summons, he did not mean to aver, nor would he be able to prove, that the defender had given directions to the officers

No. 93.

Feb. 25, 1845.
Munro v.
Taylor.

in truth, superior in his own distinct department, and as such supersedes the master, and so for the time releases him from responsibility.—(Shee's *Abbot on Shipping*, (6th Edit.) p. 184, citing Dr Lushington's judgment in the case of the *Maria*.)

"In a word, the Lord Ordinary adopts implicitly the doctrine laid down by the learned Judge in the case just cited, as applicable, not less to the case of a procurator-fiscal, compelled in the discharge of his duty to employ a sheriff-officer, than to the case of a party compulsorily employing a pilot. 'What is the general principle,' asks Dr Lushington, 'on which one man is responsible for the acts of another? He is answerable for injury done to another within the scope of his employment, because he elects him, and the act is voluntary. But where a man is compelled to employ another, the whole principle on which liability depends entirely fails.' This doctrine, in rigour, would perhaps apply even to the case of a private party who is obliged, in the execution of legal diligence, to resort to one of the regular officers, whom the law holds alone competent with reference to such an *actus legitimus*. But, at all events, it is a fortiori applicable to the case of a public functionary, such as the procurator-fiscal in the present case.

"In conclusion, and as in all points applicable to the present case, the Lord Ordinary implicitly adopts the words of Mr Justice Story, (*Law of Agency*, p. 24:).—'Where persons are acting as public agents, they are responsible only for their own misfeasances and negligences, and not for the misfeasances and negligences of those who are employed under them; if they have employed persons of suitable skill and ability, and have not co-operated in or authorized the wrong. If the doctrine 'respondeat superior' were applied to such agencies, it would operate as a serious discouragement to persons who perform public functions, many of which are rendered gratuitously, and all of which are important to the public interest. In this respect their case is distinguished from that of persons acting for their own benefit, or employing others for their own benefit.'

"3. As regards the third finding, the Lord Ordinary has held himself entitled to assume that the pursuer means to raise no special case in regard to the warrant of commitment.

"P.S.—Since preparing the above judgment, the Lord Ordinary has observed in a number of Adolphus and Ellis' Reports, just published, a case (*Martin v. Temperley*, 4. Adol. and Ellis, new series, 298) which, while it expressly recognises and confirms the principle on which Milligan and Quarman (*supra*) were decided, appears in some degree to qualify and restrict the application of Dr Lushington's judgment in the case of the *Maria*. It is sufficient to call the attention of the parties to the matter. But, so far as the Lord Ordinary can see, there is nothing to shake, in its substance, the general soundness of the principles which he has above attempted to deduce from the whole authorities. And as regards the particular question involved in the case of *Martin* itself, there really seems to have been no room for difficulty; for there, the owner of the barge, though compelled by the *Waterman's Act* to employ one or more freemen in the navigation of his vessel, was still the uncontrolled master of these parties, after they were so employed by him, and while they continued in his employment; and the statute accordingly, in one of its sections, expressly designates them as 'his servants.' Of course, being his servants, and acting entirely under his command and control, there could be no doubt (upon the ordinary application of the principle of constructive liability) that he was liable for their neglects.

"The Lord Ordinary may just add, in order to prevent misapprehension, that a finding no expenses due, he has not been actuated by a notion that the fiscal was in any respect to blame. No such personal imputation was cast upon him by the pursuer, the case being treated purely on its legal principles. The Lord Or-

No. 93. to confine the prisoners in the chamber which had been used as a bank-safe, but only that he had ordered them to be brought to the bank-office and detained there.

Feb. 25, 1845.
Munro v.
Taylor.

LORD JUSTICE-CLERK.—The first finding in the interlocutor of the Lord Ordinary was not impugned in the argument addressed to us, and is founded on clear and indisputable law.

The second finding in both its branches, and particularly from the terms and expressions employed, raises a very grave and important question of constitutional law. Upon the general doctrine contained in this part of the interlocutor, *as stated* by the Lord Ordinary, I wish to express no opinion whatever. I am desirous to be understood neither to intimate dissent nor to express concurrence, as I am clearly of opinion that this case may be satisfactorily and more usefully decided upon the special facts set forth in the summons, as that summons was restricted and explained at the bar.

It is better, therefore, to leave the general doctrine perfectly open, to be maintained when necessary in any other case, if any one shall ever arise, for the decision of which it becomes essential.

It was distinctly admitted to us by Mr Craufurd, that under the general expressions in the summons, in which it is stated that the other defenders, the officers and their assistants, acting "under the employment of the said Harry Munro Taylor," forced the pursuer, with other prisoners, into the stone chamber, or safe of the bank, and confined them there in the cruel and oppressive manner alleged in the summons, he did not intend to prove that the defender, the procurator-fiscal, had given any direction whatever to use the bank-safe as a place of confinement, but only that he had desired that the prisoners should be brought to, and detained until morning in, the bank-office as a place of safe custody; in which office the summons states there were two sufficient and suitable and strong rooms, perfectly secure, and well adapted for the purpose. Indeed, he admitted that it would appear that the procurator-fiscal knew nothing of the outrage complained of until after it was over. This admission or restriction of the summons excludes, in the circumstances set forth by the pursuer, the liability of the defender for what occurred during the night. Upon the statement so restricted, it is quite clear that the wrong complained of (assuming at present that it occurred) was an act of individual cruelty on the part of the officers—a strange, wanton, and violent outrage by them as individuals, perpetrated (assuming that it occurred at all) in the middle of the night, against the occurrence of which no precautions could be required, as no one could foresee the possibility of such an outrage.

The case shows that no view of the procurator-fiscal's duty could impose on him the necessity or obligation of giving instructions not to commit an outrage, the possibility of which could not enter into the contemplation of any reasonable man. Indeed, had the procurator-fiscal, at a period of alleged excitement such as

dinary, considering the novelty and importance of the question, merely thought it was not a case for expenses on either side. He doubts not that on due representation the fiscal will find no difficulty in obtaining his pecuniary indemnity from the proper quarter."

that stated in the summons, after a riot and deforcement, so exercised his ingenuity as to contemplate the stone safe as a place of custody, and given the officers orders not to put them into it, it might have been a very fair question on the facts, whether such an unnecessary and singular order was not meant to be understood as a broad hint to put them there. No. 93.
Feb. 25, 1845.
Munro v. Taylor.

The wrong complained of is now brought to this—not that in acting on the instructions alleged to be given, or in the execution of the warrant and detention of the prisoners, as directed and intended by the procurator-fiscal, any wrong could or did occur; but—that after the prisoners were secured, the officers committed an act of cruelty as uncalled for and unnecessary (as the summons says) for the safe custody of the prisoners as it was barbarous in itself;—and what the pursuer contends for is, that the procurator-fiscal shall be liable, because he did not specially prohibit an unforeseen and extraordinary individual outrage, originating in the wanton violence of the officers, and that he is in law responsible for every act, even of such unforeseen violence, which the officers may commit, if not specially prohibited by him beforehand. I think, when brought to this proposition, the case against the procurator-fiscal is quite extravagant, on the strictest view of his duty which the grave and serious regard due to the personal liberty of the subject can suggest.

There is, then, a plain ground for holding that no relevant case has been stated which can subject the defender in responsibility. On the pursuer's own showing, the case is one in which an outrage of personal and individual cruelty and violence was committed by the officers, (assuming the facts,) originating as completely in their personal feelings and individual abuse of the power which circumstances gave them, as if they had taken up pistols and shot the party of prisoners after they were all duly apprehended—a case in which the Fiscal surely could not be liable in assyhtment.

Any difficulty which the case at first presented arose from the introduction of the various analogies derived from the relation of master and servant, owners employing pilots, and the like, which have been so largely discussed in this case.

I beg to say, that no valuable aid or sound and safe rules can be drawn on either side from such cases, in considering the responsibility on the one hand, and the protection or privilege on the other, of the procurator-fiscal in the exercise of his duties as procurator for the public interest. The distinctions between the case of the procurator-fiscal and the classes of cases referred to in this discussion are numerous, fundamental, and insuperable, and utter confusion would arise from applying the doctrines laid down in these cases either to the responsibility or to the protection belonging to the office of fiscal. Such doctrines were never stated with reference to the case of a public prosecutor, or in the contemplation of being so applied. In England there is no such officer—for even the Attorney-General's situation is quite different. And in the English law, therefore, the rules necessarily applicable to such a distinct subject as the responsibility of those acting in the office of public prosecutor, cannot have a place—at least not in such a form as to be of use to us. Some of these analogies would entail far greater responsibility—indeed responsibility of a different kind from any that attaches by the law of Scotland to his office, or can be attached to such an office consistently with its objects and the interests of the public. And some of the analogies would give him a degree of protection and irresponsibility, which cannot be pleaded in cases

No. 93.

Feb. 25, 1845.
Munro v.
Taylor.

where the personal liberty of the subject is an element which must be attended to in the discharge of public duty, and in the exercise of the discretion which that duty implies. I do not wish to discuss the extent either of the fiscal's responsibility or protection as an abstract question, or in any degree to express an opinion as to the general doctrine stated in the interlocutor. It is necessary, however, to state, as I have done, that in deciding this case I cannot proceed on any of the analogies pleaded on either side, from the classes of cases as to the relations of ordinary employers and their servants or assistants.

LORD MEDWYN.—In considering the important question here submitted to our review, we must carefully attend to the charge or subject of complaint brought against the defender, the procurator-fiscal, to see if the summons affords a relevant ground of action against him. Now, it is not charged against him as a wrong that he, the procurator-fiscal, the public officer in the county, whose duty it was to investigate alleged offences against the public peace, applied for, and obtained a warrant to apprehend the pursuer;—it is not charged against him that he put this warrant into execution by giving it into the hands of a sheriff-officer for that purpose; I shall notice afterwards what is said of the selection of concurrents for the officer;—it is not charged as a wrong that this warrant was executed during the night, or that the pursuer was brought to Invergordon, to a place of security which had been used as a bank-office, by the sheriff-officers, assisted by a party of military;—it is not charged against him that the pursuer was not at an untimely hour taken before the Sheriff for examination; but it is charged against him that, instead of confining the pursuer in one or other of the rooms of this house, alleged to be secure places of custody, the parties who apprehended him and had him in charge, “acting under the employment of the defender, thrust the pursuer illegally, oppressively, cruelly, and maliciously into a small stone chamber, which was utterly unfit for the confinement even of a single human being,” notwithstanding of which he was shut in with five others, and kept there for six and a half hours till he was examined by the Sheriff. It is not then for the detention during the night, but for the detention in the unsuitable place, for which the defender is sought to be made responsible. Now, it was distinctly admitted from the bar, that the pursuer does not allege that any special instructions were given by the defender as to confinement of the pursuer in this place, and he founds his claim of indemnification for the wrong he complains of on the circumstance merely that this detention was the act of the officers acting under the employment of the defender, within the scope of that employment, and in furtherance of the object entrusted to him. As the pleadings of the pursuer have not gone beyond his summons, no distinct plea in law has, therefore, been set forth by him; but, as stated in his minute of debate, p. 3, and explained at the bar, the plea is, that without necessity or excuse, being illegally subjected to a cruel confinement by the officers in the course of executing the warrant which the defender put into their hands, and though not done in his presence, nor by his instructions, was done at Invergordon, where the defender personally was, he must be responsible. Now, whatever might be the consequence of a private party, for his own individual advantage, giving a warrant of any kind as diligence against the property, still more if affecting the personal liberty of a debtor, where an illegality is committed by the messenger in the execution of it, we must remember that the procurator-fiscal is a public officer with an important public duty to discharge in the prosecution of criminals, and for this purpose bound to secure their persons

for trial; and that he is thus far protected in this branch of his duty, that he cannot be made responsible even for an unjust, that is, an unfounded accusation, and apprehension, and detention, unless it can be shown that his conduct was malicious. Then, as to any wrong committed in the offender's detention after apprehension and before examination, it not being alleged that any improper delay has taken place in bringing the accused before a magistrate for examination, it must be recollected that it is no part of the procurator-fiscal's duty to apprehend the delinquent; he cannot do so with his own hand; he would not be entitled to do so, unless under the call which every man has to do this if he saw the crime committed, and could lay hands on the offender *flagrante delicto*; but there are special officers of the law appointed for this purpose—messengers-at-arms or sheriff-officers—whose duty it is to execute the warrants in criminal cases, applied for and obtained by the procurator-fiscal on behalf of the public. These officers are presumed to understand their duty; the law so accounts of them. The procurator-fiscal must employ them, and is entitled to rely on their knowledge and discretion, and that they will execute the warrant of apprehension entrusted to them in a legal manner. I do not hold, that although the procurator-fiscal was at Invergordon at the time, and might have expected the pursuer to be brought there during the night, so that he would require to be detained till it was a fit time for the Sheriff to examine him in the morning, it was his duty to be upon the spot when the prisoner was brought in, or to give any instructions to the officers as to the mode of his detention; and I must own it strikes me that the more unfit this stone-chamber was for the detention of a supposed offender, and the more secure the other two rooms were for such a purpose, this just makes it the more improbable that it would enter into the defender's imagination to be necessary to warn the officers against putting the prisoners in there. The summons distinctly charges this as an illegal, oppressive, and malicious act against the officers alone. The culpability is directly charged against them, and not against their employer; and it is such a wrong as I think must be borne by the wrong-doer, and not by the public officer who employed him to do lawfully what it appears he executed irregularly, in his peculiar department of public duty also, with which the other has no interference. No doubt the procurator-fiscal might make himself responsible, by giving the officer special instructions, and if these involved irregularity or illegality, he must be answerable; but I think he incurs no such risk if he employ the accredited officers, not alleged to be incompetent or unskilful, and gives them no other instructions than to execute the warrant. I know of no direct authority in our law upon this point. The opinion I have formed is, upon general principles, applicable I think to a just estimate of the procurator-fiscal's duties and powers, and the necessity of not laying upon him any higher responsibility than for his own acts in his own department of duty, leaving with another set of public officers their peculiar duty and peculiar responsibility if they act illegally. And I think the absence of authority leads to the conclusion that no such responsibility has been held to attach to a procurator-fiscal, but for his own act or the acting under his special instructions, as it can scarcely be supposed that irregularities of this kind have not occurred before in the execution of such warrants. As to the employment by the procurator-fiscal of messengers-at-arms, in addition to the officers of his court, I think no inaccuracy has been committed here, nor illegality involving personal responsibility. A messenger-at-arms is an officer of a higher

No. 93.

Feb. 25, 1845.

Munro v.

Taylor.

character than a sheriff-officer, with more presumed knowledge of his duty, and more skilful as well as considerate in the execution of such a warrant. Whether they are to be viewed as concurrents with the sheriff-officer, or as principals, they are still public officers of the law, here employed to execute their appropriate duty, and must be responsible for their own wrong, if any such has occurred. It is true this is not a mere case of diligence against the goods of a debtor, but one where the personal liberty of the subject is concerned. This no doubt calls for a careful enquiry into the circumstances complained of as illegal, and ample indemnification, if any illegality has been committed in the detention; but I do not apprehend, that the circumstance that personal liberty is involved can change the character of the offence, and that that circumstance alone will make the procurator-fiscal, as employer, who would not otherwise be liable, responsible for the wrong of the officer employed by him, who is acting on his own official responsibility, and in his own department of duty, totally distinct from that of the procurator-fiscal, who could not execute it himself. That personal liberty is concerned, will aggravate the wrong and inflame the damages, but it will not create the responsibility, nor push it beyond the immediate actors in such a case as this. I am, therefore, for adhering substantially to the interlocutor, although I am not inclined to affirm every position in it or in the note.

LORD MONCREIFF.—I am of opinion that the interlocutor is right, in so far as it sustains the objections to the relevancy of the action, and dismisses it. All the findings of the interlocutor are not necessary to the particular case before us; and though, as at present advised, I in general concur in the views of the Lord Ordinary, I do not object to the terms of the judgment being varied in the way proposed. I certainly think that a public officer like the procurator-fiscal is not in general answerable for the conduct of a regular messenger or sheriff-officer, to whom he may entrust the execution of a warrant legal in itself and legally obtained. He may indeed render himself liable by giving special instructions; and perhaps cases may exist in which, from their peculiar circumstances, it may be his duty to give particular instructions. But how far he could be made liable civilly in an action of damages for not having given such special instructions, I shall give no opinion until such a case shall be presented before me. In the mean time, I am perfectly clear that there is no such case libelled or condescended on here; and finding no such case in the record, I am of opinion that the relation between the procurator-fiscal as one public officer, and the messengers or sheriff-officers, whose duty it is as separate public officers to execute the warrants of the magistrates, is essentially different from that which exists between a private individual and his servant; and, therefore, I lay aside all the law referred to, derived from that relation of master and servant, as either inapplicable or unnecessary to the case. For this reason, I think the separatim finding in the interlocutor of doubtful accuracy, having doubt whether the law there stated with reference to the case of master and servant is correct, though it may be perfectly sound in reference to the case of the procurator-fiscal and the executive officers. I do not think it necessary, after what has been said, to go deeper into the case, as we are unanimous in pronouncing the interlocutor proposed. It seems only necessary further to say, that I cannot think that the question with the procurator-fiscal is at all the same with any similar question with a private party employing a messenger to execute diligence. I think the cases essentially different.

No. 93.

F.b. 25, 1845.
Munro v.
Taylor.

LORD COCKBURN.—This interlocutor sanctions some principles which are questionable and unnecessary, and therefore it cannot be all affirmed. Indeed, it is very rarely that a judgment can be adhered to, simply and absolutely, which, instead of merely deciding the cause, and leaving the grounds to be explained separately, is framed, like the one before us, on the plan of incorporating the reasons, and consequently the facts and the legal principles, into the body of the judgment itself. But though there be fragments of this interlocutor which we cannot, and need not, sanction, I am of opinion that in substance it is sound.

It is admitted that the defender interfered solely as procurator-fiscal—that is, as a public officer, acting for the public interest; and that in applying for the warrant, and in putting it into the hands of a sheriff-officer for execution, his conduct was quite correct. It is asserted that he gave directions to the officer to take the prisoner, when apprehended, to the house at Invergordon; and since it is so stated, I assume this to be the fact. It is not said to have been improper. And it was explained pointedly by the counsel for the pursuer at the bar, that though the words in the summons ('acting under the employment of the defender') might be ambiguous, it was not meant to be said that any instructions were given by the defender to put the pursuer into what has been called the safe. Nor can it be said that one of these implied the other. For it is admitted that the house contained no rooms, which were not only comfortable, but "strongly secured by iron bars;" and there is nothing unreasonable in holding, especially in the absence of any opposite argument, that the defender might intend the custody to be in one of these apartments. Accordingly the summons describes the insertion into the safe as a distinct and separate proceeding—and by the officers alone.

Now I have no idea how an action of damages can lie against a public officer, when some breach or neglect of duty, actual or constructive, be laid to his charge. There is no breach or neglect charged against the defender whatever. The only thing said to have been done wrong was the confinement in the safe; and it is admitted was not done, or ordered to be done, by the defender.

It was maintained, or rather suggested, that the defender had failed in not giving proper instructions to the officer. To this there are two good answers. 1st, No failure is set forth, or even alluded to, in the summons. 2d, Giving special instructions, by which I mean any other instructions than to execute the warrant, is a necessary part of a procurator-fiscal's duty. On the contrary, it would often be highly dangerous if he were to attempt to regulate the officer, in unknown circumstances, by hypothetical directions. The law relies on the officer. The pursuer is not the party by whose orders the treatment of the accused can always safely be controlled. There may, perhaps, be occasions on which it may be proper for a sheriff, and even for a procurator-fiscal, to give particular instructions; but undoubtedly this is no necessary part of their invariable duty.

In this situation the plea of the pursuer is reduced to this—that a procurator-fiscal, who directs a sheriff-officer to execute a warrant, is responsible for the manner in which the officer may act. Now that a procurator-fiscal may, by acts of his own, whether of commission or of omission, render himself responsible, there can be no doubt. But the plea is, and as there is no personal impropriety set forth, it necessarily must be, that the procurator-fiscal, even when his own conduct has been correct, incurs responsibility by the mere act of employing.

I know no authority, and no principle, for this doctrine—a doctrine incompatible

No. 93.

Feb. 25, 1843.

Munro v.

Taylor.

with the administration of criminal justice as hitherto most beneficially practised in this country. It is idle to cite cases touching the liabilities of private parties or of any parties, even official, acting voluntarily or for their own behoof; and, as far as I am capable of appreciating them, the authorities that have been laid before us from the law of England are hostile to the pursuer. But in truth there is no much, if any, light to be obtained from any foreign system, upon this matter of purely Scotch criminal practice. But deducting civil, and therefore inapplicable cases of employment by private parties, the pursuer has not been able to refer to a single decision, institutional authority, or judicial dictum, for the responsibility he contends for. No example of a procurator-fiscal whose own conduct has been correct, being found liable for the misdeeds of a sheriff-officer lawfully employed by him to execute a criminal warrant, can be produced. If such liability had been understood to arise from the mere fact of employment, examples of its being enforced must have been of very ordinary occurrence.

The mere circumstance of his having employed one of the regular officers may not always be sufficient to liberate him; because there may be persons who, though in office, it was improper to employ—persons of bad official character—known enemies of the accused—or unfit for the particular duty. But there is no improper selection averred here, or any improper failure to direct. In this situation, the established and necessary practice is, for the procurator-fiscal simply to give the warrant to the officer, and to leave him to execute it upon his personal and official responsibility. What else can he do? He must act, and in what other way can he act? I cannot expose a public agent to an action of damages for merely doing what the law forces him to do.

The pursuer appealed to the liberty of the subject. This liberty we are undoubtedly bound to protect. But we must do this according to law. Under the very principle of protecting the liberty of the subject, we are equally bound to protect public officers in the performance of their public duty. It appears to me that the plea of the pursuer is inconsistent with the rights and safety of both.

THE COURT accordingly pronounced the following interlocutor:—"Adhering to the first finding in the interlocutor complained of: Recal the second finding: Find that it has been expressly admitted by the pursuer at the bar, that he does not undertake or intend to prove, under the general words of the summons, that the officers and others confined the pursuer in the manner complained of in the stone chamber or safe of the bank under any express or implied directions or instructions of the procurator-fiscal, or with his knowledge: Find that the allegations in the summons, as so restricted and explained, merely extend to general directions given to the officers to bring the pursuer, if apprehended during the course of the night, to the bank office, then employed by the sheriff and other magistrates of the county as a guard-house, and which were the only instructions which, in the circumstances, were necessary on the part of the procurator-fiscal: Find that the summons states that the said bank office contained rooms, which rendered it, according to the statements in the summons, a place perfectly fit and suitable for the detention of a prisoner brought into Leveigordon, on the occasion in question, during the night, and before his examination: Find that, by the statements in the summons, it is averred

that the pursuer was brought into Invergordon during the night, and at an hour when his examination would not have been proper and suitable, and taken to the bank-office above mentioned: Find that the alleged wrong of confining the pursuer and others in the manner stated, in the said stone chamber or safe, without any directions, as is now admitted, from the procurator-fiscal, and with the circumstances of oppression set forth in the summons, must, assuming the same to have occurred, be regarded as an individual act on the part of the officers, which the procurator-fiscal could not, in the circumstances, have anticipated, and against the occurrence of which he was not bound to take any precautions, and is an act for which in law he cannot be made responsible: Adhere to the third finding in the interlocutor, and refuse the prayer of the reclaiming note: Find the defender entitled to expenses of process since the date of the interlocutor complained of."

No. 93.

Feb. 25, 1845.

Graham v.

Mackay.

ROBERT LANDALE, S.S.C.—JAMES BURNES, S.S.C.—Agents.

Additional Authorities for Pursuer.—2 Hume, pp. 78, 80; Stats. 1535, c. 35—1579, c. 78—1587, c. 58—1593, c. 170; 2 Hume, p. 127; 2 Alison, 114; Macfarlane, Part II. tit. 19, § 8; *Mensies v. Stevenson*, December 27, 1839, (*M'Farlane*, p. 281.)

Authorities for the Defender.—*Smith v. Scott*, June 26, 1844, (*Scot. Jurist*;) *Macfarlane v. Anderson*, 25th February 1842, (*ante*, Vol. IV. pp. 786, 787, 788;) *Storrie's Commentaries on Law of Agency*, p. 283, §§ 320, 321; *Nicolson v. Moun-*

ton, (15 *East's Reports*, 384, and p. 390.

THOMAS GRAHAM, Pursuer.—*Macfarlane*.

No. 94.

GEORGE MACKAY, Defender.—*E. S. Gordon*.

Jurisdiction—Review—Sheriff Small-Debt Court—Act 1 Vict. c. 41.—A defender in the Sheriff's Small-Debt Court objected to the Sheriff's jurisdiction, on the ground that he (the defender) had no residence within the county; and the Sheriff, after hearing evidence, repelled the objection, and decreed against the defender:—Held, that the only competent court of appeal was the Circuit Court of Justiciary.

THIS was an action of reduction of a decree for £2 : 7 : 10, pronounced Feb. 25, 1845.* the Sheriff of Sutherlandshire in his Small-Debt Court, at the instance of the defender, against whom the decree was pronounced. Decree was originally pronounced in absence, but the defender obtained a

1st DIVISION.

Lord Ivory.

N.

* Decided Feb. 22.

No. 94. **F.b. 25, 1845.** **Graham v. Mackay.** sist and hearing under § 16 of the Small-Debt Act,¹ and at the hearing an agent attended for him, and pleaded an objection to the jurisdiction of the court, upon the ground that he resided in Fife, and had no residence in Sutherlandshire. The Sheriff, after hearing evidence, (the nature of which did not appear, no record of it being kept,) repelled the objection. In the summons of reduction, the pursuer (defender in the Small-Debt Court) was designed as "road-contractor, residing at Ken noway, Fifeshire."

The ground of reduction was the want of jurisdiction, which had been unsuccessfully pleaded before the Sheriff.

In defence, it was pleaded that the action was incompetent, in respect 1st, That Sheriff-court Small-Debt decrees were, by §§ 30 and 31 of the Act 1 Vict. c. 41, declared not subject to review by action in the Court of Session, but only by appeal to the next Circuit Court of Justiciary, and "defect of jurisdiction" was one of the grounds of appeal to the Circuit specially mentioned in the Act; and 2d, That the objection to jurisdiction having been pleaded to the Sheriff, his judgment repelling it was final by the Act.

The pursuer answered, that the protection of §§ 30 and 31 of the Act extended only to causes "decided under the authority of this Act," which could not be said of a cause in which, from the residence of the defender the Sheriff had no jurisdiction; that many cases might occur, in which appeal to the "next Circuit Court of Justiciary" would be impossible as for instance in the case of a decree in absence, of which the defender not being resident within the territory, knew nothing till the next circuit was over. The only remedy in such cases was by action in the Court of Session.

The Lord Ordinary ordered minutes of debate, upon advising which his Lordship pronounced the following interlocutor:—"Repels the defences so far as they impugn the competency of the action, or allege *personalis exceptio* against the pursuer in bar of his proceeding therein and appoints the cause to be enrolled, that parties may be heard as to the disposal thereof on the merits; meanwhile reserves all questions of expenses." *

¹ 1st Vict. c. 41.

* "NOTE.—The Lord Ordinary would have been disposed to report this case to the Court, in order that a question of such general concernment in the construction of the Sheriff's Small-Debt Act might at once have been settled by an authoritative judgment. As both parties, however, concurred in asking a deliverance on the case as it stands, he has not thought himself entitled to refuse it.

"The question does not, as has generally been the case, turn upon any point of mere nice technicality. It involves considerations of deep and substantial im-

The defender reclaimed.

Counsel were heard on the 17th of January, when the following opinions were delivered :—

No. 94.

Feb. 26, 1845.
Graham v.
Mackay.

portance, and cannot be decided without materially affecting the whole scope and operation of the statute.

"Now, to the Lord Ordinary it seems impossible to bring the proceedings which are here submitted to challenge within the protection of the statute. No doubt the words of its 30th and 31st sections are very broad. But the Lord Ordinary cannot think it was thereby meant to extend the powers which the Sheriff is entitled to exercise, to a case where the party has no domicile within the county, or to authorize the Sheriff, under any circumstances, to pronounce sentence, or at all exercise his judicial functions in reference to persons 'without his territory.' Unless it was so, however, this strikes at the root of the whole matter, Rank. 1, 2, 16. For otherwise the cause was not one of which it can be said that it was either 'raised' or 'decided under authority of this Act.' In this view, after an anxious study of the whole authorities, the Lord Ordinary cannot distinguish between the case now under consideration, and that of Scott, 2d July 32.

It is said that the pursuer is barred by having appeared before the Sheriff, and now maintaining that the latter had no jurisdiction. But the decree originally pronounced against the pursuer was a decree in absence. And unless that can be maintained on its own strength as a competent and valid proceeding, the whole superstructure subsequently reared upon it must fall to the ground. Even afterwards, when the pursuer did appear, he did so, as seems to be proved, only to plead the want of jurisdiction, and 'the offering of a declinature, after from importing an acquiescence in the judge's jurisdiction, that it is an absolute disowning of it.'—Ersk. 1, 2, 27.

Perhaps the strongest consideration that can be offered in support of the defender's plea is, that the Sheriff must necessarily have jurisdiction to dispose of all cases of declinature, and that his judgment on such a question ought therefore to be as conclusively final under the statute, as his judgment on the merits. The Lord Ordinary cannot hold that the Sheriff could thus be supported in any such and usurped extension of his jurisdiction, beyond his proper territory. It would lead to the most extraordinary conflict between the courts of different counties.

And then, in such circumstances as here occur, just suppose that the summons before the Sheriff had on the face of it described the party residing in Fifeshire, could it have been maintained for a moment that the proceeding was entitled to protection; on the contrary, the Sheriff could not have sustained his jurisdiction in such a case, without doing violence not only to the spirit and intent of the statute, but to every fundamental principle of the law of jurisdiction. But it comes to the same thing in principle if the fact truly was, and shall be established to have been, that the party had (as he alleges) possessed no actual residence or domicile within the county for a number of years. And the pursuer's objection to this effect being relevant, it must meanwhile be held *pro veritate*, in question of competency.

The Lord Ordinary is not moved by the late case of Rankine, 7th December 41. The objection is not here to mere "omission, or irregularity, or informality in the citation," &c., or even to 'defect of jurisdiction,' as arising out of error out of any other suchlike grounds. It rests on a total and absolute nullity and out of every thing that took place when put forward in the light of a judicial proceeding. The Sheriff, in truth, was not, in the sense of the law, entitled to the character of Judge at all. His court was not *forum compositum*. The cause was not a cause within 'the authority of the statute.' The proceedings were *coram non jure*, and so were void *ab initio*, just as much as if they had occurred before a party not holding the judicial character.

"As to the remedy of appeal to the Court of Justiciary, the Lord Ordinary

No. 94. **LORD JEFFREY.**—I think there is a great deal in the speciality of this case, the objection to jurisdiction was stated to the Sheriff, and his judgment taken upon it. I cannot see how the Sheriff's judgment should not be final on the question of jurisdiction, as well as all others. The parties join issue on the question, whether the defender was resident within the territory or not, and the Sheriff determines on evidence. If that point was really raised for the judicial determination of the Sheriff in his Small-Debt Court, why should his judgment be exempted from the statutory finality of his judgment on all points subject to his cognizance in that Court. No doubt there is a great puzzle in the words "raised under the authority of the Act." The words which follow show that violation of the statutory enactment shall not take the case from under the protecting clause. Reading §§ 30 and 31 together, I think the object was, in all cases falling under the Small Debt Act and decided by the Sheriff in his Small-Debt Court, to limit review to the Court of Justiciary, and exclude processes in this Court. This peremptory rule may, no doubt, sometimes lead to injustice; I know of no peremptory rule which does not. It is the least evil of the two, that in small cases summary injustice shall be done occasionally, than that the litigants on both sides should be harassed by processes before tribunals, where the expense is quite disproportioned to the value and interest of the case.

LORD MACKENZIE.—This is a very important case indeed. It is contended that in determining whether our review is excluded, we are to consider not whether the case is really and truly a case under the authority of the Act, but whether it

does not think that in such circumstances it was incumbent on the pursuer to resort to it.—*Sim*, 24th February 1831. And, moreover, that remedy does not seem by the statute to be exclusive of the party's other common law remedies; the case, in this respect, falling to be decided on the strength of section 30, which contains the only enactment to be found in the statute that is truly exclusive of review. Now, 1st, That section excludes review only where the decree has been given in a 'cause or prosecution decided under authority of this Act.' 2d, The words in which it so excludes review are nowise broader than those which formerly occurred in 10 Geo. IV. c. 51, § 18, unless in so far as (to meet such cases as *Brown*, 16th February 1833; *Wallace*, 3d July 1835; *MacLaren*, 12th December 1835; and *McEwan*, 9th March 1838,) they include irregularity or informality 'in the citation,' as well as in the 'proceedings.' 3d, Neither do they any more than those of the corresponding enactments in 10 Geo. IV. (for the words 'ground or reason whatever' occur in both Acts,) exclude review on 'incompetency or defect of jurisdiction,' at least not otherwise than as these grounds of review may have originated in mere omission, irregularity, or informality. 4th, Any implication to be drawn even from section 31, as regards the allowance of appeal to the Justiciary, may reasonably be met, and the expression of the statute be satisfied rather by construing the 'incompetency and defect of jurisdiction' there mentioned as going no further than those causes of incompetency, pointed at in the precedent excluding clause, (or perhaps its reference to such jurisdiction as if created under section 26,) than by extending them so as to violate all principle by letting in the Sheriff to proceed against parties not subjected to his jurisdiction at all under the statute, and wholly beyond his territory. Indeed it might very well so happen that a party resident beyond the Sheriff's jurisdiction—perhaps in a foreign country—should never hear of the decree taken against him until long after all power either of obtaining a rehearing before the Sheriff, or of submitting the Sheriff's judgment to review by way of appeal, had been lost by lapse of the statutory period allowed for the purpose."

Sheriff thinks it is so. Appeal to the next Circuit may be impossible; and after the next Circuit, appeal is incompetent by the Act. The next Circuit has always been held to be the next Circuit after the decree. Moreover, appeal is not the proper remedy in many cases. Suppose that the defender was insane, or that the decree was obtained by gross fraud, or by violence, the pursuer having seized on the defender and locked him up, and taken decree when he was in durance. It would be extreme to hold, that in no case is there any remedy except by appeal. Unless it can be made out that the party can go to the Justiciary, and that an appeal there is as good as a reduction, I should not be for excluding review in this Court.

No. 94.

Feb. 25, 1845.
Graham v.
Mackay.

LORD PRESIDENT.—This is a very important question. The view taken by Lord Jeffrey in the case of Rankine deserves consideration. The words in §§ 30 and 31 of the Act are very broad. They exclude review, except by appeal to the Justiciary, in all cases *raised* under the authority of the Act. The words in § 31 are “*raised* (not *decided*) under the authority of this Act.” In the case of Rankine,¹ none of us differed from Lord Jeffrey, when he said that “the principle and policy of the Act is to shut the Court of Session to every thing bearing the form of a small debt decree.” As to the construction to be put on the words “next Circuit Court of Justiciary,” they must be held to mean the next Circuit Court for the party is certified of the decree against him, and to which it is possible for him to appeal. Suppose the Circuit Court sat the next day after the decree, it would be impossible to appeal to it.

The case was then delayed for further consideration, and put out for the next day.

LORD PRESIDENT.—I have always understood that the last Sheriff Small-Debt Act was meant, by much more stringent provisions, to exclude the difficulties which have arisen under the Justice of Peace and former Sheriff Act to prevent effect being given in all cases to the intention of the legislature to exclude expensive reviews in this Court. My opinion is, that this last Act does provide, that in regard to all the matters embraced in § 31, review shall not be competent by appeal in this Court, but only by appeal to the Court of Justiciary, exercising the jurisdiction conferred by the Act 20th Geo. II. The Court of Justiciary may hear the appeal to the Court of Session, it being in regard to a decision of the Sheriff in a civil case. The words in § 30, “decree given by any Sheriff in any case or prosecution, decided under the authority of this Act,” mean decree given by any Sheriff as a Judge in the Small-Debt Court; that is the way I read them. We must hold that the legislature meant to allow review only in a certain fixed manner—viz. by appeal to the Justiciary, which is the only mode of review provided by the Act. The provision for appeal to the High Court of Justiciary applies only to the three Lothians. The evil that was to be corrected was expensive processes in miserable petty cases; and while these are prohibited, a summary and distinct mode of redress is given. Then comes the question, is the ground of objection here a matter in respect of which a decree is not reviewable in the Jus-

¹ Rankine v. Lang and Co., Dec. 7, 1843, (ante, Vol. VI. p. 183.)

No. 94.

Feb. 25, 1845.
Graham v.
Mackay.

tiary? The words of the Act expressly include "defect of jurisdiction" as one of the grounds of appeal to the Justiciary. I read the words "defect of jurisdiction," as meaning want of jurisdiction; there cannot be a fraction of jurisdiction. The defender here took the course provided by the Act, and applied to be heard against a decree in absence, and was heard, and took the objection to jurisdiction, which the Sheriff decided on evidence. There is no record of the evidence, and that is one of the inconveniences of review in this Court. On these grounds I have come to be of opinion, that what was expressed by Lord Jeffrey in the case of Rankine in 1843, where he says that the statute intended to shut this Court "to every thing bearing the form of a small debt decree," is sound law; and I am disposed to adhere to the judgment in that case, by dismissing the present action as incompetent.

LORD MACKENZIE.—I can only say that I am troubled with doubts. The words of the Act declare, that the judgments of the Small-Debt Court shall not be subject to review in this Court in any cause "decided under the authority of this Act." The interpretation of these words, contended for by the defender, is, that they just mean any decree pronounced by a Judge sitting in the Small-Debt Court. I cannot put so very broad a construction upon the words as that I think they must be interpreted to mean a decree which appears to have been pronounced under the authority of the Act. What makes me entertain doubts of the other construction, is just the consequences to which it would lead; for, according to it, the Sheriff, as soon as he is placed in his chair in the Small-Debt Court, may do any thing, and yet his judgment is final. I can hardly think that could be the intention of the legislature. In this case the plea is, that the decree is against a party not resident in the county; but suppose a decree given against a party who had never been in Scotland, or in the British dominions, would there be no mode of redress except appeal to the next Circuit? What is to prevent parties from taking out Small-Debt summonses, and obtaining decree in absence, which the defender could not oppose, because he had no knowledge of what was doing? There is no limit to that. It is hardly possible that such a door for injustice could be meant to be left open. Suppose a party took a decree against a dead man, and used diligence against his heirs, would there be no remedy? Again, take all the cases of nullity in human transactions—take the common case of force and fraud. Suppose a decree taken against an infant, to whom tutors are afterwards appointed, are they to have no relief? Or suppose it is taken against an insane person, who has no guardians? Suppose, again, a party is laid hold of by main force, and kept from attending the Court when decree is taken against him. In all of these cases, is it to be laid down, that if the judgment was given by the Sheriff sitting at the time, and in the place prescribed for holding the Small-Debt Court, there is no remedy whatever? It is impossible for me to be satisfied that this was meant. Then if review in this Court is open in these cases I have supposed, it must be here, where the party says he was not resident within the county. It is said he went and pleaded the objection before the Sheriff, and had to get the decree recalled. I am not satisfied with this; I do not think it validated the original decree. Again, it is said the Court of Justiciary has a sufficient power of review, for "the next Circuit Court of Justiciary" means the next after the party has heard of the case, and has a power of appealing. I cannot hold that. I think the statute must be held to mean the next Circuit in point of time after the date of the decree.

In these circumstances, I am not able to concur in holding that, in this case, the proceedings were under the authority of the Act, the defender not being resident in the county. I admit that the case is attended with doubt, and that an opposite decision may, on the whole, in actual practice, answer the country better.

No. 94.

Feb. 25, 1845.

Graham v.

Mackay.

LORD FULLERTON.—I am quite sensible of the difficulty of reconciling some of the cases put by Lord Mackenzie with the ordinary rules of procedure, and with substantial justice, on the construction of the statute contended for by the defender. But, on the other hand, I am satisfied that the opposite construction, which lets in the right of appeal, different from that pointed out by the statute in all cases in which defect of jurisdiction is urged, as being cases not “under the authority of the Act,” would go far to defeat its most clearly expressed provisions.

But whatever question may arise under different circumstances, I can have no doubt that, in this case, in which want of jurisdiction and alleged informality of procedure are the only grounds of reduction, the words of the statute are unequivocal and imperative. Section 30 provides, “That no decree given by any Sheriff in any cause or prosecution decided under the authority of this Act, shall be subject to reduction, advocacy, suspension, or appeal, or any other form of review or stay of execution, other than provided by this Act, either on account of any omission or irregularity or informality in the citation or proceedings, or on the merits, or on any ground or reason whatever.” Section 31 provides for, and describes the particular forms of review, to which, by the preceding section, the power of review is exclusively confined:—“That he shall be competent to any person, conceiving himself aggrieved by any decree given by any Sheriff, in any cause or prosecution raised under the authority of this Act, to bring the case by appeal before the next Circuit Court of Justiciary, or where there are no Circuit Courts, before the High Court of Justiciary at Edinburgh, in the manner and by and under the rules, limitations, conditions, and restrictions contained in the before-recited Act, passed in the twentieth year of the reign of his Majesty King George the Second, for taking away and abolishing the heritable jurisdictions in Scotland, except in so far as altered by this Act: Provided always, that such appeal shall be competent only when founded on the ground of corruption or malice and oppression on the part of the Sheriff, or on such deviations in point of form from the statutory enactments as the Court shall think took place wilfully, or have prevented substantial justice from having been done, or on incompetency, including defect of jurisdiction of the Sheriff; provided also, that such appeals shall be heard and determined in open Court, and that it shall be competent to the Court to correct such deviation in point of form, or to remit the cause to the Sheriff with instructions, or for rehearing generally; and it shall not be competent to produce or found upon any document as evidence on the merits of the original cause, which was not produced to the Sheriff when the case was heard, and to which his signature or initials have not been then affixed, which he is only to do if required, nor to found upon nor refer to the testimony of any witness not examined before the Sheriff, and whose name is not written by him when the case is heard upon the record copy of the summons, which he is to do when specially required to that effect: Provided further, that no sist or stay of the process and decree, and no certificate of appeal, shall be issued by the Sheriff-

No. 94.

Feb. 25, 1845.

Graham v.

Mackay.

clerk, except upon consignment of the whole sum, if any, decreed for by the decree, and expenses, if any, and security found for the whole expenses which may be incurred and found due under the appeal."

These passages, taken together, remove all doubt as to the sense of the term "under the authority of this Act;" because they show that one of the grounds of appeal contemplated as applicable to a decision "under the authority of this Act," and to be determined exclusively by the statutory forms of review, was incompetency and "defect of jurisdiction." The import of these provisions is exactly the same as if the statutes had enacted, that whereas "decisions under the authority of this Act" might be objected to on the ground of defect of jurisdiction, such objections should be raised and discussed only in the form of review which was there pointed out. In one sense, it may be said that a decision by the Sheriff, having no jurisdiction, and pronounced in disregard of the proper rules of procedure, is not a decision within the authority of the Act. But that is clearly not the sense in which the term is used in the statute, otherwise the limitation of the power of review, even on those very grounds, would be contradictory and absurd. The meaning clearly is, that where a decision is ostensibly, and *ex facie* of the record, a decision under the authority of the statute, it shall be reviewable even in the supposed cases—that is, of alleged defect of jurisdiction and alleged informality—only in one specified way.

That this may lead to hardship in some cases is quite possible, though I think that, in most of the supposed cases, the defect of jurisdiction is combined with some other circumstances, such as absence, or designed and fraudulent contrivances in order to abuse the forms of summary procedure which the statute allows. When such cases occur, it is possible they may be held, on special grounds, to be taken out of the provision as to review. On the other hand, if they are not, the only remedy must be a new application to the legislature. But here there is no room, as it appears to me, to doubt how we may act.

The decision here, in as far as we can see, is clearly one within the authority of the Act; and the objection, on the ground of alleged defect of jurisdiction, is just one which, by the express words of the statute, can be reviewed by the statutory tribunal, and by no other.

LORD JEFFREY.—I am very clearly of the opinion of the majority. I am not much startled by the cases put by Lord Mackenzie, which must be admitted to be extremely improbable. I am not startled on this account, that I think almost all peremptory rules intended to arrest the progress of a great prevailing evil will be found not so carefully worded as to exclude all possible evils. I am not to be embarrassed in applying a rule, wholesome in its general application, and very much so here, by considering extremely improbable cases of hardship which may, by possibility, occur under it. I go just to the 30th and 31st sections of the Act, where I find that all that is competent by the Act to the Court of Justiciary is incompetent in the Court of Session. These are parts of the same provision. The plain meaning of the Act is, that no proceeding in the Court of Session shall be competent to question any thing done by way of decree in the Small Debt Court. I hold that, hereafter, every thing having the colour of a small debt decree is shut out from the Court of Session, and confined to a court limited to peremptory sittings, and of very summary jurisdiction. The first object of the Act is to prevent any litigation in the Court of Session upon the merits, validity, or

competency of a decree pronounced in the Sheriff Small-Debt Court. We have nothing to do with whether this is right or wrong. If it has been rashly done, it is not our rashness, but that of the legislature. We have it declared in the statute, that, in cases of oppression, corruption, malice, and injustice by wilful neglect of form, the remedy shall only be in the Court of Justiciary. The only other ground of review is defect of jurisdiction, which is the ground of reduction here; and the statute says you shall only go to the Court of Justiciary for that. It is said the remedy is insufficient. Very likely it is—many remedies are so. I have often been struck with decrees of divorce not being allowed to be reviewed after a year. It leads, and I have known it in my own practice to lead, to flagrant abuse. So also services are not allowed to be reduced after twenty years. It is sufficient for us that we have an express enactment. I am not much moved by the words “next Circuit.” If a man is absurd enough to take decree against a person abroad, it does no harm till brought into operation against property, and then the persons holding the property have their remedy, by coming to the Sheriff-court again, and having a rehearing of the case; and then an appeal might be taken to the next Circuit. It is the next Circuit after the final decree in the rehearing; that is a peremptory rule. In some of the cases put there would be remedy by action of damages; in all cases of force and fear there would be; and in all decrees in absence, as soon as property is touched, there is power to apply for a rehearing by the holders of the property, and then there may be an appeal to the next Circuit. I am, therefore, not much moved by these imaginary cases. We must shut our eyes to such cases, and consider that the evil we have to deal with is sufficient for us. So long as no cases of that kind occur, we should not frighten ourselves by imagining them. Here, a party, going about attending to roads in various districts, objects to the Sheriff’s jurisdiction, and the Sheriff, after hearing him, repels his objection. I don’t allude to this to consider whether the objection was good or bad, but to show that, in the present case, we need not suffer much ringing of our nerves in excluding review, as the party manifestly could suffer no hardship by being compelled to answer in one county, where he was present, rather than another. I rely on the construction of sections 30 and 31 of the Act, and particularly on the words “defect of jurisdiction” in the latter, and don’t hesitate at all in thinking that the interlocutor of the Lord Ordinary ought to be altered.

No. 94.

Feb. 25, 1845.
Graham v.
Mackay.

THE COURT pronounced the following interlocutor:—“Alter the interlocutor of the Lord Ordinary submitted to review; find that the only competent court of appeal in this case was the Circuit Court of Justiciary; dismiss the action, and decern; find the reclaimers entitled to expenses.”

LACHLAN MACKINTOSH, S.S.C.—BAXTER and MACDONALD, W.S.—Agents.

Purser’s Authorities.—Act 10 Geo. IV. c. 55, § 18, and cases decided under it, viz. *Brown v. Richmond and Co.*, Feb. 16, 1833, (11 S. 407)—*Wallace v. Hume*, July 3, 1835, (13 S. 1034)—*McLaren v. Finlay*, Dec. 12, 1835, (14 S. 143)—*Scott v. Anderson*, July 3, 1832, (10 S. 760); Act 6 Geo. IV. c. 48, and

- No. 94. case decided under it, viz. *Miller v. McCallum*, Nov. 14, 1840, (ante, Vol. III. p. 65.)
 Feb. 25, 1845. *Defender's Authorities*.—*Alexander v. Seymour*, Dec. 2, 1828, (7 S. 117;) Ashley v. Craigie v. Mill, Feb. 11, 1826, (4 S. 447—affirmed on appeal, 2 W. & S. 662;) Cook v. Mill, May 17, 1823, (2 S. 317;) *Campbell v. Mill*, June 28, 1823, (2 S. 440;) *Hume's Reports*, p. 263; *Atherton v. Moffat*, Feb. 18, 1843. (1 Brown's *Justiciary Reports*, p. 524;) *Rankine v. Lang*, Dec. 7, 1843, (ante, Vol. VI. p. 183.)

- No. 95. ASHLEY BROTHERS and MANDATARY, Complainers.—*Thomson—Hector*. WILLIAM MUIR, (Reid's Trustee,) Respondent.—*Rutherford—Neaves*.

Bankruptcy—Ranking—Bill of Exchange—Obligation.—Ashley, without value, accepted a bill drawn on him by Izat, and Izat, without value, indorsed it to Reid, who discounted it in bank and drew the proceeds: both Izat and Reid became bankrupt before the bill fell due, and Ashley retired it:—Held that Ashley was entitled to be ranked for the amount of the bill on both sequestrated estates to the effect of drawing full payment. Opinion, 1st, That an obligation granted by Reid to Izat to provide for the bill when due was available to Ashley; 2d, That Izat was not entitled to be ranked on Reid's estate.

- Feb. 25, 1845. MESSRS ASHLEY BROTHERS, Liverpool, accepted, without value, a bill of exchange for £320, at four months, dated 27th May 1839, drawn upon them by George Izat, Kincardine. Izat indorsed it, also without value, to Alexander Reid, Leith, who, on 5th June 1839, granted him a letter acknowledging that it had been indorsed to him without value, and obliging himself to provide for it when due. Reid discounted the bill, and received the proceeds. He became bankrupt on the 14th, and Izat on the 26th of August following. On the 28th of August, Izat intimated to Ashley Brothers that the bill had been given to Reid for his accommodation, and this, so far as appeared, was the first intimation they received of that fact. Ashley Brothers retired the bill when due. They ranked on Izat's sequestrated estate for the amount, and drew a dividend of 5s. in the pound. Neither Izat nor the trustee in his sequestration claimed to be ranked on Reid's estate, in respect of the bill; but certain other claims were made on Izat's behalf against Reid, which were ultimately settled by the payment of £100, upon receiving which Izat (on 6th December) granted a discharge of all claims competent to him against Reid's estate on any grounds whatever.

Ashley Brothers claimed to be ranked on Reid's sequestrated estate for the amount of the bill, but the trustee rejected the claim, "because—1st, If the bill for £320, mentioned in the claim, was granted to Mr George Izat, the drawer, without value, (a fact which does not come within my knowledge,) it was so granted by the claimants to Mr Izat solely at his request, and for his behoof, and not at the request or for behoof of the

bankrupt, Alexander Reid ; and any advance made by the claimants in paying said bill was made by them to Mr Izat, the drawer of said bill. 2d, The letter, said to be dated 5th June 1839, and to have been addressed by the said Alexander Reid to the said George Izat, is dated subsequent, not only to the date, but to the discounting of the said bill by Reid and Company, and imports no obligation by Reid to any party other than the said George Izat, to whom it is addressed. 3d, The claimants were not in possession of said letter till the claim which they made through Mr Smith as an indorsee and holder of the said bill was rejected, and cannot therefore allege that they relied on Mr Reid in granting of that bill. 4th, The claimants are not in right of any claim of relief competent to the said George Izat, by his indorsation of the said bill to Reid, or by Reid's obligation contained in the said letter ; and every such claim, as betwixt Izat and Reid, is now cut off by the said George Izat's discharge in favour of me as trustee, and the creditors of the said Alexander Reid, of date the 6th day of December last."

No. 95.
Feb. 25, 1845.
Ashley v.
Muir.

Ashley Brothers presented a petition and complaint to the Lord Ordinary against this deliverance.

The preceding narrative gives a connected view of the leading and material facts of the case ; but the whole facts were found, specially and particularly, by the Lord Ordinary in the following interlocutor, (of 20th July 1844,) which, in the subsequent discussion, the parties agreed to hold as correct :—" Finds it sufficiently instructed, that, prior to the month of May 1839, Alexander Reid, the bankrupt, had been in the habit of receiving accommodation bills to a considerable amount from Mr George Izat : Finds that, on the 25th of May 1839, the said George Izat addressed a letter to William Ashley, one of the partners of the house of Ashley Brothers, the appellants, enclosing a draft for the sum of £320, dated 27th May 1839, and payable four months after date, of which he requested acceptance for his accommodation : Finds that the appellants accordingly accepted the said draft without value, and transmitted the same to the said George Izat : Finds it not proved that the appellants were, until 28th August 1839 after mentioned, aware of the said draft being intended for the use of the bankrupt, or for the accommodation of any other party than the said George Izat : Finds that the said acceptance having been indorsed by the said George Izat and by the said Alexander Reid, under the name of Reid and Company, the same was discounted by the said Alexander Reid, and the proceeds thereof were received by him, and the same was entered in his books : Finds that the said Alexander Reid, in a letter to Izat, dated 5th June 1839, acknowledged that he had received the said acceptance from the said George Izat without value, and bound himself to retire the same : Finds that, on the 14th August 1839, before the said acceptance became due, the estate of the said Alexander Reid was sequestrated, and that the said acceptance was afterwards retired by the appellants, Ashley Brothers : Finds that the estate of the said George Izat was sequestrated

No. 95. on the 26th of August 1839, and that on the 28th of the same month the said George Izat intimated to the appellants that the draft had been given to Reid and Company for their accommodation, and that the appellants, Ashely and Company, might rank both upon his estate and upon the sequestrated estate of the said Alexander Reid : Finds that no claim upon the estate of Reid was lodged for the amount of the bill in question, or any part thereof, in name of the said George Izat : Finds that the said letter of Reid, of 5th June 1839, relative to the said bill of £320, was entered by the respondent in the sederunt-book of Reid and Company's sequestration before the entry of the claim by John Smith, hereafter mentioned : Finds that, on the 13th of November 1839, a claim was lodged on the estate of the said Alexander Reid, for the amount of the bill in question, by John Smith, shipowner in Leith, in his own name, but on behalf of the appellants : Finds it averred by the appellants, and denied by the respondent, that on or prior to the 5th December 1842, the said John Smith produced to the respondent, as trustee on the said Alexander Reid's estate, the foresaid letter of 5th June 1839, as a document held by him in relation to said claim : Finds that said claim was ultimately rejected upon the point of form, that the said John Smith was not in right of the bill, which had been retired by the appellants as aforesaid : Finds that the said George Izat did not give up, as part of the funds or debts belonging to him, any claim of ranking on the estate of Reid and Company, under his sequestration, for the said sum of £320, or any other claim, and that thereafter he was discharged in terms of the bankrupt statute, on payment of five shillings per pound : Finds that, on the 24th of March 1840, a claim was lodged on the estate of the said Alexander Reid, on behalf of the said George Izat, to the extent of £606 : 2 : 2, which did not include the said draft, or any part thereof : Finds that the claim of the said George Izat was afterwards settled, by payment of the sum of £100 ; but Finds that the appellants are not barred by such settlement from any claim, otherwise competent to them in their own right, on the estate of the said Alexander Reid in respect of said acceptance, and that it was not intended by the said discharge to affect any such right directly competent to the appellants : Finds that, upon payment of the said sum of £100, on the 6th December 1842, the said George Izat granted a discharge, not only of the foresaid sum of £606 : 2 : 2 claimed by him, but of all claims competent to him against the estate of the said Alexander Reid on any grounds whatever ; but Finds that, simultaneously with the signing of the said discharge, he wrote to the trustee on the estate of the said Alexander Reid, that it was understood he did nothing prejudicial to the claim of the appellants ; and on the 7th of December he again wrote to the same effect ; to which it was answered, by the agent for the respondent, that the said discharge (if adhered to) was not merely a discharge of Izat's claim lodged, but of all claims which he could make against Reid and Company's estate on any

Feb. 25, 1845.
Ashley v.
Muir.

No. 95.

Feb. 25, 1845.

Ashley v.

Muir.

ground whatever, and that if he had any interest in the appellants' claim, the discharge would affect his interest in that claim; and that Izat replied, that he had no interest in the appellants' claim, further than having got the bill for Reid at his request for his accommodation; that he would do nothing to prejudice their claim, but in compromising for himself he could not think he could hurt them, so that he would keep the £100, and let the discharge go on: Finds that the said George Izat stated that he had other claims against the said Alexander Reid's estate, arising from other bills which he had accepted for Reid's accommodation, and which claims were not settled at the date of the said discharge: Finds that the appellants, through the said John Smith, were ranked on the estate of the said George Izat for the amount of the bill in question, in respect of its being an accommodation granted by them without value, and that they drew a dividend thereon to the extent of five shillings, under a composition-contract: Finds that, in these circumstances, the appellants maintain, 1st, That they are entitled to rank as in their own right on the estate of Reid, who received the proceeds of the acceptance in question, and for whose accommodation it was procured by the said George Izat; and, 2dly, That they are not barred by the terms of the discharge granted by the said George Izat from any claim competent to them as in his right, but are entitled to claim in his place on any other ground for the said sum; and therefore appoints parties to lodge minutes of debate on the questions of law, as arising on the facts fixed by the preceding findings."

The complainers pleaded, that having accepted the bill without value, and retired it when due, they were entitled to rank upon the estate both of Izat, who had obtained it from them, and of Reid, who had received the proceeds, to the effect of drawing full payment: That the bank which discounted the bill, had a good claim against both Izat and Reid, and, by paying the bank, the complainers became by implication assignees to all rights competent to the bank upon it: That Reid had granted a special obligation to Izat to provide for the bill when due, and they, as the parties who had given the bill to Izat, and had actually provided for it when due, were in right of that obligation: That Izat did not claim upon Reid's estate in respect of the bill, and could not have done so, inasmuch as he neither paid value for the bill originally, nor retired it when due, and therefore his discharge of Reid's estate did not affect the present question.

The respondent answered, that the position of the complainers upon the bill (as acceptors) precluded them from making any claim upon it, and they could therefore claim only upon the transaction; but the transaction was between them and Izat alone, and Reid was no party to it: That they had, therefore, no direct claim against Reid. They might have claimed against Izat, and Izat might in turn have claimed against

No. 95. Reid ; or the matter might have been shortened, by their obtaining an assignation from Izat ; but this was prevented by Izat's discharge of Reid's estate, which precluded not only his claim, but also the complainer's, as his assignee. If Reid had paid Izat the amount of the bill, that would have settled the transaction so far as he was concerned. The payment of the £100 under the agreement, was equivalent to a ranking on his estate, which was equivalent to payment. That the complainers were not entitled to found on an obligation granted by Reid not to them, but to Izat.

F. b. 25, 1845.
Ashley v.
Muir.

The Lord Ordinary pronounced the following interlocutor :—" In respect of the findings in point of fact contained in the interlocutor of 20th July 1844, now final, and specially in respect, 1st, That the bill in question was granted by the appellants without value received, and was ultimately retired by them out of their own proper funds. 2d, In respect Alexander Reid, the bankrupt, received the proceeds of the said bill, for which it is admitted that he gave no value, and by his letter, dated 3d June 1839, expressly became bound to retire the said bill, And 3d, In respect no party has been ranked on the bankrupt estate on account of the said bill : Finds, That the appellants, as true and *bona fide* creditors in the said transaction, are entitled to be ranked on the estate of the bankrupt, the true debtor, who received the proceeds of the said bill without value, and out of whose estate no dividend or payment has been made to any party in respect thereof : Finds, That the appellants are not barred from insisting in their claim, in respect of their having ranked on the estate of Izat, who was bound to relieve them of the consequences of their acceptance ; nor by the discharge granted by Izat to the respondent as trustee on Reid's estate, no claim having been made thereon on behalf of Izat in respect of the said bill : Therefore sustains the appeal, and remits to the trustee, with instructions to rank the appellants upon the bankrupt estate in terms of their claim, and decerns : Finds them entitled to expenses."

The respondent reclaimed.

LORD PRESIDENT.—I hold the facts of the case fixed by the interlocutor of 20th July. It is a case of some difficulty, but I think the Lord Ordinary has done right.

LORD MACKENZIE.—I am also for adhering. I think the letters of Reid are of great importance, not only as containing a direct obligation, but as showing that Reid perfectly well knew the nature of the transaction ; that this was nothing but a wind-bill, for which no value had been given to the acceptor ; and that the party who actually got the money was responsible to the acceptor for it, which is the ordinary course of wind-bills. He could not have bound himself to provide for it when due, consistently with its having been accepted for value. It is not an obligation to relieve Izat, but to provide for the bill when due, which is an acknowledgment that he knew it was a wind-bill. In this situation, the party

who gets the money must be liable. It does not signify who is the acceptor—all the parties just put their names on the bill to get money from the bank, and the party who gets the money is liable.

No. 95.

Feb. 25, 1845.

Ashley v.

Muir.

But the case is made stronger here by the positive obligation undertaken by Reid to provide for the bill when due. I have considerable doubt about the objection, that Messrs Ashley are not entitled to the benefit of this obligation, which was taken from Reid by Izat. I have extreme doubt whether he who had got the bill for nothing from the acceptor, could not take an obligation for his, the acceptor's, behoof. I think it was his duty to take it, and, having done so, is it not available to the party? There is one of our own decisions, in which it was held that an obligation to pay to a party was good, though it had never been delivered. It is doubtful whether, on that ground alone, viz., that Messrs Ashley are entitled to the benefit of the obligation of Reid to provide for the bill, though granted to Izat, they ought not to succeed. But independent of that, I think that Reid having got the money, he could not, if solvent, and, being insolvent, his estate can a little, resist the claim.

LORD FULLERTON.—This has always appeared to me a case of greater apparent nicety than of real difficulty. I make the distinction, because I think that it only requires an exact and a rigorous statement of the true legal character of the transaction to bring out the result—a result in which I entirely agree with the Lord Ordinary.

The facts of the case are fixed by the interlocutor of the 20th July 1844, and a very short detail includes all those necessary for the due statement of the question.

Ashley granted, without value, an acceptance for £320 to Izat, at the request of the latter, dated 27th May 1839. Izat indorsed this acceptance, also without value, to Reid; and he acknowledged by his letter to Izat of 5th June 1839, that it was so indorsed without value, and that he would "provide for it when due." This letter proves that the indorsement to him (Reid) was without value; and, I think, the words "I will provide for it when due," also prove Reid's knowledge that the acceptance had been granted by Ashley without value. Indeed this last point is of the less importance, because, as Reid received the bill from Izat without giving value, he was liable to all the responsibilities of Izat to the acceptor, of which he must be presumed to have had information from his cedent.

Reid, thus holding the bill with Ashley's acceptance, indorsed it for value, and drew that value; then, for the first time, conferring on the bill its true character as an obligation in favour of the onerous holder against Ashley the acceptor, and that independently altogether of any understanding or question of liability between the acceptor and the previous indorsers. In consequence of this, payment of the bill was made good against Ashley.

Both Izat and Reid having become bankrupt, Ashley has ranked upon Izat's estate; and two questions arise, first, Whether he can rank directly against Reid's estate, or only through the right of Izat? And secondly, Whether, supposing that he cannot rank directly, but must rank through Izat, his claim is not cut off by the discharge granted by Izat to Reid's trustee? I think there is no room for entering into the second enquiry, because I think it clear that Ashley was, and is, entitled to claim directly, and in his own right, against Reid's estate.

The objection to this is founded entirely on what I conceive to be a misconception.

No. 95.

Feb. 25, 1845.
Ashley v.
Muir.

tion of the responsibility truly incurred by Reid, when he discounted the bill and drew the proceeds. It is maintained by the trustee on Reid's estate, that, by doing so, he contracted no direct obligation to Ashley the acceptor; that though Izat, by obtaining the acceptance of Ashley without value, became bound to the acceptor to relieve him, that obligation was not transferred against Reid, by Izat indorsing the bill to Reid; and that Reid, by taking it in the same way without value, contracted a new and separate obligation of relief only to Izat, from whom he got it. According to this view, there were two totally separate transactions—one between Ashley and Izat, and the other between Izat and Reid; in one of which Izat was the only debtor, and in the other Reid; so that the case was said to be the same as if Izat had discounted the bill, and paid the amount to Reid, who, in that case, would have been Izat's debtor, but not the debtor of Ashley the acceptor.

Now all this reasoning seems to me to rest on a very erroneous conception of the true nature of an acceptance granted without value, and passed without value to another, or any number of parties.

It is undeniable that Ashley's acceptance, granted without value, constituted an obligation in favour of the drawer against the acceptor. It created no obligation at all against the acceptor, till it was passed to an onerous indorsee. Then, of course, it created an obligation good against the acceptor, as well as all the other parties. So long, then, as the acceptance was in the hands of the gratuitous holder Izat, it was really nothing but a mandate from Ashley, empowering the holder to render the acceptor liable to an onerous indorsee; in other words, to raise the amount on the credit of Ashley, under the obligation, of course, to relieve Ashley of the consequences. But as the writing constituting such mandate was from its form transmissible, it passed to the next gratuitous indorsee, but always under the same responsibility.

Reid, then, by taking the bill without value, became the holder of the mandate, to raise the amount on the credit of the acceptor; and the moment he put it in force by discounting it, and taking the proceeds, he, by the very nature of the transaction, became bound, not only to Izat, but to the acceptor in that obligation of relief, which was inseparable from the execution of the power to bind the acceptor. It is a mistake, then, to say, that there was no direct responsibility, or what is called "privity of contract," between Ashley the acceptor and Reid. Reid's responsibility to the acceptor was created by acting upon, and taking the benefit of, Ashley's signature in raising the money. By putting in action the mandate implied in Ashley's signature for his own behoof, he necessarily came under the obligation to relieve the party whose mandate he had used for that purpose.

The case, as it stands, differs from the case supposed, just in the essential particular on which the decision of each must depend.—

If Izat had discounted the bill, and paid the proceeds to Reid, there would have been no direct responsibility by Reid to Ashley, for the obvious reason, that the effect of the acceptance as a mandate had been exhausted, on its passing from Izat to the onerous holder, and that there would have been nothing to connect Reid with Ashley. But by the bill passing without value into the hands of Reid, he became the holder of Ashley's mandate to raise money on Ashley's credit; and, on that being done by Reid, the immediate responsibility arose between him and

Ashley, whose mandate he had executed under the necessary responsibility of relieving the mandant, whose credit he had employed for his own benefit. It appears to me that all this followed, necessarily, from the circumstance of Reid using Ashley's acceptance to raise money, which acceptance he held without value. That being admitted, it is clear that in regard to him the document possessed none of the privileges of a bill of exchange. In regard to him it was not a bag of money, according to the usual phrase applied to a bill in the hands of an onerous holder. If "a bag of money," it was one so sealed and labelled with the name of Ashley, that he could not open it and use the contents, without becoming liable to the party whose name it bore.

But the case is made stronger by the terms of the letter by Reid to Izat of 5th June 1839. By this letter, Reid not only acknowledged that he had received the bill without having given value, but bound himself to "provide for it when due." This was a positive obligation to provide for the bill—that is, to pay its contents when due. It was not merely to relieve Izat, which might have been merely personal to Izat—it was to pay the bill, an obligation which was available to Ashley, whom, it is admitted, Izat was bound to relieve.

Izat being so bound, must therefore, in taking such a letter, be presumed to have taken it and held it in behalf of Ashley as well as himself; so that it was a right which required no assignation to communicate the benefit of it to Ashley.

On these grounds, it appears to me that Ashley had a direct claim of debt against Reid, and was therefore entitled to rank upon his estate; and that right cannot be affected by the fact, that he has already ranked on the estate of Izat.

In the first place, if Ashley has a direct claim against Reid's estate, it is clearly *in tertio* on the part of the trustee, that he ranked, however groundlessly, on another estate.

But, secondly, according to the view which I take, he was entitled to rank on Izat, to the effect of securing full payment of his debt; Izat, by using the acceptance and passing it to Reid, was instrumental in putting in force the means of raising money on Ashley's credit, without any consideration given. Both Izat and Reid then became jointly liable to relieve the acceptor of the consequences of his acceptance.

Though Reid was liable in relief to Izat, they were both liable to Ashley; so that there was nothing wrong or unusual in him ranking on both the estates.

For these reasons, I think the Lord Ordinary's interlocutor ought to be adhered to.

LORD JEFFREY.—I entirely concur in the opinions that have been given. It is vain to say that Izat might have ranked on the estate of Reid in the circumstances. If he had paid the bill, there would have been an end of any possibility of concurrence on the acceptors Ashley, for it is proved that Izat paid no value for it. What sort of debt did Reid incur to Izat, by merely having indorsed to him a bill which another party retired and took out of the circle? It is quite clear that Izat could not have ranked on Reid's estate, and that therefore his ranking is of no consequence in the case. Messrs Ashley were not debtors to Reid by accepting the bill until money was raised in reliance upon their obligation. Then here is a bill which first became operative by being discounted in the bank, which had a good claim against all the parties whose names were on it.

No. 95.

Feb. 25, 1845.

Ashley v. Muir.

No. 95.

Feb. 26, 1845.
M'Grigor v.
Hamilton.

Messrs Ashley, by paying to the bank, put themselves in the same situation as any third party retiring the bill who had got no value, and lay under no obligation to retire it. The implied assignation from payment to the bank is enough for the case. I concur in every word of the most luminous and unanswerable opinion of Lord Fullerton. I think the bill was nothing but a mandate to raise money on the credit of the acceptor, and that there was no obligation till the money was raised. I therefore think that, independent of Reid's letter of 5th June, the case is a clear one, but that this letter, from the terms of the obligation in it, is also of itself conclusive. No further obligation could, in common reason, have been taken. It is an obligation to extinguish the bill;—it is to retire the bill, and that imports an extinction of it. Suppose Reid had retired the bill, could he have enforced it as against the Messrs Ashley? It does not signify whether he knew that the immediate indorser to him gave no value for it. Did he not incur a debt by his obligation to retire it when due?

Therefore, looking at the case in every possible point of view, I think the judgment just and unimpeachable.

THE COURT adhered, with additional expenses.

JOHN MEIKLEJOHN, W.S.—JOHN MURDOCH, S.S.C.—Agents.

No. 96.

ALEXANDER M'GRIGOR, Pursuer.—*Rutherford—Cowan.*

JOHN HAMILTON, Defender.—*Marshall—Dunlop.*

Entail—Clause.—1. Held that the words “acts and deeds” in the irritant clause of an entail included debts, though, in the resolute clause which followed the words “acts, deeds, or debts,” were used. 2. Question, whether an heir entail can plead the entail against an adjudication for his own debt?

Feb. 26, 1845.

1st DIVISION.
Lord Wood.
W.

ALEXANDER M'GRIGOR raised action of adjudication of the lands of Bardowie upon a debt of £6000, due to him by John Hamilton, the proprietor, on personal bonds.

Hamilton pleaded, in defence, that he held the lands as heir under deed of strict entail executed in 1773. The pursuer answered that the entail was invalid, in respect the irritant clause of the deed did not extend to the statutory prohibition against contracting debt.

The irritant and resolute clauses, on which the question between the parties turned, were in these terms:—“Declaring hereby, that if the said John Buchanan, or any of the said heirs of taillie, shall act and do in the contrary of the particulars above mentioned, or any of them, or neglect to fulfil the conditions above specified, or any of them, then, and in that case, all and every one of such *acts and deeds*, with all that shall happen to follow, or may follow thereupon, shall be *ipso facto* void and null, and of no force, strength, nor effect, aicklike, and in the same manner

ner as if the said facts and deeds had not been done, acted, or committed; and also declaring that the person so contravening, or failing to fulfil the conditions above mentioned, shall for him or herself alone, immediately upon the contravention, or failing to fulfil and observe the said conditions and provisions, or any of them, amitt, lose, and tyne, all right and title he or she has, or can pretend, to the said lands and estate, and the same shall, in the case foresaid, *ipso facto*, fall, accresce, and belong to the next heir and member of taillie, hereby appointed to succeed thereto, although descending of the contravener's body, sicklike, and in the same manner as if the contravener was naturally dead; and it shall be leisom and lawful to the next heir of taillie to establish the right thereof in his or her person, and that either by declarator, or serving heir to the person who died last vest and seased in the said lands preceding the contravener, or by adjudication or any other manner of way, agreeable to the laws of the kingdom for the time, without respect to any alteration, innovation, or change foresaid, to be made by the person so contravening, and without the burthen of any act of omission or commission, or any other act or deed whatsoever, which, according to the law, may be interpreted to import a contravention of the said clauses irritant, or any of them, and without the burthen of any other *acts, deeds, or debts*, done or contracted by them, either before or after the succession to the said lands, and the person so succeeding upon the said contravention, is to be subject and liable to the same irritancies, to which the whole heirs of taillie above specified are to be subject and liable through the whole course of succession, in all time coming."

The question was, Whether the words "acts and deeds," and "facts and deeds," in the irritant clause, must be read as including debts? The pursuer contended, that the use of the three terms, "acts, deeds, or debts," in the resolute clause, showed that the entailor did not intend "debts" to be included under the terms "acts and deeds," or "facts and deeds," in the irritant clause.

The Lord Ordinary pronounced the following interlocutor:—"Sus- tains the defences, and assoilzies the defender from the conclusions of the petition, and decerns; and finds the defender entitled to expenses."

* NOTE.—It seemed to be admitted at the debate, and is at any rate clear, that, after the late judgments in the House of Lords, the objection to the prohibi- tory clause, that it contains no sufficient prohibition against the contraction of debts, cannot be maintained. But it is still contended, that the irritant clause is defective in relation to debts; and this objection is rested, principally, on the terms of the concluding portion of a provision, introduced after the declaration of entail and resolution, in relation to the manner in which it shall be competent to the next heir of entail to establish in his person a right to the lands entailed, in case of a contravention by a preceding heir.

* The irritant clause (which will be found on page 12 of the printed deed, com- mencing between letter C and D) appears to the Lord Ordinary to be in itself perfect. The words 'fact or deed,' as used in a limited sense in the prohibitory

No. 96.

Feb. 26, 1845.
M'Grigor v.
Hamilton.

No. 96. The pursuer reclaimed.

Feb. 26, 1845.
M'Grigor v.
Hamilton.

LORD MACKENZIE.—This is an adjudication. Now, can an heir of entail stop an adjudication? It is for his own debt, and makes a forfeiture which he can only

clause, (page 11, letter C,) were referred to as restricting the meaning of the words 'acts and deeds' in the irritant clause. Now, it may be observed, that the form of expression in the prohibitory clause at letter E, page 11, renders it doubtful whether even in that clause the entailor does not use the words 'deeds' as including or comprehending debts. But be that as it may, the Lord Ordinary takes it to be clear, that the words 'acts and deeds' are general words, apt and proper for expressing (as they do truly include) all acts of contravention, and that they cannot be held as of themselves insufficient to comprehend debts. Upon this point it is sufficient to refer to the language of the Act 1685, and to the remarks of Lord Jeffrey and Lord Moncreiff, in the case of Lockhart, 20th May 1841, (3 Dunlop, 904.) At the same time it is an equally clear point, that, by the collocation of the words in the particular clause, or by reference back to other parts of the context, they may be made to have a more limited application, and that if it be doubtful in what sense they are used—the general or the more limited—then, according to the rule of strict construction, the latter must be adopted, and the former rejected. The only question, therefore, here is—Is there any ambiguity in regard to the meaning of the words 'acts and deeds,' as occurring in the irritant clause? The Lord Ordinary thinks there is none. He thinks that they are so placed in that clause as to prevent all ambiguity whatever, and to make it a matter free from any doubt or uncertainty, that they apply to and comprehend debts, as well as all the other things which are prohibited; for the clause declares, 'that if the said John Buchanan, or any of the said heirs of tailzie, shall act and doe, in the contrary of the particulars above mentioned, or any of them, or neglect to fulfil the conditions above specified, or any of them, then, and in that case, all and every one of such acts and deeds, with all that shall happen to follow, or may follow thereupon, shall be, *ipso facto*, void and null;' and one of the particulars above mentioned, against which the prohibitory clause is directed, is the contraction of debt.

"If this be the state of the case so far, it is apprehended that it would require something very explicit in the subsequent part of the tailzie to render ineffectual that which had been aptly and unequivocally done in the appropriate part of the deed, in execution of the indisputable intention of the maker of it; but, in the opinion of the Lord Ordinary, there is nothing of the kind. The resolution of the right of the heir contravening, is confessedly framed in an adequate form. At that point, therefore, there is a good prohibition against the contraction of debt, duly fenced with the requisite irritancy and resolution; and what is there, in that which follows, to weaken the otherwise effectual operation of the fencing clauses?

"After providing for the manner in which a title may be made up by the next heir in case of contravention, the deed further provides, (p. 12, letter G,) that the title may be so established in his person, 'without respect to any alteration,' &c., to be made by the person so contravening, and 'without the burden of any act or deed whatsoever, which, according to the law, may be interpreted to import a contravention of the said clauses irritant, or any of them, and without the burden of any other acts, deeds, or debts, done or contracted by them, either before or after the succession to the said lands, and,' &c. Had the provision stopped at 'the said clauses irritant, or any of them,' it is plain that there is nothing in it which could reflect back upon the words 'acts and deeds' in the irritant clause, so as to give them a more limited meaning than that in which, looking to it alone, they must be held to have been there unambiguously used. On the contrary, the provision, so far, is a positive declaration, that on contravention the next heir is

purge by paying the debt. I never saw it tried before. The question may be avoided by the creditor putting in a minute, restricting his adjudication to what is adjudgeable under the deed of entail. That will still enable the validity of the entail to be tried, for, if it is invalid, there will be an adjudication of the fee-simple.*

No. 96.

F.b. 26, 1845.
M'Grigor v. Hamilton.

The Court did not call on the counsel for the respondent.

LORD PRESIDENT.—This is a perfectly good entail. It would be carrying the doctrine of strict construction further than has ever yet been done to hold otherwise.

LORD MACKENZIE.—I think the entail is perfectly complete. The meaning is quite clear, and does not admit of construction.

LORD FULLERTON.—I think it clear that the Lord Ordinary is right.

There is no such rule of interpretation as that founded on by the defender, viz. that whenever you can find in one part of a long complicated sentence of a deed the words "acts and deeds," in addition to the words debts, you must in every other part of it hold the words "acts and deeds" to be exclusive of debts.

The rule, as may be inferred from many cases of the kind, is, that when the words "acts and deeds" occur as general words, having no technically definite meaning, they must receive the sense which the context clearly and unequivocally

is to be affected by any act or deed, which, according to the law, can be interpreted to be a contravention of the clauses irritant, or any of them, *ex hypothesi*, the contraction of debt is, according to the legal interpretation of the clauses of the deed, a contravention struck at by the irritant clause. True, it is further held, that the next heir may, on contravention, establish a title, 'without the burden of any other acts, deeds, or debts, done or contracted by them,' (that is, by their contravening,) 'either before or after their succession to the said lands.' This addition may be entire surplusage, or it may not. There may, or there may not be, other acts, deeds, or debts, which cannot be interpreted to import a contravention 'of the said clauses irritant, or any of them;' and if there are such, the declaration may be utterly unavailing, in respect of their not being comprehended within the irritant clause, and struck at by it. But in whatever way this may stand, the Lord Ordinary cannot hold that the insertion of the word 'debts,' after 'acts and deeds,' in this concluding part of the provision, following the proper absolute clause, can have the effect of restricting the sense of 'acts and deeds,' as immediately before used in the earlier part of the provision, to a more limited sense than must have otherwise been put upon them; and, still less, can persuade himself that it can have that effect upon these words, as used in the irritant clause. He has no idea that, according to the most rigid observance of the rule of strict construction, as explained by late decisions, an irritant clause, in which the words 'acts and deeds' are unambiguously used in their general sense, and distinctly to include and comprehend debts, and which, as respects debts, is consequently in itself clear, explicit, and perfect, can be weakened or curtailed in operation by such expressions, introduced in the place, and in the manner, in which they are presented in the deed of tailzie in question—and his opinion therefore is, that the irritant clause is not defective in its application to debts, as contended for by the defender."

* The question here started by his Lordship was not raised on the record, which was closed on summons and defences, nor by the parties in any way. It was reserved to take a judgment upon the merits on the case as it stood.

No. 96. confers upon them. This is the ordinary and the necessary principle of interpretation ; and its application leaves the case free from doubt. For I never saw an irritant clause more anxiously expressed.

Feb. 26, 1845.
King v.
Patrick.

If the said John Hamilton shall act and do in the contrary of the prohibition above mentioned, then all such acts and deeds are declared to be null. It is clear here that every thing is declared null which was acted or done contrary to the prohibition. The substantives are exactly adapted to the verbs by which the conditions are expressed ; so that, in this passage, the word " debts " could not find a place, and the words actually employed must include debts, because the contraction of debt is a thing done contrary to the inhibition. As to the expression employed in the concluding part of the passage, about the making up titles in the case of the forfeiture of a contravener, such clauses are clearly superfluous, and this is particularly applicable to that part of the passage which mentions acts and deeds or debts ; for the entailor has, by the words immediately preceding, provided that the lands should be free from the burden of any acts or deeds, importing in law a contravention of the clauses irritant. Now, the passage goes on, " or any other acts, deeds, debts done or contracted by them, either before or after the succession." If this has any meaning at all, it must mean acts, deeds, or debts, other than those which can import in law a contravention of the clauses irritant—words which are not only unnecessary, but seem to be in themselves of no effect. It is clear that the use of the word " debts," in addition to " acts and deeds," in this part of the sentence, can lead to no inference whatever limiting the meaning of these last words in the irritant clause itself, where that meaning is quite unequivocal, and includes every thing done contrary to the prohibition.

LORD JEFFREY.—I never saw any case so clear. The irritant clause is admirably well contrived. Both it and the resolute clause are perfectly complete.

THE COURT adhered, with additional expenses.

GIBSON-CRAIG, DALZIEL, and BRODIE, W.S.—CUNNINGHAM and WALKER, W.S.—Agents.

No. 97.

DR DANIEL KING, Pursuer.—*Rutherford—Moncreiff.*
MRS MARGARET PATRICK, Defender.—*Maitland.*

Expenses—Auditor's Report—Process—Husband and Wife—Divorce.—1. A party who had lodged objections to the auditor's report at the time it was made, held not entitled, at the distance of two years and a half thereafter, to lodge new and extended special objections to the report. 2. Rule adopted by the auditor of Court in taxing the defender's account of expenses, in actions of divorce at the instance of a husband against a wife.

Feb. 26, 1845.

CASE reported ante, Vol. IV. pp. 124, 567, and 590.

2d DIVISION.
R.

After decree of divorce had been pronounced in this case, the Court, of date 5th March 1842, remitted the defender's account of expenses (amounting in all to £1442) to the auditor for taxation. From the ac

count of William Wotherspoon, S.S.C., the defender's Edinburgh agent, No. 97.
the auditor taxed off the sum of £327. On 18th July 1842, a note of
objections was lodged in name of the defender, objecting to items taxed
off by the auditor to the amount of £91. Feb. 26, 1844.
King v.
Patrick.

This note of objections, in so far as concerned the Edinburgh agent's account, (the objections taken for the country agent having been withdrawn,) came on for advising on 7th December 1844. Wotherspoon having then averred that the accounts had been taxed by the auditor, not as between agent and client, but as between party and party, the Court remitted to him to report upon which of these principles his taxation had proceeded.

The report in the subjoined note was returned under this remit.*

* "In obedience to the remit contained in the above interlocutor, the auditor humbly reports, that the account referred to was not taxed either as between agent and client, or between party and party, but upon a principle which was long ago laid down by the Court in cases of the same description as the present—viz. in actions of divorce at the instance of a husband against his wife, and which has received the sanction of the Court on many subsequent occasions—that principle being, that the expenses to be allowed to the defender in such a case should only be such as ought necessarily and properly to be incurred in defending the action, according to the circumstances of the case.

* The first instance in which this rule was laid down, according to the auditor's recollection, was in a noted case of divorce at the instance of Sir W. Cunninghame Baird, Bart., against his wife, Barbara de la Motte, which depended in Court for many years, and in which enormous expenses were incurred. Before that time it had been understood that the defender's accounts in such a case fell to be taxed as between agent and client, and the defender almost every session gave in accounts of the expenses alleged to have been incurred, for which she demanded an interim-decree, as it was said, to enable her to conduct her defence. Those accounts were so utterly extravagant and unreasonable, that the auditor refused to tax them as between agent and client, without the instructions of the Court. Indeed the system pursued in conducting the defence seemed manifestly to be, to throw every obstacle which the forms of law would admit of in the way of the pursuer's obtaining his divorce, and to accumulate expenses in such a way as either to induce him to desist from the action, or to ruin him—the unfortunate husband having to pay both sides of the litigation. Thus, for example, every dilatory and preliminary plea which the utmost ingenuity could devise was stated, and if repelled by the Lord Ordinary was appealed to the Inner-House; and, although likewise repelled by the Court, all those unsuccessful proceedings were charged against the pursuer. Five or six counsel were employed by the defender on almost every occasion, and the most extravagant fees were stated for them. When a proof came at length to be allowed, most of the pursuer's witnesses were objected to; and if the commissioner repelled the objection, it was first appealed to the Lord Ordinary, and afterwards to the Court, and all the expense attending this, was in like manner charged against the pursuer. Immense charges were also stated for journeys made by the agent to France, England, and various parts of Scotland, which it was said were undertaken for the purpose of obtaining information to conduct the defence; and all this, it was alleged, had been done with the sanction and approbation of the defender, who was therefore liable for the expense to her agent, and of which the pursuer was bound to relieve her.

* On the other hand, a great part of the expenses thus claimed were objected to by the pursuer as being altogether extravagant and unreasonable, and not chargeable against him, whatever might be the case in regard to the defender's liability

No. 97. On 21st December 1844, the Court, after considering the report by the auditor, allowed the defender to give in special objections to the original report of the auditor, specifying her objections under distinct heads with reference to the different branches of the litigation, of which portions were disallowed. Special objections were accordingly lodged, on 24th January 1845, to different items taxed off, amounting to upwards of £200.

Feb. 26, 1845.
King v.
Patrick.

Upon this the pursuer objected, that the defender was not entitled, at the distance of two years and a half, to lodge new objections to the auditor's report.

The defender answered, that the original note of objections was lodged on the understanding that the auditor had taxed her accounts as between party and party; that it now appeared he had done so upon some new principle of taxation, of which she was ignorant when the original objections were lodged, and that she was now entitled to lodge new and more extended objections applicable to that principle on which the auditor had proceeded.

The pursuer replied,—That the principle on which the auditor proceeded was not a new one, but one which was in use to be acted upon in similar cases,¹ and the defender could not be heard to say that she did not know what that principle was. It was required by the Act of Sederunt that where a party meant to object to the auditor's report, he should "immediately" lodge his note of objections.²

The Court (with exception of the Lord Justice-Clerk, who doubted whether the facts brought the case within the rule of the Act of Sederunt, as it seemed that neither party knew on what principle the auditor had proceeded) were of opinion that the defender should have stated all her objections to the auditor's report at once, and that the special objections were too late.

for them; and it was contended, that if it should be held that a defender in such an action was entitled to throw every obstruction in the way of the pursuer—to state pleas, however irrelevant—to raise objections, however ill-founded—and so incur such enormous expense by useless and fruitless journeys, &c.—and that all those proceedings, however unreasonable and unsuccessful, should be chargeable against the pursuer, it would be an engine of the grossest oppression, and, in most cases, lead to the ruin of the husband—and would, in fact, amount to a denial of justice, except where he was possessed of boundless wealth.

"In these circumstances, the auditor considered it his duty to make a special report to the Court, and their Lordships had no hesitation in laying down the rule that has been mentioned, which has been acted upon ever since, in a great many cases which have received the sanction of the Court.

"At this distance from the time the account was taxed, (two and a half years ago,) the auditor cannot recollect the circumstances of the present case, but he has no doubt the account was taxed on the principle which has been mentioned, and he seems to have done so not very rigidly, seeing that the account has been sustained to the extent of £858 : 9 : 3, which, it must be admitted, is a very large sum of expenses to have been incurred in such a case, and where the parties are in a humble rank of life."

¹ Taylor v. Taylor, Nov. 17, 1831, (10 S. & D. p. 18.)

² A. S. 6th Feb. 1806.

THE COURT pronounced this interlocutor:—"Find that the said **No. 97.**

Mrs Margaret Patrick is not entitled to insist in the special objections lodged by her on the 24th day of January last, but is confined to the objections given in by her on the 18th day of July 1842; and allow her to arrange and classify the same in the way which may best bring them before the Court."

Feb. 27, 1845.
Brash v.
Steele.

LOCKHART, HUNTER, & WHITEHEAD, W.S.—WM. WOTHERSPOON, S.S.C.—Agents.

JANE BRASH and BROTHERS, Pursuers.—*G. G. Bell.*

WILLIAM STEELE and OTHERS, Defenders.—*Rutherford—Milne.*

No. 98.

Reparation—Assythemment—Process—Proof—Recovery of Writings.—1. In an action of assythemment and damages by the children of a party who had been killed by a stage-coach accident, against the proprietors of the coach, in which the pursuers had set forth, that they had been deprived of the paternal care and support, and had been grievously injured in their feelings,—Diligence granted to the defenders for recovery of documents, to instruct that the deceased did not support his family, but had been separated from them in consequence of his habits, and of the illicit intercourse he carried on; and, inter alia, for recovery of a correspondence alleged to have passed between the deceased and the party with whom he had the illicit intercourse. 2. Observed, that in granting such diligence, the Court were disposing of the general question of the admissibility (in the event of a jury-trial) of the evidence sought to be recovered.

ROBERT BRASH, surgeon in Selkirk, was a passenger by the *Defiance*, Feb. 27, 1845. a stage-coach running between Edinburgh and Carlisle, when it was overturned near Selkirk. In consequence of injuries sustained by this accident, he shortly afterwards died.

2D DIVISION.
Jury Cause.

Jane, Robert, and John Brash, his children, raised an action of assythemment and damages against the proprietors of the coach, setting forth that, by the death of their father in this manner, they had been deprived of his parental care, protection, and support, and had likewise suffered grievously in their feelings; and concluding for £4000 in name of assythemment and reparation, for the loss and injury they had sustained by his death, and in modum solatii.

In defence, it was stated;—That for some years before his death, the deceased had separated himself from his wife and family, and had ceased to have any intercourse with them—a separation which his habits had rendered desirable on their parts; that they had themselves done their utmost to bring about this arrangement, and, to accomplish it, had sacrificed a separate provision, which had belonged exclusively to his wife; that his family had received no share of what he derived from his professional employment, but, on the contrary, during his last illness he had bestowed his savings upon a woman who acted as his servant, and with whom (it was alleged) he lived in illicit intercourse.

No. 98. A motion was made by the defender for a diligence to recover, 1. Any agreements, or correspondence, or other documents, between the deceased and his wife or her friends, relative to his residing separate from his family. 2. Any proceedings before courts of law, or before arbiters, between the deceased and his wife's father, relative to the maintenance and support of her and his family, or relative to claims at their instance against him. 3. Excerpts from the books of any of the banks in Selkirk, of any accounts or entries therein in name of the deceased, during his residence there; and any cheques or orders for money drawn by him, after 8th July 1843, the date of the accident. 4. All letters, and copies of letters, between the deceased and the party above-mentioned, his servant, during the period of his residence in Selkirk, tending to instruct the averment of the defenders on record.

Feb 27, 1845.
Brash v.
Steele.

G. Bell, for pursuers, objected to the specification as irrelevant to the case. The defenders were not entitled to enquire into the whole history of the family, or into the separation of Mrs Brash, who had been for some years dead.

Milne, for the defenders, answered;—That the averments of the defenders upon record, that the deceased was separated from his family and that to obtain a separation the latter had made great pecuniary sacrifices, were relevant to mitigate damages; and it was with this view the diligence was sought. The third article of the specification was sought with the view of showing, that all the money drawn by the deceased subsequent to the 8th July, had been given by him to the woman above referred to, his servant.

LORD MONCREIFF.—This sort of proof has been allowed in former cases. At the summons is laid it is quite relevant. The pursuers libel that they have suffered from the loss of the paternal care and protection.

LORD JUSTICE-CLERK.—With regard to the third article of the specification we cannot allow that. We cannot allow you to recover evidence as to what he did after he was injured so severely that he died a few days afterwards.

The case having been delayed as to the fourth and remaining article of the specification, of this date

Rutherford, for the defenders, argued;—The pursuers' claim for damages was founded on the loss of the paternal care and support, and the injury they had sustained in their feelings. The necessary consequence of an action of this sort, was to admit evidence as to the father's character. In a question of damages, it could not be maintained that it was one and the same case, whether the father was a man of irreproachable, or of the most abandoned habits. The defenders meant to prove, that there had been a separation between the deceased and his family, and the worst feeling in consequence of this intercourse; that it was carried on in an open and undisguised manner; and that one of the pursuers, his

daughter, could not reside with him in consequence. The letters sought for might be most important evidence to instruct these facts, and to show that the family were aware of the intercourse, and how they acted upon that knowledge. No. 98.
Feb. 27, 1845.
Brash v.
Steele.

Bell, for the pursuers, answered;—That the Court were bound to protect this woman, who was not a party to the cause, from an attempt to establish adulterous intercourse against her. She might be entitled to protect herself, by refusing to give up the letters that were in her own hands, but as this would probably be only one side of the correspondence, she might be injured by the production of the other side, if the diligence were not refused.

LORD JUSTICE-CLERK.—I did not like the first aspect of this demand, especially when it was stated that it was founded upon the notoriety of the illicit intercourse. If it was notorious, it might easily be proved by other means than these letters. I am now rather inclined to think that we cannot refuse to allow them to be recovered. I lay aside entirely this woman's interest. I think she will be entitled to protect herself, by refusing to produce those that are in her possession; but I give no absolute opinion upon the point. With regard to those that are not in her possession, I can only say, she ought not to have written them. This is not a case where these letters are sought to be made public for the purpose of gain or some similar object; they are sought to be recovered in a Court of Justice—not in proof against her, but against the man. In these letters he may state the complaints made by his father-in-law and the family in reference to the intercourse. I have looked at the Session papers in the case of *Brown*,¹ and I see that there is an inaccuracy in the report. A proof was allowed by the Lord Ordinary, and so minute was the investigation gone into, that a diligence was allowed for the recovery of his books, to show that the deceased was incapable of keeping them, and that his wife made the entries in them. This was a very inquisitorial course of enquiry. In granting the diligence in the present case, I consider that we are disposing of the general question of the admissibility of the evidence sought to be recovered; and that the general objection, independent of any speciality, cannot be revived at the trial.

LORD MEDWYN.—I am of the same opinion. I go entirely upon the averment that the connexion was notorious, and that his family had for years left him. As the claim of damages is in modum solatii, I think we could not exclude this evidence. I would have great hesitation, however, in allowing the correspondence to be the sole evidence adduced.

LORD MONCREIFF.—I never had any doubts that the defenders were entitled to go into the matter; but I felt a delicacy in allowing these letters to be recovered from this private party. I now think that it belongs to this woman to protect herself; but there should be some guard put upon the admission of this evidence.

LORD COCKBURN.—The question is merely, whether this diligence should be

¹ February 26, 1813, (F. C.)

No. 98.
Feb. 27, 1845.
Officers of
State v.
Anderson.

granted ; and I have no hesitation in saying that it should. But I decline deciding whether these letters would be admissible at the trial. It is better never to decide prospectively a hypothetical question which has not occurred. I see that these letters may be admissible as evidence ; and therefore I give the party the requisite machinery for receiving them.

LORD JUSTICE-CLERK.—I must say that I consider that the defenders, if they have a right to recover these letters, have also a right to use them at the trial, even supposing that there should be no other proof of the notoriety of the connexion.

LORD COCKBURN.—There is a danger in going to trial with the hands of the Court tied up ; but I may say that I do not hold the letters to be necessarily excluded, because the defenders fail to prove notoriety.

THE COURT accordingly granted diligence for the recovery of the first, second, and fourth articles of the specification, and refused the third.

W. A. G. and R. ELLIS, W.S.—GREG and MORTON, W.S.—Agents.

No. 99. OFFICERS OF STATE, Pursuers.—*Sol.-Gen. Anderson—Sir W. Hamilton—Neaves.*
B. T. G. ANDERSON, Defender.—*Rutherford—Moncreiff.*

Teinds—Entail—Lease—Process—Reduction.—The proprietrix of an entailed estate obtained decree of valuation of her teinds, on the footing of the rent paid to her under an existing lease of her lands ; to this process the Officers of State and the tacksman of the teinds had been made parties, and it had been objected by the latter, that this lease having been granted by a predecessor in diminution of the rental and for a grassum, afforded no criterion of the value of the lands ; the proprietrix having subsequently reduced the lease on these grounds, as in contravention of the entail, the Officers of State brought a reduction of the decree of valuation ;—which action in the circumstances dismissed.

Feb. 27, 1845. MRS A. V. S. GASKAIN ANDERSON of Tushielaw, in 1821, brought a process of valuation of the teinds of her lands. This action was directed, inter alios, against the Officers of State, as representing the Crown, the titular, and against the Duke of Buccleuch, as tacksman of the ministers, known by the name of Deans of the Chapel-Royal, to whom the Crown was in use to give a life grant of these teinds, and also as an heritor with unvalued teinds. The summons was duly executed against the Officers of State, who entered appearance in the action. The procurator for the pursuer having craved a day for proving the rental of the pursuer's lands, the then solicitor of teinds, for the Officers of State, craved and obtained leave to give in interrogatories to be put by the commissioner to the pursuer's witnesses, and engrossed in the act and commission. These interrogatories, which were in the usual form, were—"Primo, Are the lands

2D DIVISION.
Lord Wood.
Teind-Clerk.

libelled set in tack, or what part of them are so let? Secundo, What was the rent of the lands? Tertio, When did the tacks commence, and how long did they endure? Quarto, What grassums were paid by the tenants on their getting such tacks? Quinto, If any of the lands under valuation were in the natural possession of the pursuer, then the witnesses to be interrogated what they think such lands would let for on a nineteen years' lease, and no grassums to be paid by the tenant or tenants to whom such lands should be so let? Sexto, What casualties were paid by the tenants, and what was the value of these casualties, according to the rate of the country?"

No. 99.
Feb. 27, 1845.
Officers of
State v.
Anderson.

After this, the Officers of State took no further part in the proceedings in the process.

The proof then proceeded, and two witnesses were examined, who proved that the lands were set in tack, and the amount of the tack-duty paid to the proprietor. Both of these witnesses were interrogated for the minister of Hawick, as to whether the lands were subset, and the amount of the subrent. The commissioner refused to allow the latter question to be put.

When the diligence was reported, the Duke of Buccleuch, the other party interested, gave in objections to the proof of value led by the pursuer, on the ground that the lease referred to afforded no evidence of the value of the lands, and that they were subset for a much larger subrent. He stated that Mrs Anderson's lands were held by her under the fetters of a strict entail; that about the year 1800, Mr Kirkton Anderson, then proprietor of the estate, granted a lease of the entailed lands for nineteen years, in favour of Mr Chisholm of Stirches, at a very low rent, and upon payment of a large grassum; and that subsequently, down to the year 1815, when Mr Kirkton Anderson died, the lease had been repeatedly renewed, with the view of ensuring to the tenant its currency for as nearly as possible nineteen years after his death; and that upon these renewals, an additional grassum was sometimes paid by the tenant to Mr Anderson, and occasionally an additional rent was stipulated for. He therefore objected that the proof was imperfect, the witnesses not having been allowed to answer the questions in regard to the rent paid by subtenants; and also, that the value of the lands was underrated, the grassums paid by Chisholm not having been taken into account. He further referred to the decision in the Queensberry cases, to show that the lease in question was a contravention of the entail.

In answer, it was stated for Mrs Anderson,—That if it were the case that the lease might be set aside by her, she would undoubtedly be a great gainer; but whether it were the case or not, it was *jus tertii* to the objectors, because the lease standing and subsisting as it did, must be held to be the rule for ascertaining the rent, of which the teind formed a proportional part; or, in other words, that she ought to pay teind according

No. 99. to the rent that she received, and not according to a rent that she did not receive.

Feb. 27, 1845.
Officers of
State v.
Anderson.

In March 1825, these objections and answers were disposed of by Lord Medwyn, Ordinary, by this interlocutor :—" Finds that the rule of valuation must be the existing leases of the lands, in so far as they are not affected by the grassums ; and allows the objector to state in a condescendence what he avers and offers to prove as to grassums having been paid at the granting of those leases, or of leases of which these may have been renewals ; and to state the evidence by which he will prove his allegations thereanent."

The Duke of Buccleuch subsequently obtained a diligence for the purpose of substantiating his allegations as to grassums having been paid ; but having failed in doing so, decree of valuation was pronounced upon the footing of the rent paid under the lease to Chisholm.

About nine months after this decree was pronounced, Mrs Anderson brought a process of reduction of the lease, and succeeded in having it set aside, of date 11th June 1828, on the ground of its having been granted in contravention of the entail, with diminution of rental, and in consideration of grassums.

In 1841, a reduction of the decree of valuation was brought by the Officers of State against Mr B. T. G. Anderson, Mrs Anderson's successor in the estate, on the grounds, 1. That it was pronounced without any sufficient or adequate probation ; 2. That it was obtained by the pursuer in a wrongous and fraudulent manner, in so far as it proceeded upon the rent alleged to be contained in the above-mentioned tack of her lands, which she reduced immediately after she obtained the said decree of valuation, on the ground *inter alia* that it proceeded upon false narratives, was granted with diminution of the rental, and was the last of a series of such leases, all granted in consideration of grassums more or less, and under fraudulent devices and agreements for diminishing the real and just value of the rent ; 3. That the valuation was unjustly led with diminution of more than a third of the just rent then paid for the lands, in so far as they were valued in stock and teind, parsonage and vicarage, at the nominal rent of £372 : 9 : 5, whereas the real rent at which they ought to have been valued was £930.

The Officers of State pleaded ;—

1. The decree of valuation was pronounced without competent proof having been led of the just rental of the relative lands.

2. The said decret was obtained by fraud on the part of the defender's predecessor, who first in the process of valuation approbated, as valid, a tack, which she immediately thereafter reprobated and reduced, as *ab initio* null.

3. The said decret is reducible on the ground of enorm lesion, the

valuation having been led with diminution of more than a third part of the just rent payable at the time of the valuation. No. 99.

4. In general, the lease of Chisholm, though not reducible by third parties, and, so long as it subsisted, good to all intents against them, still, when reduced by a party having title, that party can no longer maintain, against third parties, rights founded on the hypothesis of its validity. Feb. 27, 1845.
Officers of State v. Anderson.

5. In particular, the decret of valuation proceeds on the finding "that the rule of valuation must be the existing leases of the lands," while the lease on which the valuation was led was immediately thereafter reduced by the pursuer in the valuation "as null and void from the beginning;" consequently the valuation itself becomes forthwith virtually null and void, as founded on a lease judicially declared to have had at the time no legal existence.

6. In like manner, the decret of valuation proceeds on the finding, "that the rule of valuation must be the existing leases of the lands, in so far as they are not affected by grassum," while the lease on which the valuation was led was soon after reduced on the very ground of its being granted for such consideration; consequently the valuation itself becomes forthwith reducible, as calculated on a lease affected by grassum.

In support of the above pleas, and more particularly of the third, the pursuers referred, in cases, to the undernoted statutes and authorities.¹

Mr Anderson pleaded;—

1. The subject-matter of the present action is *res judicata* of this

¹ *Authorities for Officers of State*.—Erek. 4, 3, 3; Leslie v. Earl of Kintore, Feb. 1795; Ferrier v. Mudie, Jan. 31, 1829, (7 S. & D. No. 170;) Smith v. Hunter, 1823, (Shaw's Teind Cases, No. 19.)

Applicable to 3d Plea.—King's Letter to Teind Commission, Nov. 5, 1630, Connell on Tithes, App. No. lxxvi. 1st Edit., No. lxxviii. 2d Edit.; Act Teind Commission, July 25, 1632, Connell, App. xlviii. Vol. III. p. 107; Stat. 1633, c. 19; Articles of the Rectifications of the Commission, Dec. 1636, Connell, App. No. lii.; Act of the Commissioners against Collusion in Valuations, March 25, 1636, Connell, App. No. lxxvii. 1st Edit., lxxix. 2d Edit.; Commission for Valuation of Teinds in Parliament, 1690, c. 30; Stat. 1707, c. 9; Connell, Vol. I. p. 443; Connell's App. No. lx. Case 8, Case 36; Forbes on Tithes, p. 405; Marquis of Douglas, July 1696, (MS. registered Decisions in Teind-Office, and Connell, l. 450;) Record of Court of Teinds, Vol. IX. p. 411, (1 Connell, 381;) McKee v. Sinclair and Scott, (12 S. & D. p. 822;) Meldrum v. Colquhoun, Jan. 1672, (Forbes, p. 405;) Laird of Cavers, Connell, I. 449.

Authorities for Mr Anderson.—Thomson v. Officers of State and Earl of Gallovay, (M. 10687;) Stat. 1633, c. 19; Stat. 1690, c. 30; Stat. 1707, c. 9; Connell, Vol. II. p. 238, App. No. 79; Connell, Vol. II. p. 111, and p. 295; Minister of Kinnoull v. McDonald, (1 W. & S. App. Cases, p. 297.)

No. 99. Court; and the reasons of reduction founded on were proposed and repelled in the process of valuation.
 Feb. 27, 1815.
 Officers of
 State v.
 Anderson.

2. The decret and valuation under reduction having been obtained in foro, and having been lawfully led against all parties having interest, can not be called in question on any ground but that of collusion, under the provisions, and in terms of the Act 1690, chap. 3.

3. The circumstances under which the decret in question was pronounced, do not infer either fraud at common law, or collusion in terms of the Act 1690, chap. 20, against the defender's author, by whom it was obtained.

The Lord Ordinary reported the case.

LORD JUSTICE-CLERK.—It is not necessary for us to enter into the general discussion in the cases as to the statutes there referred to. I do not think there is any ground of challenge, or foundation for the action in point of fact. It is a reduction of a decree of valuation, which was duly instituted in the Court of Teinde—the Crown was duly called, and appeared, and gave in a set of questions to be put to the witnesses, which appears to be in the common form. These questions were calculated to bring out the very point in respect of which the present action of reduction is instituted. After this the Officers of State appear to have taken no subsequent proceedings. Whether they thought that the tacksmen would fight the point, I do not know; but they had an opportunity of contesting it themselves. The Duke of Buccleuch, however, goes on and objects to the lease of the estate to Chisholm being made the basis for the valuation, as being granted upon payment of a grassum, and with diminution of the rental, which he says the heir of entail might challenge in virtue of the decision in the Queensberry cases, as a contravention of the entail. To this Mrs Anderson very fairly answers, If your statements be correct, I may be able to reduce this lease; and if I succeed, I will be a great gainer; but whether the lease may be set aside or not is *jur tertii* to the present question, as the existing lease must be the rule of the valuation. The case then comes before Lord Medwyn. The Crown had left its interests as titular to be protected by the tacksmen, the party in the beneficial enjoyment. The point is disposed of by Lord Medwyn, who finds “that the rule of valuation must be the existing leases of the lands, in so far as they are not affected by the grassums;” and the Duke of Buccleuch subsequently fails to establish that any grassums had been paid. This judgment becomes final, and the valuation is approved of on this principle. Lord Medwyn's interlocutor was pronounced in March 1825, being five years after the decision in the Queensberry cases. We are not dealing with a case founded upon some unknown and latent reason of reduction. That is not the nature of the one before us. The objection here is one under the law of Scotland. This lady afterwards proceeds to reduce the lease, and succeeds in setting it aside, but not till three years after Lord Medwyn's interlocutor. A process of reduction requires outlay and expense, and the benefit a pursuer may obtain by it, he obtains for himself. Is the titular, then, who never offered to try the question for her, entitled to take the benefit of this action, obtained at her own expense, and by her own exertions? It is not said that

Lord Medwyn's law was not correctly applicable to the state of the case as it then stood. It was correct law, and must be held to be so, as it was acquiesced in by the pursuers. Of what, then, does the Crown complain? It is said that, at the time this decree of valuation was pronounced, this lady had it in her view to reduce the lease, and that she did so shortly afterwards. Be it so. I remember a case in which a valuation was carried through, upon the footing of a current lease, although the termination of the lease, at which there would be a large increase in the rent, was quite near. As for the notion, that a fraud in law has been committed here, there is no ground for it whatever. No question arises under the statutes referred to, and I do not consider that we are called upon to interpret them. The case of the Crown is without foundation in fact or law, and I only regret that we cannot find the Officers of State liable in expenses.

No. 99.
Feb. 27, 1845.
Officers of
State v.
Anderson.

LORD MEDWYN.—I am entirely of the same opinion. There is no room here for suspecting collusion. The Duke of Buccleuch was made a party to the action of valuation, and appeared. There is no point in the present case which was not known or suspected in that process; but the Duke there failed in his proof. The right of which Mrs Anderson has availed herself, she was entitled to exercise, and I can see no ground on which the Officers of State can be entitled to prevail in this action.

LORD MONCREIFF.—I am of the same opinion. It is not necessary to decide any question under the statute. There is no evidence of collusion here. The process of valuation was regularly brought, every person having an interest being called. The objection, that the lease had been granted on payment of a grassum, was stated; upon which Mrs Anderson says, without disguise, that it might very possibly happen that she might thereafter have occasion to reduce the lease. The Officers of State allow the case to go on, no evidence of a grassum having been paid is brought, and decree of valuation is pronounced. After Mrs Anderson, at her own expense, has obtained decree of reduction, these pursuers seek to take advantage of the decision in her favour. She might have failed in obtaining it. It would be most dangerous to allow reduction of this valuation. We do not know how many valuations of entailed estates there may be placed in the same circumstances.

LORD COCKBURN.—The case is quite free from all points of law. I think that the point raised here was very vigorously proponed and repelled in the valuation. I cannot see where there is any fraud.

THE COURT accordingly repelled the reasons of reduction, and assolized the defender.

W. H. SANDS, W.S.—JOHN ARCH. CAMPBELL, C.S.—Agents.

No. 100.

THOMAS BUCHANAN CAMPBELL, Pursuer.—*Rutherford—Ingliston*.

Feb. 27, 1845.

GEORGE CRUICKSHANK, Defender.—*Marshall—E. S. Gordon*.Campbell v.
Cruikshank.

Discharge—Novation—Copartnery.—Circumstances which were held to afford no evidence that the creditor of a company, after its dissolution, had substituted the sole liability of the partner continuing to carry on the business, instead of the liability of the company; and that certain transactions of the creditor with that partner did not infer *novatio debiti*.

Feb. 27, 1845.

1st Division.
Ld. Robertson.
N.

ALEXANDER MARSHALL and George Cruickshank carried on business together as plumbers at Aberdeen, under the firm of Marshall and Company, for several years prior to 1st May 1843, when the company was dissolved by consent. They were then indebted to Thomas Buchanan Campbell, merchant, Edinburgh, on a current bill for £92 : 3 : 6, accepted by the company, which fell due on 16th June following.

By the minute of dissolution, which was communicated to Campbell, Cruickshank, who was to retire altogether, was authorized to sign the company's firm for the current obligations; and Marshall, who was to continue the business, became bound to relieve him of all the obligations of the company, and to exhibit discharges within six months.

On 12th June, Campbell transmitted two bills to Marshall for acceptance—the one for £60, and the other for £33 : 3 : 6—being together the amount of the original bill, with interest and price of stamps added. In the letter transmitting these, he said—"I will require to hold Alexander Marshall and Co.'s bill until these are paid." Marshall accepted these bills himself individually, and returned them to Campbell, who thereupon remitted him money to retire the original bill, which was in the hands of the bank. It was accordingly retired, and transmitted to Campbell.

Marshall retired the bill for £60, but dishonoured that for £33 : 3 : 6. He likewise dishonoured bills which he granted to Campbell in August following, in payment of an account then rendered by him for goods furnished partly to the company, and partly to Marshall individually, subsequent to its dissolution. £26 : 14 : 5½ was the price of the goods included in this account which had been furnished to the company.

In 1844, Campbell raised action against the late firm and the individual partners, concluding for payment, first, of £33 : 3 : 6 as the balance of the bill in his hands for £92 : 3 : 6 accepted by the company, the retirement of the subsequent bill for £60, accepted by Marshall, being held a payment to account; and, second, £26 : 14 : 5½ for goods furnished to the company.

Cruickshank¹ pleaded in defence,—1. The defender having, in the No. 100.
 knowledge of the dissolution of the company, and of the terms of the
 minute of dissolution, rendered the account libelled on to Marshall as an Feb. 27, 1845.
 individual, and taken his acceptance in satisfaction thereof, his claim, in Campbell v.
 so far as regards the company, must be held to have been extinguished Cruickshank.
novatione. 2. The presumption of law was, that the bill for £92 : 3 : 6,
 was retired with the funds of the acceptors. 3. The pursuer was barred
 from insisting in either of these claims, he having, in the knowledge of
 the obligation come under by Marshall to discharge the company's debts
 within a limited period, given him time, and enabled him to exhibit to
 the defender discharges of the claims concluded for ; more especially, as
 the pursuer had made no claim against the defender until after the ex-
 piry of that period.

The Lord Ordinary pronounced the following interlocutor :—“ Finds
 that, on the 13th of February 1843, the company of Alexander Marshall
 and Company, of which Alexander Marshall and the defender were
 partners, stood indebted to the pursuer in the sum of £92 : 3 : 6, by ac-
 cepted bill which fell due on the 16th of June 1843 : Finds, that on the
 16th of June 1843, the said Alexander Marshall transmitted to the pursuer
 a copy of a proposed minute of dissolution of the company, and at the same
 time expressed his anxiety about the retiring of the said bill then current :
 Finds that the pursuer, in answer, stated that the proposed minute ap-
 peared to be reasonable, and proposed that the bill should be renewed :
 Finds that, by the said minute of dissolution, it was *inter alia* agreed that
 the company should be held as dissolved on the 1st of May 1843, except-
 ing as to the current obligations, for which the defender was authorized
 to sign the company firm ; and that the said Alexander Marshall became
 bound to free and relieve the defender of all the obligations of the com-
 pany, and to exhibit discharges of the debts within six months of the
 date of the agreement : Finds that, on the 12th of June, the pursuer
 transmitted to the said Alexander Marshall two bills, one for £60, pay-
 able at one month after date, and the other for £33 : 3 : 6, payable at
 three months after date, being the amount of the said first-mentioned bill,
 with interest and stamp ; and, in the letter transmitting the same for
 acceptance, he wrote in these terms :—‘ As I will require to hold Alex-
 ander Marshall and Co.’s bill until these are paid, I shall arrange the mat-
 ter with Mr Chivas (the bank agent) direct.’ Finds that, on the 13th of
 June, the said Alexander Marshall returned the said bills, and at the same
 time requested the pursuer to remit money for retiring the said first-men-
 tioned acceptance : Finds that, on the 15th of June, the pursuer accordingly
 remitted to the said Alexander Marshall, in place of Mr Chivas, the sum
 of £92 : 3 : 6, for the purpose of retiring the said bill, and at the same time

¹ Marshall did not defend.

No. 100. requested that the bill should be transmitted to him, adding, that it would be given up when the new bills were paid : Finds that the bill for £92 : 3 : 6 was accordingly retired out of the pursuer's funds, and retained by him after having been transmitted as aforesaid : Finds that the said bill for £64 was retired by the acceptor, but that the said bill for £33 : 3 : 6 was dishonoured, and that the pursuer now demands from the defenders in this action the sum of £32 : 3 : 6, as the balance of the company's bill of £92 : 3 : 6, with interest from the time when the same fell due : Finds that furnishings were also made by the pursuer to the said company to the amount of £29 : 1 : 1½, to account of which the sum of £2 : 6 : 8 was credited : Finds that the balance of £26 : 14 : 5½ was included in an account rendered to the said Alexander Marshall on 2d August 1841 along with the price of other goods furnished to him, and the amount was included in certain bills granted by him, which bills were not paid : Finds no evidence of the averment that the said bill for £92 : 3 : 6, the said account, were exhibited by the said Alexander Marshall to the defender as discharged documents : Finds that, under these circumstances, the pursuer did not, either *novatione debiti* or otherwise, discharge the said company of Marshall and Company, or the defender, a partner thereof, either of the balance of the said bill of £92 : 3 : 6, account due by the company, and therefore repels the defences, and succeeds in terms of the libel : Finds expenses due." *

The defender reclaimed.

LORD PRESIDENT.—After full consideration, I am satisfied that the interdict should be adhered to. There is no evidence of novation, nor of that species of giving of time, sufficient to relieve the defender of his obligations as a partner of the firm of Marshall and Co. I go materially on the fact, that it is not proved that either the bill or the account were produced to the defender by Marshall as discharged documents.

LORD MACKENZIE.—I am of the same opinion. I do not see that the defender is in the situation of a cautioner. I am not satisfied that Marshall had not the right of signing for the company, though by the agreement it was given to the defender.

LORD FULLERTON.—The debt now pursued for was part of one undoubted

* "NOTE.—Discharge by novation is not to be presumed, more especially where no new party is taken bound, or additional security or advantage of any kind obtained by the creditor. The recent cases have rather narrowed than extended this ground of defence, and the Lord Ordinary can see no reason for holding that the pursuer intended to liberate the defender, or actually did so.—*McBray v. White*, 17th June 1824, (3 Shaw, p. 146;) *Buchanan, Watson, & Co. v. Adam*, 20th June 1833, (11 Shaw, p. 762.) Nor can the defender, who was a primary obligant as much as his partner, represent himself in the position of a cautioner who has been liberated in respect of time having been given to the original debtor."

due by the company, and consequently by the defender, Craicksbank, as well as No. 100.
his copartner, Alexander Marshall.

The defence comes to this, that the pursuer having originally both of those parties bound, chose to restrict himself to the liability of Marshall, and thus substituted for the joint liability of both the single liability of one. This, though not presumable, may be proved; accordingly, we did find it proved in the late case of *McKechnie v. Dunlop*. Feb. 27, 1845.
Campbell v. Craicksbank.

The question is, Has it been proved here? And I agree with the Lord Ordinary in thinking that it has not.

In the first place, in regard to the taking of the bill from Marshall, all pretence for holding that to amount to *novatio* or *delegatio* is excluded by the consideration, that the pursuer, while he agreed to take it alongst with the other bill, since paid, as a voucher of debt from Marshall, expressly stipulated that he should be allowed to retain the former voucher granted by the company until Campbell's bill was paid, that company bill being, in the mean time, retired with Campbell's own money. It is clear, then, that so far from having his acceptance of the security of one of the partners, in place of the security of the two, he just stipulated that he should continue to hold the security of both.

And if this was the case, when he took the first bill from Campbell, the subsequent renewal could make no alteration; because he continued to hold the original bill of the company, and has it at this moment.

There is not the slightest room for holding that he discharged the company; on the contrary, it is, I think, proved that he intended to hold them bound till Campbell's separate obligation was paid.

Secondly, as to the account, it appears to me to be defective evidence of what the defender is bound to prove. It is a mere statement of the account as between the pursuer and Alexander Marshall, the partner remaining in the business; in which part of the credit side is "By Bill," meaning the bill which he had granted to the pursuer; and it is attested by Campbell's signature. It is perfectly good, then, as showing the state of the proceedings between him and Alexander Marshall; but it is good for nothing as evidence that he, Campbell, had discharged any other person, whom he might have held bound for any part of the account. For it cannot be well maintained that the entry "By Bill" extinguishes any part of the debit side of the account, unless the bill be paid.

The essential elements of evidence in the case of *McKechnie v. Dunlop* are here wanting.

There, the debt was not only carried to the debit of the new company, but, according to a document signed by the creditor, the debt, as standing against the old company, was absolutely extinguished, by a settlement expressing that that debt had been paid in cash.

Here there is nothing of the kind. There is nothing but a statement of the original debt as standing against one of the partners, without the slightest indication of any intention on the part of the pursuer to discharge the other.

But, then, the defender maintains, that supposing the plea of *delegatio* to be ill founded, he is now free, in consequence of the pursuer giving time to the remaining partner, who, it is said, was bound by the articles of dissolution to relieve the defender of all the company debts—the defender being, as it is said, a mere cautioner, and entitled to all the privileges of a cautioner by the virtue of those articles.

No. 100. I think this view of the effect of the articles, whether communicated to the pursuer or not, is certainly erroneous.

Feb. 27, 1845.
Campbell v.
Cruckshank.

There may be cases in which a creditor holding two or more parties bound, but entitled to relief among each other in a certain order by the very terms of the obligation, may lose his claim against some of them by so dealing with the others as to impair the relief which the former held against the latter.

But when a creditor holds two or more parties bound to him, without any qualification express or implied, and is entitled to proceed against one or other in the way he thinks best for getting payment, he cannot be affected by any *ex post facto* arrangement which these parties choose to make for regulating their responsibilities among each other.

Now that was the case here. The pursuer was entitled to go against either the defender or Campbell, as he chose, and when he chose, and according to the view which he took of the probability of obtaining payment. He surely was not bound, on the penalty of losing his claim against the defender, to insist against Marshall within six months; because, by a private agreement between the partners, the one had agreed to relieve and report discharges to the other within that period. I see a similar plea was maintained in the case of Denny v. Adam, in which I was Ordinary; and I still adhere to the opinion I formed upon it in that case, and which is expressed in the note.

Such an agreement does not entitle the retiring partner to throw the responsibility of seeing that his copartner perform the obligation to pay the company debts within a certain period, on the company creditors.

On the contrary, it only strengthens the title which the retiring partner, at any rate, has to watch over the winding up of the company concerns. It enables him to compel the remaining partner to pay the company debts, and report discharges, within the specified period; but it cannot, on any principle of law, bind the company creditors to insist for payment in any other form than that which they think most conducive to their purpose, or forfeit any right which those creditors have to insist on all the parties originally bound.

On these grounds, I think the interlocutor ought to be adhered to.

LORD JEFFREY.—I entirely agree. As to the giving of time, Lord Fullerton has anticipated me. It is a mere confusion and perversion of the principles on which such matters rest. As to novation, again, I think, so far as the bill is concerned, there is no ground for it whatever. The keeping of the company document was a distinct intimation that the pursuer intended no novation.

With regard to the account, it is not less than absurd to say that the pursuer intended to relieve the company, and take the individual. Marshall was just the company winding up by his hand.

THE COURT accordingly adhered, with additional expenses.

SAMUEL BEVERIDGE, S.S.C.—GEORGE MUNRO, S.S.C.—Agents.

DUNCAN MONTGOMERIE, Defender.—*Rutherford*—*T. Mackenzie*.

No. 101.

A B, Haver compearing.—*Craufurd*.

Mar. 1, 1845.

Montgomerie v.

A B.

Process—Diligence.—A law-agent who had a hypothec over certain documents in his possession for a business-account due to him by his employer, the pursuer of a jury cause, appointed to produce them, without payment or reservation, under a diligence obtained by the defender, but found that the pursuer could not use them at the trial without paying his agent's (the haver's) account.

THE defender in a jury cause obtained a diligence to recover documents, under which he examined a former law-agent of the pursuer's as a haver. The haver pleaded his hypothec as an agent, and declined to give up the documents unless paid the business-account in the course of which they came into his hands.

Mar. 1, 1845.

1st DIVISION.

The Commissioner reported the matter to the Court.*

Rutherford and *Mackenzie*, for the defender, contended that there was a clear distinction between the case where documents were required from an agent by his client, or for his behoof, and by a third party having no connexion with him, but requiring them in *modum probationis* in a cause. In the latter case, the agent was bound to produce, under diligence, without either payment or reservation.

Craufurd, for the haver, answered, that the pursuer (the client) could not be allowed the use of the documents without paying his agent's account; and there was no form of process by which the defender could have the benefit of them, and not the pursuer.

LORD MACKENZIE.—The case is clear in principle. I never understood that a party could pledge his titles as against his adversary.

The other Judges concurred.

THE COURT accordingly appointed the haver to produce the documents under the defender's diligence, but found that the pursuer could not make use of them at the trial without paying the agent's (the haver's) account; and found the haver liable in expenses.

* The pursuer in the cause had a joint diligence; but, although he desired the documents also, did not maintain that he could recover them from the haver without paying his account. There was no suspicion of collusion between the parties.

No. 102.

REVEREND ARCHIBALD LIVINGSTONE, Pursuer.—*Inglis*.
 REVEREND JAMES CLASON and OTHERS, Defenders.—*Dunlop*.

Mar. 1, 1845.
 Livingstone v.
 Clason.

Process.—Circumstances in which certain defenders were allowed to withdraw from an action depending in the Outer House, under reservation that they should be liable for their share of the previous expenses, if such were ultimately awarded to the pursuer, and that he should be entitled to take decree against them therefor in that action.

Mar. 1, 1845.

1st Division.
 Lord Cuning-
 hame.
 W.

THE Reverend Archibald Livingstone, minister of Cambusnethan, in the Presbytery of Hamilton, raised an action of reduction of a libel against him, bearing to be at the instance of that Presbytery, and the whole proceedings thereon, upon the ground that the Presbytery was partly composed of incompetent members, viz. ministers of *quoad sacra* churches.

The action was in dependence before the Lord Ordinary at the date of the non-intrusion disruption, when several of the defenders (both parish and *quoad sacra* ministers) seceded from the Church. These persons gave in a minute, moving the Lord Ordinary to “order their names to be withdrawn from the said action, to the effect that they should not be liable for any further expense of process incurred therein, under reservation always of their liability for the expenses of process hitherto incurred”—if the pursuer should obtain decree therefor. The record was still open, and the Presbytery of Hamilton, as constituted after the disruption, judicially declared their readiness to take up the suit, and meet the pursuer on all his pleas.

The pursuer gave in answers to the minute in these terms:—

“Though the persons in whose names the minute was lodged had now ceased to be members or clergymen of the Church of Scotland, they were not entitled to withdraw themselves from the present action unless upon payment of expenses, and a consent to decree of reduction being pronounced against them, as craved. He stated further, that their abandonment of the pleas, hitherto maintained by them, entitled the pursuer to insist for decree against them to that extent, seeing that their liability for expenses could not be legally dependent upon the pursuer’s ultimate success as against other parties, but arises from their continuing in the litigation till the present stage, and then virtually admitting their error, by abandoning further opposition to the decree of reduction craved against them.

“It is not enough for the present defenders to withdraw from the litigation, merely to the effect of saving themselves further expenses in it. They were parties to the wrong complained of, and must either consent to decree being pronounced against them with expenses, or go on with

the litigation, to the effect of showing that their pleas are well-founded, No. 102.
and that the pursuer is not entitled to the remedy for which he applied.”

Mar. 1, 1845.
Livingstone v.
Clason.

The Lord Ordinary pronounced the following interlocutor:—“In respect, 1st, That this action of reduction and declarator was originally directed against the Presbytery of Hamilton for the time being, as primary defenders at the date the action was raised, (23d April 1842,) and against the individual members thereof, for acting ostensibly in that capacity; 2d, That it is not denied that the parties now desiring to withdraw have truly ceased to be members of Presbytery; and, 3d, That the Presbytery, as now constituted, have judicially declared their readiness to take up the suit, and to meet the pursuer on all his pleas in this reduction—Finds that the said parties who have asked leave to withdraw are entitled to have it found that they are no longer to be held as parties interested in, or responsible for, the future proceedings in this cause, and finds and declares accordingly, under the condition expressed in the minute, that they shall be liable in their share of the previous costs, if such are ultimately awarded to the pursuer; and appoints the cause to be enrolled in the motion roll *quoad primum*, that the further procedure therein may be arranged; declaring that all objections by the pursuer to the validity of the original proceedings, and decree pronounced by the Presbytery under reduction, shall remain entire to him, notwithstanding that the parties before mentioned have ceased to continue the litigation.” *

The pursuer reclaimed.

THE COURT adhered, “under this reservation, that the pursuer shall be entitled to take decree in this process against the defenders,

* “NOTE.—The processes in which the preceding interlocutor, and another to the same effect, in a relative process of suspension, have been pronounced, bring under the review of this Court a certain judgment of the Presbytery of Hamilton, as constituted in 1842, finding the pursuer guilty of certain criminal charges, supposed to infer deprivation, or other serious consequences, to the pursuer. The pursuer's ground of challenge is, that the decree was pronounced by a court composed of incompetent members. The individuals thus complained of, and other members of presbytery, have, since the action was brought, retired from the Established Church; and, thus ceasing to be members of the Presbytery of Hamilton, they have intimated that they decline proceeding further with the cause. The pursuer would, of course, be entitled to decree of suspension and reduction, if the Presbytery of Hamilton, as now legally constituted, had not taken up the case, and offered to maintain that the decree was competently and validly pronounced. The Lord Ordinary does not think he can, *de plano*, and before closing the record, and without full argument, give a judgment on that plea. But he is of opinion that the retiring members are entitled to decline further appearance as litigants, in the same manner as translated, or suspended, or (it might be) deposed members of presbytery, in cases of a different description, cease to be suitors, when their connexion with the presbytery is dissolved, in virtue of which alone they were cited to the original action.”

No. 102.

for whom the minute has been lodged for any expenses that may be awarded against them."

Mar. 1, 1845.
Laing v. Duff.
1 B v. C D.

WOTHERSPOON and MACK, W.S.—DALMAHOY and WOOD, W.S.—Agents.

No. 103. JOHN LAING, (Berrie's Trustee,) Advocator and Defender.—*Rutherford*
—Cook.

JOHN DUFF and OTHERS, (Morton's Trustees,) Respondents and Pursuers.—*Sol.-Gen. Anderson—Cowan.*

Landlord and Tenant—Title to Pursue.—Question, Whether the landlord has a direct action against a subtenant for rent?

Mar. 1, 1845.

1ST DIVISION.
D. Robertson.
N.

CIRCUMSTANTIAL case. It was an action for the rent of a warehouse, and two questions were raised—1st, Whether a party was to be held a subtenant or an assignee? And, 2d, Whether, if a subtenant, the landlord had a direct action against him for the rent? The second question was argued, but not decided, the Lord Ordinary and the Court holding that, in the circumstances, the party must be viewed as an assignee.

LOCKHART, HUNTER, and WHITEHEAD, W.S.—WILLIAM MILLER, S.S.C.—Agents.

No. 104.

A B, Pursuer.—*Inglis—Boyle.*

C D, Defender.

Jurisdiction—Foreign—Husband and Wife—Adherence—Divorce.—A party who had been domiciled in Spain came to Scotland, where he married a Scotchwoman, and, a few months thereafter, returned with her to Spain: the parties lived together there for some years, when they returned to this country: on their arrival at Belfast the husband left his wife there, stating his intention of not again living with her, and returned to Spain, where he continued subsequently to be domiciled: the wife proceeded to Scotland, where she afterwards resided;—Held that the Court had no jurisdiction to entertain an action of adherence at her instance against her husband.

Mar. 1, 1845.

1ST DIVISION.
D. Robertson.
T.

THIS was an action of adherence at the instance of a wife, residing in Scotland, against her husband, domiciled in Spain. No appearance was made for him in the action. It appeared that the wife was a native of Scotland, but there was no evidence that the husband was a native of Scotland. Previously to the marriage he had resided in Spain, where

he had been engaged in business as a fruit-merchant. The parties were regularly married in Glasgow in the year 1831, where the lady had previously resided. A few months after the marriage, they went together to Alicante in Spain. There they lived as husband and wife till June 1837, when both returned together to this country in a vessel which arrived at Belfast. At this place the husband went ashore, repeating to his wife an intimation which he had previously given her, that they then saw each other for the last time. She then proceeded to her mother's house in Glasgow, with whom she resided till June 1840, when she went to London, with the view of meeting her husband, who had then come there from Alicante, and of accompanying him on his return to Spain. No meeting, however, took place between the parties, the husband having declined the desired interview by a letter, which repeated his resolution of not again living with her. In July of the same year he returned to Alicante, where he continued subsequently to reside. His wife remained resident in this country. They never met again after their return from Spain in 1837. In letters, dated in 1841 and 1844, the husband repeated his resolution of not again living with his wife.

The husband was cited as furth of the kingdom, and personal intimation was made to him of the action. In answer, a paper was returned by him, denying the jurisdiction of the Court of Session, and declining to become a party to the action, stating also that there was no probability of his ever being resident in Scotland. A proof was then led by the pursuer before the Sheriff-commissary, to the effect stated above.

The Lord Ordinary having appointed the pursuer to state in a minute the grounds on which she maintained that the Court had jurisdiction to pronounce decree of adherence against the defender,

She pleaded,—That the locus contractus of her marriage being in Scotland, she was entitled to seek redress from the law of that country for the disregard of the obligations imposed by it on the defender. The offence of desertion might also be said to have been committed in Scotland, and was therefore cognizable by its law—the law which had given effect to the marriage. The pursuer could not be bound, in seeking her remedy, to follow her husband to a country to which he denied her access as his wife, and whose laws and customs were so widely different from those of her own; at all events, she was entitled to have decree in absence pronounced, *valeat quantum*.¹

¹ Walker v. Walker, Dec. 7, 1844, (7 Jurist, 87;) Ponsonby v. Ponsonby, March 18, 1837; Downie v. Downie, Nov. 18, 1837, (16 S. & D. 82;) Pirie v. Luan, (M. 4590.)

No. 104. The Lord Ordinary reported the case, adding the subjoined note.*

Mar. 1, 1845.
A B v. C D.

LORD JUSTICE-CLERK.—The question is, whether we have jurisdiction in this case. Independent of all consideration of the nature of the action, it appears to me that we have none. The defender has no connexion with Scotland whatever. He marries a Scotchwoman, but he leaves Scotland immediately afterwards. His employment is apparently fixed in Spain, and he has resided there constantly since his marriage, with the exception of two visits to England. Personal intimation of this action has been made to him, but he declines the jurisdiction of this Court. Nor have any funds been arrested for founding jurisdiction. Because she chooses to live in Scotland, that does not make his domicile

* **NOTE.**—The Lord Ordinary feels it his duty to report this undefended action of adherence to the Court, as a very important question of jurisdiction arises. The parties were married in Scotland in May 1831. It does not appear that the defender was either a native of, or carrying on any business in this country. Soon after the marriage, the parties went to Alicante, in Spain, where he resided, and where he continued to live with little intermission. He never appears to have returned to Scotland, and his wife lived with him at Alicante for some years. In 1837, he was with his wife at Belfast, where they parted, she having on this occasion come to Scotland. In 1840, he was in London, whither she went to meet him; but he declined having any intercourse with her, and returned to Alicante, where he is still resident. It seems distinctly proved that he has deserted his wife, and will not receive her into family with him; so that, if there was clear jurisdiction against the defender, decree of adherence would be pronounced. But the Lord Ordinary has great difficulty in sustaining the jurisdiction.

“He called on the pursuer to establish, if she could, that the defender was a Scotchman. But this she has failed to do, so that there is not even the circumstance of the forum originis in her favour. Neither does it appear that, at the date of the marriage, the defender was domiciled in this country, and his only place of residence was in Spain. He never appears to have had a home elsewhere. To Alicante, as to the domicile of the marriage, the parties repaired, where the defender has, with little exception, been resident ever since; and certainly nothing has occurred to give him a domicile in this country. He has been cited as furth of the kingdom; and although the proceedings have been intimated to him, he has made no appearance, and his only answer, as appears by the letters produced, is, that this Court has no jurisdiction over him. The Lord Ordinary is strongly impressed with the opinion that this view is correct, and that, however cruelly the pursuer may have been treated, this Court can give no redress. She, in truth, married a domiciled foreigner, who is not liable to answer in a Scots Court, merely because the marriage was contracted here. Neither can the Lord Ordinary go into the notion of pronouncing decree in absence, *valet quantum*, and leaving the rights of parties to be afterwards adjusted. The Court, in all such cases, should be satisfied that the jurisdiction is clear; and as guardians of the law, prevent, as far as possible, any incompetent and ineffectual judgment from going forth in questions of status. The decree of adherence is in all probability to be followed by action and decree of divorce; and those decrees proceeding in absence might, if there be an essential nullity from defect of jurisdiction, be set aside by the defender at any time, and perhaps after a second marriage had been contracted. The Lord Ordinary, therefore, if called on to pronounce judgment, would have dismissed the action; but in a matter of this kind, and in an undefended cause, he thinks the course of reporting to the Court more suitable.”

here. I can see no ground on which we could sustain our jurisdiction against him. No. 104.

Is there any thing in the nature of the action of adherence which gives us a jurisdiction? The law under which the action is brought, is that of the statute 1573, c. 55. This Act peculiarly points to the defender being resident in this country. After the first judgment of adherence, the proceedings are directed to take place before the "Archbishop, Bishop, or superintendent of the country (now the presbytery) where the offender remains." The whole process implies personal communications and admonitions, although they may not now be followed out. I cannot conceive how the process can go on, if the defender has not a proper domicile in this country, where he may be cited. It is true that Erskine¹ states that the process might *perhaps* be sustained against the deserter, though not residing in the kingdom; but in saying this, he assumes that this could only be done where the defender had left the kingdom from a wilful purpose of deserting, and abandoning the conjugal society, and then the *desertion* by leaving Scotland may give jurisdiction. There is no such case as that here. And he says previously, that it would seem that the only persons who can be sued in a process of adherence, are such as continue within the kingdom, and who are alone capable of receiving admonition from the Church, or incurring the censure of excommunication. In the case of Walker v. Walker, Lords Jeffrey and Fullerton felt great doubt; but, besides, that case is quite distinguishable from the present. I think that the view of the Lord Ordinary is the correct one, and that we must dismiss the action.

LORD MEDWYN.—I am of the same opinion. We are not treating the case of a Scotch marriage, but rather of a Spanish one celebrated in this country. From 1831 to 1837, the defenders are domiciled in Spain, living under the marriage-law which was contemplated by the parties when they were united. After his marriage, the defender apparently was never in Scotland at all; it does not appear how long he was in Scotland before it. We have no jurisdiction over him; nor can I see what right the lady, his Spanish wife as I may term her, can have to avail herself of the marriage-law of this country. The statute 1573 has only application to the inhabitants of this country. Observe the nature of the process. There is prescribed first, private admonition by the presbytery—then the case is remitted to the minister of the parish "where the offender remains," and in case there be none, or he will not execute, to the minister of the next adjacent kirk thereto, who is to proceed with public admonitions, and, if they are contemned, to the sentence of excommunication. I think we must dismiss the action.

LORD MONCREIFF.—I am of opinion that we have no jurisdiction here. That is a clear point. Though the parties were married in Scotland, this defender lived in Spain before that, and intended, and did return to Spain immediately after his marriage, where he now resides a domiciled Spaniard. Had the parties been domiciled in Scotland, and one of them had left the country for the purpose of deserting, I have no idea that there would be no redress. Would it be a sufficient objection, that the wife having gone away, the provisions of the statute could not be followed out? I think this would be a dangerous doctrine. It is perfectly clear, on other grounds, that we have no jurisdiction here; and I think it is better

¹ 1 Ersk., 6, 44.

No. 104. to avoid laying down unnecessary doctrines of law. The husband's domicile in this case has always been in Spain—his domicile is his wife's. I never heard of the husband following his wife's domicile.

Mar. 1, 1845.
Mackenzie v.
Gibson.

LORD COCKBURN.—I am of the same opinion. I confine myself entirely to the facts of the case, and avoid laying down unnecessary law. I may observe, that the practice in the Outer-House in cases of this sort has become exceedingly loose. Practically, indeed, nothing is taken into consideration but whether the two parties are living together or not. There is always proof that the defender is remaining absent, but there is not proof that his remaining away is for the purpose of desertion. The case generally presented in the Outer-House, is, that the party has gone away, perhaps with the most honest intentions, and that he has never been heard of—he perhaps being all the while dead, mad, or a captive. All proof that he has not wilfully deserted, is left upon him, who most likely has never heard of the case. There are many cases in the Outer-House in this situation. Our practice, also, with regard to divorces, calls for some remedy. They may be obtained so easily here, that, while in one year, the number granted in England is only six, and in Ireland eleven, the number in Scotland is no fewer than one hundred and sixty. I remember one divorce case in which I was moved on Friday to make *avizandum* with the proof for an early decision; and the reason given for it was, that the lady and the paramour were to be proclaimed on the Sunday. I not only refused, but I decided against the divorce.

LORD JUSTICE-CLERK.—If the practice be as Lord Cockburn states it, I think it is important that it should be known, in order to be corrected.

LORD MONCREIFF.—When I was in the Outer-House, I never passed a divorce without proof, not only of desertion, but that it was the party's purpose to desert.

THE COURT accordingly dismissed the action.

WILLIAM WISHART, S.S.C.—Agent.

No. 105. MRS A. W. MACKENZIE, Petitioner and Complainer.—*Cook*.
P. C. GIBSON, Respondent.—*Rutherford—Marshall*.

Curator Bonis—Factor—A. S., 13th February 1730.—A curator bonis removed from his office, in respect of his not having lodged his accounts, in compliance with the provisions of the Act of Sederunt, 13th February 1730.

Mar. 1, 1845. MRS A. W. MACKENZIE presented a petition and complaint, praying for the removal of her curator bonis, Mr P. C. Gibson, on the ground of his not having complied with the provisions of the Act of Sederunt of 13th February 1730, by lodging his curatorial accounts; and also praying for an accounting.

2D DIVISION.
T.

The respondent stated, in answer, that he was willing that his accounts should be investigated, offering at the same time to resign his office.

No. 105.
Mar. 4, 1845.
Paterson v.
Beattie.

LORD MEDWYN.—I am afraid we must remove the respondent, as the provisions of the Act of Sederunt have not been complied with. We know nothing of the case, not having seen the accounts; but it appears to me that this gentleman acted kindly by this family, and I think it is a case peculiarly fitted for a private settlement.

LORD JUSTICE-CLERK.—We know nothing about these matters; but we are obliged to remove him, because the Act has not been complied with.

THE COURT accordingly, in respect the respondent had failed to comply with the Act of Sederunt in lodging his accounts, removed him, and appointed a new curator bonis; and remitted to the junior Lord Ordinary to examine the accounts, and report.

DUNDAS and JAMIESON, W.S.—JOHN GILMOUR, S.S.C.—Agents.

JAMES PATERSON and OTHERS, Complainers.—*Neaves—Patten.*

No. 106.

ALEXANDER BEATTIE and OTHERS, Respondents.—*Rutherford—Burton.*

Property—Burying Ground—Interdict.—Note of suspension and interdict in the instance of proprietors in a burying-ground, against the erection therein of a monument to the memory of the Martyrs to Political Reform in 1793-4, (viz. certain persons who had then been convicted and punished for sedition,) refused.

THE Incorporated Trades of Calton had for upwards of a century been proprietors of the Calton burying-ground, acquired by them from different parties at various times, except in so far as they had sold portions of it to individuals for the purposes of sepulture, to which purposes it was all along exclusively devoted.

Mar. 4, 1845.
1ST DIVISION.
Ld. Robertson.
W.

In 1776, the Incorporation sold a portion of the burying-ground to David Henderson in the usual way, viz. by granting a receipt for the price, binding themselves to execute a conveyance if required, and entering his name in their books as purchaser. Henderson disappeared without having taken possession, and no claim being made by him, or in his right, for forty years, the Incorporation struck his name out of their books, and resumed possession of the ground, on which they built a house and holding the tools used in grave-making.

In July 1844, the Incorporation sold the same piece of ground to the committee and subscribers for erecting a monument to the memory of

No. 106. the Martyrs to Political Reform in 1793-4,* as a site for the monument, granting the usual receipt, and binding themselves to execute a conveyance when required.
 Mar. 4, 1845.
 Paterson v. Beattie.

Against this sale James Paterson, one of the managers of the Incorporation, dissented, upon the ground that it was not for the purpose of burial, and was therefore *ultra vires* of the Incorporation.

In August following, when the laying of the foundation-stone of the monument was advertised, certain parties, proprietors of burying-places in the ground, presented a note of suspension and interdict against it, in respect it was foreign to the purposes for which the ground had been set apart, on the faith of which they had become proprietors of burying-places in it, and had their relatives buried there.

This note the Lord Ordinary (Murray) refused without answer.†

In December following, another note of suspension and interdict was presented at the instance of ten individuals, of whom four were members of the Incorporated Trades of Calton, (one of them a manager,) and the whole were proprietors of burying-places within the Old Calton burying-ground, and some of them having relatives buried there. Five of these persons (not members of the Incorporation) were parties to the previous note.

The prayer of the second note was in these terms:—" May it therefore please your Lordships to suspend the proceedings complained of, and to interdict, prohibit, and discharge the said Incorporated Trades, and the said office-bearers thereof, on behalf of the same, or other parties having charge of or connected with the Old Calton burying-ground, from executing any disposition in favour of, or giving any license or right to, the said William Tait, or other members of the committee or subscribers for erecting a memorial, testimonial, or monument, to the memory of Thomas Muir, Thomas Fyshe Palmer, William Skirving, Joseph Gerald, and Maurice Margatot, to erect any such memorial, testimonial, or monument, within the Old Calton burying-ground of Edinburgh, or to give access to the parties engaged in the construction of such monument, and to interdict, prohibit, and discharge the said William Tait, treasurer foresaid, and as representing or acting for the said committee or subscribers foresaid, and also the said members of committee and subscribers themselves, as also the said contractors for the work, if such there be, from

* These were, Muir, Palmer, Skirving, Gerald, and Margatot, who were convicted of sedition in the Court of Justiciary, and sentenced to transportation.

† " NOTE.—It appears to the Lord Ordinary that the complainers have no sufficient title or interest to apply for an interdict against laying the foundation-stone in question; he, however, considers it open to them to present any application they shall think fit, if they shall be able to show that the monument which is to be erected will be contrary to the regulations established in the burying-ground in question."

erecting, or assisting in the erection of, the said memorial, testimonial, or monument, within the burying-ground aforesaid ; or further or otherwise to do in the premises as to your Lordships shall seem just.”

No. 106.
Mar. 4, 1845.
Paterson v.
Beattie.

In support of this note, the complainers pleaded, 1st, That the piece of ground in question having been sold to Henderson, such of the complainers as were members of the Incorporation were entitled to prevent a second sale to the respondents, which might subject the Incorporation to a claim for damages. 2d, The Old Calton burying-ground having for ages been used exclusively for purposes of sepulture, and the complainers or their authors having, in the faith of its continuing to be so, become purchasers of burying-places in it, and had their relations buried there, were entitled to prevent any portion of it being applied to a purpose totally foreign to the character of a place of sepulture ; viz. the erection of a monument in commemoration of political events, with which a large portion of the community did not sympathize. A monument to individuals, because they had been convicted and punished for sedition, was a most improper erection in a place which had for ages been set apart for the burial of the dead ; and was illegal there, however competent it might be to erect it elsewhere.

The respondents answered, 1st, It was *jus tertii* to the complainers to plead the previous sale to Henderson. His purchase had been forfeited, and possession of the ground resumed by the Incorporation, and no one now claimed it on his behalf. 2d, The proposed monument was to the memory of individuals deceased, and not to a principle or in commemoration of an event. It was intended to be of a proper sepulchral form, viz. an obelisk raised upon a hollow pedestal, in which the remains of such of the martyrs as could be recovered were meant to be interred. Without the remains, it was a proper cenotaph to persons deceased. Was such an erection illegal in a burying-ground ? There was no authority for saying so, and it was against practice. Cenotaphs were quite common in churchyards in this country, and, in England, they were numerous in consecrated ground. If illegal, because of no burial, most of the monuments would be swept from Westminster Abbey and St Paul's churchyard. Could the complainers have objected to the burial of the individuals in question within the Old Calton burying-ground ? If not, could they have objected to the erection of a monument over their remains ? It was not maintained that they could. Then if the persons could have been buried here, and a monument erected over their remains, what objection was there to a monument to their memory ?

It was in contemplation to recover their remains, and bury them in the ground ; and if this were done, would the case be in a different position ? The complainers were in the position of objecting to the monument, because they had not got the bones. Conviction for sedition did not prevent burial even in consecrated ground ; and if not, it could not prevent

No. 106. the erection of a monument over the remains, or a cenotaph to the memory.

Mar. 4, 1845.
Paterson v.
Beattie.

The Lord Ordinary pronounced this interlocutor:—"Having heard the counsel for the parties, and considered this note, with answers and productions, passes the note, and grants the interdict as craved." *

* "NOTE.—The building against which the present interdict is sought, is described to be 'A Monument to the memory of the Scottish Political Martyrs.' It is admitted that this applies to Mr Thomas Muir, and certain other persons, who, in the years 1792 and 1794, were convicted of the crime of sedition, sentenced to transportation, were transported beyond seas, and whose conviction was not followed by pardon or recal, but now stands on the records of the High Court of Justiciary. The place in which the building is proposed to be erected is the Old Calton Burying-Ground of Edinburgh, which is the property of the Incorporated Trades of Calton. It has been for a long time occupied as a burying-ground, and contains enclosures separating the spaces or ground belonging to individuals or families, with tombstones or monuments in memory of the persons interred there, or perhaps, in some instances, of members of families who may have fallen in foreign service or died abroad. There are no monuments or testimonials of a political character, or connected with persons of distinction not interred within the ground; and it is not alleged that there has been any practice of dedicating any portion of the ground to such purposes. It is not a churchyard, but has been occupied exclusively as a place of interment. By one of the rules of the Incorporation, the officers are prohibited from letting leases beyond the space of two years without the approbation of the Incorporation, 'reserving to the managers the power to sell burying-ground as usual;' and there are certain regulations for the management of the burying-ground. The general character and occupation of the ground as a place of sepulture is therefore beyond question; and it is not stated that, in time past, any erection has been made there inconsistent with ordinary decorum, or with those feelings of peaceful solemnity which are suitable to ground so appropriated. The spot of ground on which the monument is proposed to be built was, by minute of the Burying-Ground Committee of the Incorporation, of date the 11th of July 1844, sold to the respondents. The sale was approved of by the managers on the 25th of July—Mr James Paterson, who is one of the present complainers, dissenting; and on the 1st August, at a General Meeting of the Incorporation, that gentleman moved 'not to sanction the transaction as to the Political Martyrs' Monument, in respect that the Burying-Ground Committee were not entitled to sell ground for other purposes than burying-ground;' but the motion, not having been seconded, fell, and the transaction was approved of by the Incorporation. The other complainers are three other members of the Incorporation, and Mr Robert Reid of Lowood, Mr John Elder, W.S., and the trustees of the late Mr William Blackwood, bookseller—the whole complainers being proprietors of burying-places within this grave-yard. It is stated by the complainers that the grant is beyond the power of the Incorporation, because the piece of ground, which for some years past has been occupied as a tool-house, was, in the year 1776, sold to a person of the name of David Henderson, whose representatives it is said may yet come forward to claim the spot. On the other hand, the respondents maintain that Henderson lost all right to the ground, and that, at any rate, this is *res tertia* to the complainers. The facts connected with this grant are not very distinctly brought out. If the grant to Henderson had been proved, and no dereliction established, the Lord Ordinary does not consider that members of the Incorporation would have been excluded, on the ground of want of title, from objecting to a second grant in favour of another party. But, on the other hand, if the proposed occupation of the ground had been

The respondents reclaimed.

Counsel were heard on the 19th of February, and the Court took time to consider. The case was advised this day.

No. 106.

Mar. 4, 1845.
Paterson v.
Beattie.

for the ordinary purposes of interment, and erecting a tomb over a person interred, he does not think that there would have been grounds raised by the averments on record as to this grant sufficient to justify immediate interposition by interdict. In the month of August last, an application for interdict, on grounds very much the same with the present, indeed substantially the same, with the exception of the allegation as to the grant in favour of Henderson, was made, and was refused by the Lord Ordinary; and his Lordship's judgment was not brought under review of the Court. This is pleaded by the respondents as amounting to *res judicata*; but the Lord Ordinary does not think that the present application can be excluded as incompetent on that ground. Not only are there here new averments, and consequently new *media concludendi*, but what is conclusive on the subject, there are three new complainers who made no appearance under the former application at all; consequently that application, though on the same subject-matter, even had the allegations been identical, would have been *res inter alios* as to these new complainers. The judgment is no doubt entitled to due weight as matter of precedent, but it is not in any sense *res judicata*. The application was made under different circumstances; and Lord Murray has stated in a note, that whilst he thought 'the complainers had no sufficient title or interest to demand interdict against laying the foundation-stone, it should be open to them to present any application they shall think fit, if they shall be able to show that the monument which is to be erected will be contrary to the regulations established in the burying-ground in question,' The Lord Ordinary, therefore, thinks that he is entitled and bound to deal with this as a competent application, and one as to which there has been no authoritative determination.

"On the merits of the question itself, which is one of novelty, and not free from difficulty, the Lord Ordinary has come to be of opinion that the interdict ought to be granted. Of course, in arriving at a judicial determination of the matter, all considerations connected either with good taste, or the merits of the political differences of opinion between the parties, are wholly irrelevant. Neither is the Lord Ordinary called upon to find that a testimonial of this character is in itself illegal. It is not said in the abstract to be *contra bonos mores*, or that in law it amounts to a nuisance. The question raised by the complainers is, Whether the plot of ground acquired by the respondents, supposing there was no difficulty as to the prior grant in favour of Henderson, can be lawfully used for the purpose of the proposed building? Now this burying-ground is a subject in which all the proprietors have a common interest, and a right to see that its use is limited to the lawful and common occupation of such a subject. It must be occupied by all according to use and wont, and for purposes consistent with the nature of the subject, and custom and right feelings of the country in such matters. It could hardly be said that two or three of the proprietors of plots of ground could join together and build within this grave-yard a theatre or a concert-room, or a riding-school or a dancing-school, or that the Incorporation of Calton could let out the unoccupied spaces for a tavern or an auction-room, or a place for exhibiting giants or dwarfs, or wild beasts, or other shows. Yet, in ordinary situations, such might be a lawful use of property, and not in law a nuisance. But if this be now admitted—and it seems difficult to dispute the doctrine—there has, from the past use of the subject, and the conditions necessarily inferred in these points of such a subject, been an implied undertaking on the part of the granters, just as strong as if it had been expressed, that the remaining stances within the grave-yard shall only be disposed of either for purposes necessary for its proper occupation, such as the erection of a tool-house or watch-house, or suitable to, and consistent with, its peaceful and solemn character. In this view, perhaps the

No. 106.

Mar. 4, 1845.
Paterson v.
Beattie.

LORD PRESIDENT.—It is necessary, in coming to a decision on this question, to consider the situation in which the suspenders and respondents respectively stand. The suspenders state that their number includes one manager (Mr Paterson) and three other members of the Incorporated Trades of Calton, and that the whole of them are proprietors of portions of the Old Calton Burying-Ground, and have relatives buried there; and in this character they complain of an encroachment on their respective rights, in the terms set forth in the note of suspension.

erection of a church or a small chapel for funeral service, or a stone with an alms-box, might be lawfully made, because these are suitable to such a situation; and it might appear unreasonable and emulous to object to such erections. But, on the other hand, if there be any sort of building not in itself illegal to which the complainers are entitled to object, the question then arises, Is the proposed building of that description? Now, the complainers say it is offensive to them; and that this cannot be considered as mere caprice, seeing that their feelings arise from detestation of the conduct of convicted criminals, and the impropriety of perpetuating their memories by any testimonial so placed. On the other hand, the respondents express their admiration for these persons, whom they conceive to have been unjustly condemned, and in consequence of that very condemnation hold them to be martyrs in the cause of Reform, which they consider to have been just in itself, and state to have been triumphant. The Lord Ordinary does not enter into these matters further than they bear on the character of the proposed building, and explain the reasons of the application. The result is, that whether the one opinion or the other be sound, the building is a testimonial of a political or party description; and if such building, however lawful generally, be of a kind inconsistent with the ordinary use of this grave-yard, and incompatible with the implied conditions of the previous grants of spaces within the ground, it cannot be permitted. In determining this question, it is very material to observe, that none of the persons, in memory of whose martyrdom or conviction the testimonial is to be raised, are interred within this place of sepulture, nor is it proposed that their ashes should be deposited there. It is said that the building 'is of a proper sepulchral character, being an obelisk raised upon a hollow pedestal, in which interments may take place, and in which it is determined they shall take place.' It is not said who or what description of persons are to be buried there, or whether it is to be reserved for future martyrs who may be thought hereafter to have been unjustly convicted of sedition. Nor is it of any importance what the architectural style of the building may be, presuming that it is free of offence. It is enough that it is a political testimonial not in connexion with any persons buried within the ground, or whose families, or any of them, have burying-places there. It is not the tomb of any person or persons whatever—it is not an erection in any way conformable to the use hitherto made, either of this particular grave-yard, or generally of burying-places within Scotland. The complainers, therefore, when they acquired and paid for their property within the Calton burying-ground, were entitled to trust that a spot, not consecrated certainly, but appropriated to the purposes of interment, was not to be converted into a receptacle for monuments to persons not interred there, and in memory of political events which, whatever be their merits or demerits, are, like the present, wholly unconnected with those associations of piety and peace by which they expected that the dust of their families should be surrounded. The complainers, therefore, appear to the Lord Ordinary to have a sufficient title, by virtue of their common interest in the subject, to prevent a perversion to purposes unconnected with the ordinary use of a place of interment, of any part of this grave-yard. At all events, until the contrary be established by declarator, he holds himself bound, by the rule *uti possidetis*, to grant interdict against an erection of a character not sanctioned by any practice in this particular grave-yard, or so far as he knows, under similar circumstances, in any burying-place in Scotland."

The respondents, on the other hand, design themselves as "A Committee for erecting a Monument to the Scottish Martyrs of Political Reform in 1793-94;" and there are certain individuals set forward under this title. With respect to the nature of the proposed erection, it is distinctly admitted by the respondents that the monument is intended to be raised because of the conviction of the parties for the offences laid to their charge.

No. 106.
Mar. 4, 1845.
Paterson v. Beattie.

Now, in order to ascertain whether the suspenders have or have not a valid ground of complaint in this case, it is necessary to see what rights they possess in the Calton Burying-Ground, where the monument is proposed to be erected—for there is no question raised as to the right of the subscribers to erect such a monument elsewhere. Now, having been one of the parliamentary commissioners for erecting a new jail, and building a bridge over the Calton, &c., and having been concerned in the necessary steps which were taken under the authority of Parliament for completing this great improvement, I had, when the case first came before us, some recollection of a matter which appeared to me to be material in considering the present question—and I have since, in consequence of that impression, looked at the statute 35 Geo. III. c. 170, which passed in 1814, and under the sanction of which those improvements proceeded. The 8th section of this statute shows, in the strongest manner, the extreme caution and circumspection with which Parliament conceded to the commissioners the right of making a public way through the Old Calton Burying-Ground, and the tender consideration which they evinced for the sacred rights of the parties interested in the burying-ground. It will also be remembered that, in lieu of that part of the Old Calton Burying-Ground thus appropriated, the City of Edinburgh granted a piece of ground on another part of the Calton Hill, to which the Incorporated Trades of Calton added some additional ground by purchase, and the union of which made an extensive cemetery in that quarter. And in the charter granted by the City to the Calton Corporation, it is expressly provided, "that the said piece of ground shall be occupied solely as a burying-ground, and shall be converted to no other use or purpose." From all these circumstances, I deduce the conclusion, that, be the origin of the Calton Burying-Ground what it may, it was intended from the first as a place of sepulture, and of sepulture alone.

In respect, then, to the persons who are recognised by the legislature as holding rights in this burying-ground, and in respect to all others who have since acquired rights in other parts of the burying-ground, the question arises, have they a common interest to insist and maintain, in a court of justice, that the property, of which parts have been so acquired by them, shall be exclusively devoted to the purpose for which it was intended, or at least to purposes consonant to, or not inconsistent with the admitted rights of those who have an interest in the burying-ground?

Before noticing the general question raised in this case, however, it is proper to advert to the plea urged by the suspenders, that the grant was *ultra vires* of the corporation, because the ground on which it is proposed to erect the monument was in question was sold, in 1776, to a person called Henderson. On this point it is unnecessary to say more, than that I think that a manager of the Corporation, invested with the important duty of watching over its interests, might, in the circumstances, be fairly entitled to say that this ground should not be again disposed of without his consent, unless he were relieved and secured against all possible

No. 106.

Mar. 4, 1844.
*Paterson v.
 Beattie.*

risk of any claim arising out of a double grant. Until a person appears, however, to complain of the sale on the part of Henderson's heirs, I do not see that the Court can interfere, at least on an application in the present form.

As to the other and more important question, I think that the complainers are by law entitled to all the rights and privileges belonging to persons having an interest in a common churchyard; and the erection of the present monument is, in my opinion, an encroachment on those rights. The respondents rest their right, and can only support their right to erect this monument, on the ground that the parties in honour of whom it was designed were illegally convicted, sentenced, and punished. It is very painful to revert to the proceedings of 1793-94; but it is the parties who come forward and claim a right to erect this monument who force upon the Court the consideration of these proceedings. Are the suspenders, in resisting the erection of this monument, not entitled to say, when they remember what passed in 1793-94—when they remember what is notorious, and what it is only necessary to read the State trials to be acquainted with—that, in the year 1794, there sat in this city a Commission of Oyer and Terminer, who tried and convicted two persons of high treason, one of whom was executed—when they cannot but recollect that, at these trials, the whole minutes of the transactions of the British Convention were produced in evidence of the high treason—and when they remember that it was distinctly proved that three of the persons now designated “martyrs” were leading members of that Convention, and one of them its secretary—when they remember all these things, and see the avowed object of the testimonial, are they not entitled to say that their feelings will be hurt and offended—that they have an utter repugnance to any such erection—and that they have a right to ask this Court to protect them in regard to the particular spot on which it is proposed to make this erection? Can the suspenders shut their eyes to the fact, that, if this monument be erected, the cemetery in which they have burial-places will be the resort—the common resort—of all those who sympathize with the political opinions of the men to whose memory it is to be raised? And will not this be an encroachment on the rights of the suspenders, and the appropriation of the ground to a purpose alien altogether to that to which it was originally destined?

In conclusion, and in arriving at the opinion that the interdict should be continued, I have only to state, that I am not in the slightest degree influenced by the political opinions proposed to be thus commemorated; and had the proposal been the converse of the present, viz. to erect a monument to the memory of the public prosecutor, the Judges, and the juries who prosecuted, convicted, and punished those men, I should have arrived at a similar decision.

LORD MACKENZIE.—In this case there are two questions; the first is insisted in by members of the Corporation of the Trades of Calton, the second by persons who have right to portions of the Calton Burying-Ground. These are quite distinct.

The *first* is, whether we are to interdict the Corporation from granting a disposition to Mr Tait and others, respondents, giving them possession of the piece of ground which they have purchased, in order to erect a monument, and to interdict these respondents from proceeding to erect that monument, on the *ratio* of want of power in the Corporation to sell the ground to these respondents. This is demanded by Messrs Paterson, M'Pherson, Wallace, and M'Gibbon, as members of

that Corporation, coming to this Court to obtain from us an order to control an act of the majority representing that Corporation, which they say is illegal, and may be mischievous to its funds.

No. 106.

Mar. 4, 1845.

Paterson v.

Beattie.

Now, on this point, it does appear that, in the year 1776, the Corporation sold this piece of ground to one Henderson for a price paid, and that there has been no reconveyance; and though Henderson never appears to have used it in any way, yet, if the case rested on that fact alone, it seems impossible not to see that the second sale of this ground to Messrs Tait and others must be attended with some doubts of its lawfulness and safety, if the case rested there. Henderson may have left heirs, and one of these arriving from America, or emerging from the obscurities of the Cowgate, might perhaps evict the ground after the monument to Muir and his brethren was erected, and make a martyr of the monument itself, subjecting it too to transportation, and the Corporation of Calton to a claim of warrandice and damages. For it seems very doubtful if prescription, from mere non-use, could run against the buyer of a piece of ground for burying. He is not bound to die, and dwell in it, or to stock it with other dead as a lessee stocks a farm, on penalty of forfeiture. Such a right seems a *res mera facultatis*, to be used or not as it may be wanted, and not liable to be lost by negative prescription.

But there are other circumstances in the case. Not only has Henderson and his right disappeared, but the Corporation, holding it as abandoned by him for more than forty years, themselves occupied this ground by building a tool-house on it, and made this occupation unequivocal by striking his name off their books. That seems to afford ground for positive prescription, and to form a sufficient security to the respondents against eviction. *A fortiori*, under such circumstances, the case is no longer one in which a minority of a corporation are entitled to come to this Court to control the management of its property by the majority, which legally represents it. Such an interference requires a very clear and certain case of abuse, otherwise this Court must be the manager of all the corporate funds of Scotland. It will never do for the minority merely to say that they, with our help, can manage better than the majority. There must be a case of gross abuse, or at least gross error. I cannot find such a case here; and therefore cannot grant interdict on that ground. I need say nothing, therefore, of the difficulty of interdicting, on such a ground, the Corporation from merely completing a contract in which they are already fully bound, or of interdicting, on such a ground, these parties, who owe no duty to the Corporation at all, and who hold an *ex facie* good right against which no competitor appears, or of the formal difficulty of interfering by a bill of suspension without a reduction.

The second question is insisted in by the other defenders, the holders of rights to portions of burial-ground, who demand interdict against the erection of this monument as injurious to them. Now, in this question, some things are sufficiently certain. This is certainly an ancient burying-ground, enclosed, used, and recognised as such. As such, parts of it have been sold by the Corporation to the suspenders. Hence rights, and important rights, arise to the suspenders, binding the Corporation, and also binding its disponees. They are barred from doing any thing in this place inconsistent with the ordinary use of a burial-ground. They cannot make it an arable farm or a market garden, or a pasture field for horses or cows. They cannot make a horse or cattle market of it. They cannot build in it a playhouse, or exhibition room, or drinking shop. They cannot put any thing

No. 106. there inconsistent with the safe deposit of the remains of the dead, or with the solemnity which a decent regard to those remains requires. They can hardly, I think, erect there any building that is quite foreign to the purposes of a burial-ground.

Mar. 4, 1845.
Paterson v.
Beattie.

But what is it that is here complained of? It is a monument to certain dead persons—a cenotaph?—for their bodies are not buried or deposited there. Now, is a cenotaph foreign to a burial-ground? Where are cenotaphs almost ever erected except in churchyards, or other burying-grounds? Who ever imagined that monuments to the dead were to be extruded or kept out of the churchyards, unless the bodies of the departed lay deposited below them? Such things are quite common in cemeteries; and I never heard of an objection to them.

It is said that this is not truly a cenotaph, but a public declaration, or manifesto in stone, of political opinion—an architectural protest to the public against the sentences given and executed against these men, and in cases of sedition. Then, observe, there is no statement in this case of any intended inscription; and we are not to presume that there will be any improper inscription, when no such thing is averred. Nevertheless, the monument may have effect in the way alleged; and I doubt not that effect was desired by the subscribers for it, many of whom, I can scarcely think, had any strong personal friendship or esteem for Mr Muir and the others as individuals. But that cannot make it cease to be a cenotaph; for all cenotaphs, all tombs, all tombstones, (I might say even the very graves,) of political men, good or bad, are apt to have such effect, more or less. They must, more or less, cause it to be known and remembered that there are persons who desire to honour these dead, and consequently to blame those by whom they may have been treated with reprobation or punishment; and this must be contemplated by the erectors. But that does not exclude political men, their remains, or their tombs, or cenotaphs, from our cemeteries. If men die in such circumstances, that their bare tomb, even without an inscription, must serve as a political manifesto, they may, I think, be buried nevertheless, and their tomb erected, *valeat quantum valere potest*, as other tombs are.

But, further, it is said these men were criminals, convicted and punished, and that a tomb on such a collection of criminals is not decent in a public cemetery. I, however, know no law generally excluding from burial-grounds the bodies, or tombs, or cenotaphs, of persons that have endured punishment for crime. Murderers, indeed, were given to dissection, and are now, by statute, ordered to be buried within the precincts of the jail; and of traitors, the bodies are at the king's disposal;—and the interpretation of that statute may perhaps exclude their cenotaphs from ordinary cemeteries. But I know no other criminals who are liable to such penalty after their death. It may be imagined that a conviction inferring infamy would afford a ground of such exclusion. That is not clear. Legal infamy is in no authority stated to extend beyond life. Posthumous legal infamy, if received at all, cannot be received as a rule without exception. Its application might depend on circumstances. I do not think that a quiet monument to Lord Balmerino on this ground, the ancient property of his family, would be objected to by any body; or that, if the remains of Mungo Campbell had been buried there, instead of being exposed to the brutality of the mob, it would have offended any reasonable person. Even Brodie, if some relative, or some pious brother deacon, had got him buried there, with a gravestone having on it his name, with a text or a stone moralizing his fate, I scarcely think it would by any body have been held

to be illegal. But it is sufficient that sedition is not a crime inferring infamy, No. 106. either in law or in fact, however dangerous it may be. And this is the only crime alleged in the present case.

Mar. 4, 1845.
Paterson v.
Beattie.

But it is said, lastly—and this, I think, was most of all relied on by the suspenders—that such a polemical, not to say mutinous monument, must shock and disturb the friends and relations of the dead who come to indulge their grief, or their emotions of affectionate remembrance, after grief has subsided. I think this is an idea too refined for law. Mr Gray does, indeed, beautifully describe the tranquillity of a churchyard, where

——“ the sacred calm that breathes around,
Bids every fierce tumultuous passion cease.”

But Gray drew his picture, not from law-books, but his own fine fancy; and it is a *country* churchyard which he is describing. The person who goes to sorrow, or to meditate among the realities of life and of death in the cemetery of a large town, must expect something far less perfect. He must carry with him hardihood and abstraction sufficient to defend himself from the interference of such objects. Nor, in truth, can I think that any person who hung over the grave of a beloved relation or friend, would bestow much thought on any monument of martyrs, whether he regarded them as sufferers in the cause of useful and ultimately successful reform, or as the guilty agents of a destructive but defeated revolution. I cannot, therefore, adopt this reason; and I am for refusing the note.

LORD FULLERTON.—There are two grounds upon which the suspenders found their application for an interdict. These require to be kept distinct, and must be separately considered. The one is the prior disposal of the piece of ground forming the site of the intended monument to another party, whose rights, it is said, still subsist in full force. The other is the alleged incompatibility of the purpose to which this ground is to be applied with the proper and recognised uses to which a burial-ground is limited by the law and practice of this country.

It is evident that these two questions bear no relation to, and have no effect upon each other. The first reason of suspension, if sustained, would exclude all consideration of the other, and is evidently urged only with that view; so that, in discussing it, we may assume for the time that the second objection either has never been made, and does not exist, or that it is in itself ill-founded. Now, on that hypothesis, I think that the first question admits of being very shortly stated, and of being as easily answered.

The Calton burying-ground belongs to the Incorporated Trades of Calton. The suspenders acquired this particular portion of it from the managers of the Incorporation, and the transaction was confirmed at a general meeting of the Incorporated Trades. The suspenders have received, in the form of a receipt and entry in the books of the Incorporation, all the title which it is usual to give on such occasions. In these circumstances, the question arises, whether certain individual members of the Incorporation are entitled to an interdict against the respondents taking possession and erecting a monument, for the reason that this very site or place of burial had been sold in the year 1776 to another party of the name of Henderson.

We have been told, in the course of the argument by the respondents, that Henderson's right had been forfeited by his failure to comply with certain conditions; but of this we have no evidence, and indeed no very clear explanation. I

No. 106.
 Mar. 4, 1845.
 Paterson v.
 Beattie.

may also add, that there appears to me no sufficient reasons for holding Henderson's rights to be extinguished by prescription. Looking at the nature of the right, and the purpose for which it was acquired, it would be difficult, I think, to bring such a case as this within the operation of the law of prescription; though, from the time which has elapsed—nearly seventy years—and the total silence of Henderson, or any body in his right, there are strong *prima facie* grounds for holding that it was derelinqushed, and consequently for justifying the managers in taking the responsibility of disposing of the ground to another party.

But, holding all these points to be open, the question is—Have these suspenders, or any of them, a title to urge this objection against the respondents? And I think that most certainly they have not. If urged on behalf of Henderson, that is clearly *jus tertii* which they are maintaining, and is therefore inadmissible. And accordingly the argument of the suspenders is maintained in behalf of the Incorporation, by such of them as are individual members of it, for the purpose, as it is said, of preventing the completion of a wrong done by its managers and administrators for the time, for which wrong the Incorporation may be made liable in damages.

This, at first sight, has some plausibility, but it is mere plausibility, and the substantial merits of the objection will not stand examination.

In the first place, this is not an interdict against the incorporation completing the contract of sale. The sale is completed, and the interdict is directed against the purchasers taking and using that which they have purchased. Now, even supposing that Henderson's prior right could be urged by the suspenders as a ground of reduction directed against the managers and majority of the Incorporation, it is difficult to see how, without some previous step of the kind, the allegation of Henderson's right could found these suspenders in an attempt to exclude the possession of the respondents, who are completely blameless in the matter, and who are just as much injured by the act of the Incorporation as Henderson himself or his representatives.

For, in the second place, the sale to the respondents being the act of the Incorporation, and held, according to the hypothesis necessarily assumed in this branch of the argument, in itself unobjectionable, the Incorporation is bound in absolute warraundice in support of that transaction, and its individual members equally bound at least in warraundice of fact and deed—that is, to abstain from all measures from bringing it into question. If the sale was within the powers of the Incorporation, that act is unchallengeable by any of its members, whatever it may be in behalf of other parties. And what conceivable interest in behalf of the Incorporation does there or can there exist, which these individual members have any intelligible title to assert in the form of an interdict against the respondents? When they say that there may be an action of damages against the Incorporation on the part of Henderson, the answer is obvious. If Henderson's right remains effectual, his claim must be, not to recover damages, but to recover the ground; and, at all events, his right either to recover the ground, or damages for its alienation, will not be made one whit better or worse by the erection of the proposed monument. If he recovers the ground, good and well; then the monument must go along with the rights of those who have erected it without a valid title to the site. If he prefers claiming damages, their amount cannot possibly be increased or affected in any way by the purpose to which the respondents, the second purchasers, have chosen to put it.

But the important point, and one which is totally overlooked in the suspenders'

argument on this branch of the case, is, that their zeal to protect the Incorporation from an action of damages, which nobody is thinking of, most unquestionably and necessarily creates against the Incorporation an instant liability to damages in favour of the respondents. There is, as has been already mentioned, no interdict against the sale. This has already taken place. Then, what does the case come to? The Incorporation, through the medium of their proper organs, first sold this piece of ground to Henderson in 1776, and then having expunged his name from their books, have, seventy years afterwards, sold it for a fair price to the respondents. What Henderson's representatives may do nobody can tell, or indeed whether there are any such persons in existence. But every body can see that, in the event of the respondents being excluded from the possession they *bona fide* purchased from the managers of the Incorporation, having a power of sale, they will have unquestionably a good action of damages on the warrandice against the Incorporation, so that the protection of the interests of the Incorporation, argued in this branch of the case by the suspenders, the individual members, leads to this result—that, in order to relieve the Incorporation from an imaginary or a merely possible action of damages, they shall be entitled to take a step which will inevitably create ground for an instant and certain action of damages, against which, as far as I can see, there would be no defence. Assuming, then, as I am bound to do in considering this point, that the sale to the suspenders was in other respects unobjectionable, I think the objection founded on Henderson's previous right is bad, and that the respondents, as individual members of the Incorporation, have, in regard to that matter, neither title nor interest to obstruct the respondents in taking possession.

The second reason of suspension—that which arises from the peculiar character and object of the monument in question—is one which is perhaps attended with more difficulty. But still, after bestowing upon it all the attention due to the importance which it appears in the estimation of the parties to possess, I have not been able to satisfy myself that there are any legal grounds for giving effect to the feelings or partialities, private or public, by which the suspenders are influenced in demanding the interference of a court of law.

In the first place, it must be uniformly kept in view that the object for which this ground was acquired is the erection of a monument or memorial of the dead. This circumstance at once excludes the necessity of considering any of those extreme cases which, I cannot help thinking, have been somewhat unnecessarily introduced in argument, of the proposed erection of buildings absolutely and utterly foreign and repugnant to the ordinary uses of a burying-ground. A monument in memory of the departed is just one of the uses to which such ground is ordinarily and specially applicable.

Secondly, I do not well see a distinction which can be drawn, on any definite or intelligible ground, between the case of monuments erected over the dead who are actually interred, and those erected in memory of the dead who happen to repose elsewhere. Actual interment is no doubt the proper purpose of a burying-ground; but that has, in every case, led to the erection of monuments marking not only the place where a particular individual or number of individuals are interred, but also the sentiments of respect, and sense of their merits and good qualities, entertained by the living. In regard to this latter point—and which is evidently the most important object of the greater number of monuments—it is a matter of absolute indifference whether the remains of the departed are deposited beneath

No. 106.

Mar. 4, 1845.
Paterson v.
Beattie.

No. 106. the monument or not. Accordingly, without attempting any further explanation of the source from whence the practice has arisen, the fact is undoubted, that in every place of sepulture, church, churchyard or burial-ground, monuments in memory of the dead, though reposing in a distant land, or under the depths of the sea, are of constant occurrence; and I believe that any question as to the erection of them, as being a misappropriation, challengeable by parties having no other interest than that of holders of burial-places within the same enclosure, would probably be received with equal astonishment and indignation.

Mar. 4, 1845.
Paterson v.
Beattie.

But, indeed, in the present case, this speciality, when urged by these respondents, stands in singular contrast with the professed and only grounds of their opposition to the proposed monument—that is, their disapprobation, or as the Lord Ordinary more strongly expresses it, their “detestation of the conduct” of the parties whom the monument is intended to commemorate. Now, it is obvious that, whatever may be the force in law of their objection when put on that ground, it cannot in any view be fortified by the circumstance that it is only by the monument, and not by the bodies of the “detested parties” that the burial-ground is to be polluted. Indeed, I cannot see how the presence of the actual remains of the parties could make the slightest difference on the argument. Though interment is necessary, a monument commemorative of the merits of the persons is not an indispensable accessory to interment; and, therefore, if the objection of the suspenders were good—if they could show that a monument for the proposed purpose—a public testimonial of the supposed merits of those parties—was a misappropriation of the burial-ground, the objection to such a monument would be equally good though the remains of the whole of these persons were deposited below.

These propositions, then, being assumed; and holding, as I must do, that the erection of a monument in memory of the dead, though not actually interred under it, is, in the general case, a proper and legal use of ground acquired in a churchyard; it lies on the suspenders to make out that there are good objections to this particular monument which take it out of the general rule, and justify them in requiring the interference of the Court to prevent its erection.

In entering upon this enquiry, we are relieved from one difficulty which might in other circumstances occur; and we are consequently enabled to narrow the real question still further.

It cannot be pretended, and indeed it is not maintained by the suspenders themselves, that the memory of those individuals to whom the monument is to be erected, is so tainted with any gross and public violation of the recognised rules of morality, as to render a memorial of them an outrage on decency, and an insult to the feelings of mankind.

Some stress, indeed, was laid in argument on the circumstance of their conviction. But the only intelligible ground of objection is their guilt, of which the conviction is supposed to be the proof. And those who question the justice of the conviction cannot be said to commemorate the guilt, merely because they sympathize with those who were convicted and punished without good grounds.

Besides, every one in this country knows and feels, that in regard to offences purely political, the question of absolute moral guilt or innocence is one on which it is impossible to refer to any unvarying and conclusive test. In consequence of that variation, the convicted traitors of one age become the martyred patriots of another; a character, too, which they often hold even in the opinion of a great part of their contemporaries. And in this very case, waiving any discussion of the

merits of the opinions entertained on the subject, the fact is indisputable as matter of history, that grave doubts have been entertained on the light in which those public transactions should be viewed.

Indeed, it is this very diversity of opinion which forms the single ground of the opposition of the suspenders to the erection of this monument. They do not oppose it as an alleged insult to the public feelings of the community—an objection which would be equally available whether the monument were to be placed in the Calton Burying-Ground or any where else. They very fairly put their case where it must stand, not upon the general feeling against those parties, but upon the opinion in their favour being divided. Their statement on the record is—“The views which have led to the proposed erection involve matters in which the strongest difference of political opinion exists among the community. And the erection of the structure would introduce the acrimonies of political feeling into a place where very different feelings ought to prevail.” And again—“The other complainers concurring in this application do not desire to express any opinion on the political question thus raised. But they ground their objection on the undoubted existence of strong diversity of sentiment on the subject, and on the unsuitableness of the proposed erection, the purpose and objects to which the place has been set apart, as well as the other grounds hereinafter mentioned.”

Here, then, the question is brought to a very narrow point. The respondents having acquired a piece of ground in a public burying-ground for the declared purpose of erecting a monument to the memory of certain persons whose supposed public services they value, or at least in whose sufferings in a particular cause they sympathize; the question is, whether there are grounds in law for the suspenders jointly interested in the burying-ground preventing the building, because they, and, as they say, a part of the community, do not concur in the estimate of the merits, or the sympathy with the sufferings of the persons so to be commemorated.

This is the fair state of the question as a question of law. It stands quite clear, as the Lord Ordinary has justly remarked, “of the merits of the political differences between the parties.” It must be decided exactly in the same way and on the same principles as if the relative situations of these parties had been reversed, and as if we had before us an application for an interdict at the instance of the respondents, to prevent the proposed erection by the suspenders of a monument in honour of the deceased jurymen by whose verdict these parties were convicted.

Now, in considering this point of law, I must throw out of view entirely the supposed disturbance of the feelings of the suspenders which the appearance of this monument might (it is said) inflict on them in their solemn visitations to the place of rest of their connexions. A court of justice must have coarser and more substantial materials for its decisions than such refined sentimentalities as these, which I firmly believe have no existence in the minds of the highly respectable persons who oppose this erection, and which I cannot help considering as embellishments of their case, for which they are indebted to the ingenuity and eloquence of their counsel. The fact is undoubted that, in a visit to any churchyard, monuments may be found offensive to good taste and correct feelings, and serving not so much to attest any real merits of the dead, as to show the vanity and folly of the living. And far be it from me to contest the right of these suspenders, if they choose, to set down this proposed monument as an addition to the account. But to prevent the erection of such a monument is a very different matter, and must

No. 106.

Mar. 4, 1845.
Paterson v.
Beattie.

No. 106.

Mar. 4, 1845.
Paterson v.
Beattie.

rest on very different grounds. And really if the political feelings of these suspenders were so very combustible as to rise into a flame at the mere sight of this intended obelisk upon visiting the Calton Burying-Ground, I cannot help thinking that they would, to say the least, be as chargeable with carrying "the acrimonies of political feeling" into a churchyard as the subscribers to this monument. At any rate, the true remedy would be, not a suspension and interdict against the raising of the monument, but a suspension of their visits to the burying-ground, until they had schooled down their own political partialities and prejudices into somewhat of a more charitable allowance for those of their neighbours.

But, as I said before, such considerations cannot enter into this question, which is truly a question as to the limits of the use of property legitimately acquired by the suspenders. It is theirs, and they have an undoubted right to erect upon it a monument in memory of the dead: And the difficulty which I have always felt to be insurmountable is the total absence of any law, or usage equivalent to law, to prevent them from erecting a monument to the dead whose names are brought into question, because there is a diversity of opinion as to the merits of the persons to be honoured. That the measure originates from political motives on the part of the respondents, and from their particular views of the political merits or sufferings of these individuals, is unquestionable, just as the opposition to it on the part of the respondents springs as clearly from a similar source. But where is the authority for a court of law interfering in such a case? I confess that, in principle, I can see nothing of the kind. There is no necessary community of political sentiment among the proprietors of places of interment in the same burying-ground. There is no implied adoption of the political sentiments or prejudices which may be indicated by any particular monument beyond that of the persons by whom it is erected. Consequently there is no intelligible ground for any one or more of them challenging such an indication on the part of another, by way of preserving themselves from such an implication.

No doubt, usage in such a question would have a powerful effect; and if it could be shown that such a usage existed—that monumental erections were in practice strictly limited to the expression of personal or family affection, or that no public demonstrations in honour of individuals were tolerated in churchyards, unless the feelings in their behalf were such as could be sympathized in by the whole body of the community, or at least by the whole proprietors of burial-places—the present attempt on the part of the respondents might be held in law to be a threatened misuse of the property. But the usage is all the other way. It surely cannot be questioned that monuments in respect of supposed political and public services are of constant occurrence, and are every day admitted into places of sepulture without any body dreaming of an objection. It is equally a matter of notoriety that, in the case of political services, there must and always will be in the country as great a diversity in opinion as exists here. Indeed we have not far to go to witness the existence of monuments at least as offensive in their character, and that of the parties commemorated, as that now objected to. Why, in this very Calton burying-ground, as was mentioned in the argument, the most striking feature is a monument to one whose name, deservedly high in literature, is inseparably connected with opinions which the vast majority of his countrymen would reject with abhorrence. Then to come nearer the point, we have, in one of the oldest and most frequented churchyards of this city—and I have no doubt the same will be found in every part of Scotland—monu-

ments in honour of political or religious martyrs, in their own day convicted traitors, but whose sentences have been reversed, though by what is but at least a partial change of opinion of their countrymen. For it cannot be denied, that in a number of those cases, though the remains of the dead themselves have long since been blended with the surrounding dust, the spirit of the contests, religious and political, attached to their names, has lived on, and still lives in unabated intensity and activity at the present day. Yet all these monuments were erected, and still stand without challenge. They are clearly testimonials, like all such monuments, of the opinions, religious or political, of those who erected them, and nothing else; but still, being monuments to the dead, the erection of them has been, by the usage of this country, recognised as a legitimate use of a portion of a public burying-ground, notwithstanding that very diversity of opinion, which does, when the present case is rigidly scrutinized, form the single ground in law of the opposition of the suspenders.

I conclude, then, as I set out, by stating my opinion, that I can see no reason, either in principle or as derived from usage, for questioning the intended appropriation of this piece of ground by the respondents as an abuse or misuse of the right of property which they have acquired. It is now more than half a century since these transactions took place. The merits and demerits of the individuals concerned in them are matter of history, upon which there is, and possibly always will be, a diversity of opinion. But, for the reasons already assigned, I cannot discover that the parties holding one set of these opinions are entitled to prevent the other, who take a different view, from testifying those opinions in the form of a monument in memory of the dead, who may have exerted themselves, and suffered in their defence. It is impossible for me to hold, in the circumstances of this case, that there is here any such intended abuse of the right of property acquired by the respondents, as to require or justify the interference of the Court.

LORD JEFFREY.—I concur in the opinions last delivered, and have but little to add in explanation.

As to the formal objection on the part of the dissentient members of the Incorporation, founded on the prior sale to Henderson in 1776, I have no difficulty whatever. Whatever may be the case as to the negative prescription, I am satisfied that the Incorporation has at all events established (or re-established) a complete title to the property by the positive prescription, having openly resumed possession of it on their original title, upwards of forty years ago, and occupied it during all that time as a tool-house for the use of their grave-diggers and other servants—erasing at the same time the name of Henderson, as a purchaser, from the books, which formed the only record of his original purchase. But it is, if possible, still more clear that these individuals, who now interfere (as they say) solely to protect the Corporation from a possible claim of damages at the instance of Henderson's representatives, would inevitably subject them to a certain and far more formidable claim on the part of the present respondents, if they should succeed in this interference. The bargain with these last parties is finally concluded; the price has been paid; and possession made over. There can be no doubt, therefore, that if molested in that possession by the act of the sellers themselves, they would be entitled to damages; and the only result of the complainers' success upon this ground would therefore be, to exchange a merely possible, and, in truth, imaginary liability to the extinct claim of Henderson, for a certain and far

No. 106. more onerous liability to the respondents. Upon this point, therefore, I see no ground for hesitation.

Mar. 4, 1845,
Paterson v.
Beattie.

Upon the other and more interesting question, which is raised by the proprietors of other lots in this burying-ground—as there is unfortunately a difference of opinion among us—I think it right to make a few observations. It is certainly to be regretted when any individuals propose to make such an use of their property as is found to give offence or uneasiness to others. But the mere existence of such offence or disapprobation, even where the grounds of it are not unreasonable, and may be sympathized with by many, will not warrant the interference of the law. To justify that, it will generally be necessary, I think, to show, either, 1st, That the use proposed would import a breach of contract or legal obligation; or, 2d, Would constitute a nuisance to the neighbourhood; or, finally, Would endanger the public peace, or be a violation of decency and good morals. The complainants have, very prudently, relied most on the first of these grounds. But they have sought aid also from the last; and, therefore, I must say a word or two on that, before considering the value of their plea on the allegation of substantive breach of agreement.

There is no point made, I think, on the proper question of nuisance, and it obviously would not be maintainable, the proposed structure having manifestly no tendency to injure health, or interfere with the ordinary comforts of life in the vicinage. But it is strenuously, though rather indirectly, contended that, being designed to honour the memory of convicted criminals, it is legally objectionable on the score of morality and good order. Now, I would observe, that this seems rather an objection for a public prosecutor than for private individuals; that, if at all available, it would go to prevent the erection of the monument in any situation whatever; and that it seems, therefore, to come rather inconsistently from these complainants, who, I think, have rested their case entirely on their privileges in this particular burying-ground, and distinctly disclaimed any wish to interfere with it if removed to another locality. But supposing it to be competently raised, I am far from saying that there may not be cases where there might be much force and relevancy in such an objection. If it were proposed, for example, to erect a monument to the honour of such miscreants as Burke or Bishop, on the ground of their noble zeal for the promotion of anatomical science, I should be sorry to think that there could be any doubt as to the legality of interdicting it, as an insult to common decency, an affront to the best principles of our common humanity—and so of other enormities. But political offences are in quite a different category; and though often leading to far greater evils than more debasing or revolting crimes, and therefore requiring repression with at least equal severity, yet do not imply any such moral depravity in the individuals who may fall into them, as to debar them, especially after a considerable lapse of time, from the sympathy of those who may then look with pity to their sufferings, and with charity to their excesses. Mr Rutherford made a touching allusion to the neighbour tombs of Montrose and Argyll—two illustrious men, who mutually arraigned each other of treason in their lives, and both died as convicted traitors. Hampden and Falkland in like manner, fell in adverse ranks—each battling for what he conscientiously believed to be the cause of his country—and yet do not their monuments now stand imperishably together, in the breast of every generous reader of their story! And who is there, at the present day, that would grudge a tribute of respect to the

gallantry of Balmerino or Lochiel, or look with any thing but profound veneration on the pious labours of Old Mortality among the scattered tombs of the proscribed Covenanters? The individuals now in question were persons no doubt of less mark than those I have mentioned. But they, too, fill a page in history—and their private lives, I believe, were blameless—or, at all events, unstained by any brand of infamy. Nor, indeed, do I see any reason to suppose that they were actuated by any worse motives than those which have at all times most commonly led men into political delinquencies, exaggerated notions of existing evils, and possible remedies; overweening estimates of their own power and abilities, and a morbid desire of distinction or notoriety—dangerous infirmities of character certainly, and capable of working infinite mischief in certain conditions of society, but not in themselves hateful—nor, when expiated by much suffering, at all inconsistent with feelings of deep and respectful sympathy, especially among those who, without at all approving of their conduct, may yet lean to the principles they professed, and regret that they were not asserted with greater temperance and propriety.

I have alluded to the lapse of time as a material element in any estimate of the danger and consequent illegality of monuments to political offenders; and it must at once be seen that it is a most material element. With all the allowances that can be required for such offences, it seems impossible to doubt that, while the convictions for them were recent, and the state of things which called for such convictions still continued, it might be pregnant with the most serious danger to allow the erection of any such honorary memorial to the persons convicted. To go no further, indeed, than the case of the individuals now in question—if, immediately after the suppression of what they were pleased to call the British Convention—while the country was still in a state of alarming excitement, and all the affiliated societies either in full operation or but partly dissolved—proposals had been publicly circulated for setting up such a monument in any of the populous places, (whether in the streets, suburbs, or burying-grounds,) which had been the seat of these assemblies, I feel that it must have been considered not only as a daring defiance of the law, but as an open lifting of the standard of sedition, and a perilous provocation to actual violence and disorder; and liable, as such, to be interdicted and put down at the instance of a public prosecutor.

But, after the lapse of fifty eventful years, when all the subjects of those agitating proceedings have long been in their quiet graves; when few survive who can have any distinct recollection of the actual feelings and temper of the times; and when two entire generations have risen from infancy to manhood, under an altered state of the law and distribution of political franchises, and amidst new objects of interest, and topics of contention which had not then been heard of—I cannot but think that any persons who may now choose to commemorate them by a monumental building, may be indulged in their fancy, without the smallest risk of producing public commotion, or exciting in the breast of a single individual any feeling of discontent or disaffection to the constitution and the laws.

It only remains, therefore, to consider whether the erection of this structure can be regarded as a substantial violation of any contract which the proprietors of this burying-ground may have entered into with former purchasers of burying-places within it? Now, there is confessedly no stipulation to the effect now contended for, in any of these contracts; and the whole case of the complainers rests, therefore, on what they say is to be implied or inferred, from the nature of the

No. 106.

Mar. 4, 1845.

Paterson v.

Beattie.

No. 106.

Mar. 4, 1845.
Paterson v.
Beattie.

subject, and the peculiar purposes for which it was offered and acquired. They took their several lots, they say, as portions of an enclosed cemetery or ancient place of interment; and are, consequently, entitled to insist that the whole enclosure shall be used for purposes of sepulture only; or, at all events, that no part of it shall be applied to purposes inconsistent with the decent quiet and solemnity of a place of interment. And to this proposition, so generally stated, I do not see that there need be much objection. Strictly speaking, to be sure, it might be difficult to find authority for holding that the owners of graves, in such a place, were legally entitled to any thing more than that the area should be decently enclosed, and the graves themselves protected from being trampled and defiled by the pasturage of cattle; and that they and their relatives should have access to them on all fitting occasions. But my own impression is, that they are also entitled to be secured against being disturbed in any such visits of sorrow or meditation, by the exhibition, in these precincts, of any unseemly spectacle; or by sounds or sights which, by obtruding images of worldly vanity or levity, might jar too painfully on the feelings or trains of thought which such a locality should inspire. But while I am disposed, on this ground, to agree with the Lord Ordinary, that the suspenders might justly complain, as of a substantive breach of agreement, if they found any part of this area given off as a site for shows of wild beasts, or rope-dancers, or for a comic orchestra or equestrian theatre, I must say that I think the objection extravagantly overstrained, and indeed entirely perverted and misapplied, when it is sought to be extended to such an edifice as is here in contemplation.

I shall not repeat what has been already so well said as to the established practice of erecting in such places what are learnedly called cenotaphs—or, in other words, empty tombs or monuments to the memory of individuals who are not there interred; and which are fully as often intended to commemorate the admiration and sympathy of sections of the community for public services or sufferings, as the mere private affection of surviving friends. It is enough to satisfy me of the legality of such a structure in such a locality, that it is essentially of a sepulchral and solemn character. It is a monument to the memory of dead men—of men, no doubt, who in their lifetime offended against the law, and incurred its penalties; but who may now, surely, be held to have expiated their offences by their sufferings; and of whom I cannot but think that we are bound, on every consideration of Christian charity and humility, (and especially in such a place,) to think of only as of erring and unfortunate fellow-creatures.

I am unwilling to believe, and in fact I do not believe, that the promoters of this monument, or any considerable number of them, really wish by it to encourage insubordination or contempt for lawful authority. But even if I could think that any of them were actuated by so malignant an intention, I should feel confident that the experiment must end in their signal disappointment. The evil of any lesson inculcated in such a form, fortunately depends wholly on the spirit in which it is read; and not on the purpose with which it may have been promulgated; and I have not the least fear of its being now read by the people of this country, or such of them as may think of looking at it, in any but a safe, and even a salutary sense. The thoughts which such a monument should suggest, even to those most opposed to the views and opinions of its founders, are naturally of a solemn and sobering character. And if, in some, they may still be too much mis-

ed up with feelings of anger at supposed injustice, and in others, of unmerciful reprobation of offences, of which the mischief and the penalties have been long ago consummated, I can only say that the blame will be with those who continue, on either side, to cherish sentiments so uncharitable; and that, if there be any place where the influences of the scene in which they are suggested are likely to soften them down to a more humane and indulgent standard, it is when that scene is laid where the wicked cease from troubling, and the weary are at rest; and where every thing should remind us of our own frail mortality, and of that awful Seat of Judgment before which none of us can hope to be justified—except through mercy.

I cannot, therefore, persuade myself that the erection of this monument, in the place now proposed for it, can be considered as any violation of the rights of those who have interest in the adjoining ground; or that the mere dislike of a few sensitive individuals (for no real interest is affected) is a ground on which it can be legally interdicted; and I am, therefore, for altering the interlocutor of the Lord Ordinary, and refusing the note of suspension.

THE COURT pronounced the following interlocutor:—"Alter the interlocutor of the Lord Ordinary reclaimed against, and remit to his Lordship to recal the interdict, and to refuse the note of suspension; find the suspenders liable in expenses, and remit to the auditor to tax the same, and to report to the Lord Ordinary."

SCOTT and BALDERSTON, W.S.—J. R. STODART, W.S.—Agents.

ROBERT GIBSON, Petitioner.—*Robison.*

No. 107.

Poor's-Roll—Husband and Wife—Divorce.—In this case, which was an action of divorce by a husband against his wife, the Lord Ordinary had ordered him to pay £8, to enable her to conduct her defence. The husband being unable to pay this sum, presented an application for a remit to the reporters on the *probabilis causa*, with a view to being admitted on the poor's-roll. The Court granted the application, on condition of his undertaking to have his wife put on the poor's-roll also at his own expense.

JAMES SOMERVILLE, S.S.C.—Agent.

Mar. 4, 1845.
2^d Division.

No. 108. **MAGISTRATES AND TOWN-COUNCIL OF ST MONANCE, Pursuers and Advocators.—*Rutherford—Deas.***
ANDREW MACKIE and JOHN COCHRANE, Defenders and Respondents.—*Sol.-Gen. Anderson—Cook.*
 Mar. 5, 1845. **Magistrates & Town-Council of St Monance v. Mackie.**

Property—Harbour—Prescription—Bounding Title.—1. In a declarator at the instance of the magistrates of a burgh of barony for determining the property of an open space of ground adjoining the harbour of the burgh, and situated between it and the town,—A grant to the bailies, council, feuars, and inhabitants, of the haven and harbour, with customs, &c., and the common lones, gaits, wynds, vennels, and common passages, to and from the town and haven, held to be a sufficient title to the open space. 2. A party with a bounding title, held to have acquired no right to a piece of ground beyond his boundary, by the possession of a building upon it, which had been unchallenged for more than forty years.

Mar. 5, 1845. By charter, of date 28th October 1622, William Sandilands, liferenter, and Sir James Sandilands, his son, fiar of St Monance, upon the narrative of a royal charter of erection confirmed by Parliament, by which the town and port of St Monance were erected into a free burgh of barony, and the port and harbour thereof into a free port and harbour; and upon the further narrative that the upbidding and upholding of the said haven, and of a sufficient bulwark thereto, would be beneficial to the town, and profitable to the superiors thereof, but that this could not be accomplished without considerable expense, which the bailies, feuars, and inhabitants of the town were willing to undertake; gave, granted, confirmed, and in feu-farm and heritage let and demitted, heritably and irredeemably, in favour of the then “bailies, council, feuars, and inhabitants of our said town of St Monance, and their successors, all and hail our foresaid haven and harbour of St Monance, with all and sundry the customs, anchorages, profits, privileges, casualties, and commodities of the same, our haven, whatsoever pertaining, or that may or can be known to pertain thereto, with the hail customs of the fairs of the said town; and all and sundry the common lones, gaits, wynds, vennels, and common passages to and fra the southmost part, muir and commonity of St Monance, to and fra the foresaid town of St Monance and haven thereof, as well within our said town as outwith the same, used and wont, with free ish and entry, and all other privileges, liberties, easements, and commodities of the same.” On this charter sasine followed on the 28th, recorded 30th October 1622.

Andrew Mackie and John Cochrane were proprietors of tenements in the town and burgh of St Monance, adjoining the shore. These tenements were on the north side of the main street of the burgh, which runs east and west, and between this street and the harbour was situated a vacant piece of ground.

The earliest title in Mackie's progress of writs, was a sasine of 6th No. 108. November 1704 in favour of Robert Low, proceeding upon a charter and precept of sasine from the superior, Sir Alexander Anstruther of Newark, of All and Whole a tenement of land and houses, bounded "betwixt the tenement and yard of William Stevenson upon the east, the common gait on the north, the full sea upon the south, and the house of Robert Ramsay and umquhil Thomas Strachan, &c., upon the west."

Mar. 5, 1845,
Magistrates &
Town-Council
of St Monance
v. Mackie.

In a sasine in 1738, proceeding upon a precept of clare constat, and a sasine in 1739, proceeding upon a charter of resignation, the southern boundary was described as "the full sea, the High Street intervening on the south." In a sasine in 1748, proceeding on a charter of resignation, it was described as "the High Street, and sea-flood on the south;" a sasine in 1773, proceeding on a disposition by a father to his son, "the common street on the south;" and, in a sasine in 1827, proceeding upon a charter of adjudication in 1784, "the full sea, the street intervening on the south."

In Cochrane's titles, a sasine in 1753, proceeding on a precept of clare constat, described his subject as follows:—"All and whole that head and tenement of land, &c., bounded betwixt the tenement and which sometime pertained to umquhile Thomas Binning, &c., on the east; the common passage and full sea on the south; the tenement and yard sometime occupied by umquhile David Sandilands, &c., on the west; and the common gate passing east and west through the town on the north parts." It was also described in the same manner in a charter of resignation in 1782, on which sasine was taken in 1821; and in a sasine in 1829, in favour of Cochrane himself.

Mackie and Cochrane presented a joint petition to the Sheriff, setting forth that their properties, which nearly adjoined, had the same boundary on the south; that the road or street intervened between their houses and the harbour, and their predecessors and authors had been in the habit of keeping in repair the bulwark or wall betwixt the harbour and the street; that they and their predecessors and authors had from time to time made erections on, and taken such uses of the space lying between their houses and the harbour as they required, and had also let the same; and that Mackie had a house or cellar partly built on the bulwark or wall of the harbour: That, notwithstanding their undoubted right in the space lying betwixt their houses and the harbour—to the effect at least of preventing any appropriation or obstruction of it by other persons, the Magistrates and Council of St Monance had let the same as landing stations, not only to the obstruction of the public road or wharf, but to the annoyance of the petitioners, to whom the operation of drying fish proved a nuisance. The petition craved interdict. In their answers to this petition, the Magistrates denied that the subjects of the petitioners were bounded by the sea on the south; farther alleging, that

No. 108. any use the petitioners might have had of the space or area was with their special permission.

Mar. 5, 1845.
Magistrates &
Town-Council
of St Monance
v. Mackie.

The Sheriff granted interim interdict ; and afterwards, after a proof had been led, by interlocutors of 8th August 1840, and 28th June, 15th September, and 1st November 1842, found that, as in a possessory question, Mackie and Cochrane had instructed a sufficient interest to entitle them to have the interdict continued against the Magistrates, to the effect of prohibiting them from letting the space as fish-curing stations.

The Magistrates presented a note of advocacy. The Sheriff having, by interlocutors of 3d September and 14th October 1840, repelled a preliminary defence by the Magistrates, that the petitioners were not entitled to prosecute the action jointly, and that Mackie, as a member of the Town-Council, ought to have been served with a copy of the petition, they brought these interlocutors also under review by a supplementary note of advocacy.

The Magistrates at the same time brought a declarator to have it found, that the portions of the said "space immediately adjoining the harbour, and likewise the bulwark, formed parts and pertinents of the harbour, and that the remainder of the ground or space immediately adjoining the fronts of the defenders' tenements formed part and pertinent of the public street ; or, at all events, that the whole of the ground or space immediately to the southward of the defenders' tenements formed either part and pertinent of the public street, or parts and pertinents of the said harbour ; and that the property thereof, and of the bulwark, was vested in the pursuers, in virtue of the above rights and titles, subject to all lawful rights and uses on the part of the inhabitants and community of the town."

The two processes were conjoined.

The defenders, Mackie and Cochrane, pleaded ;—

That the charter of 1704, in favour of Mackie's predecessor, undoubtedly gave right up to the sea-line ; and although his subsequent titles, and that of Cochrane, were expressed more ambiguously, they were to be construed with reference to the earlier title of Mackie, as to the possession enjoyed by the defenders. That possession, particularly in the case of Mackie, had been unmolested and exclusive for more than forty years ; and the presumption of law was, that this followed upon, and was referable to, his title as proprietor, rather than to any right in parties as inhabitants of the town, or otherwise.¹

The Lord Ordinary pronounced the following interlocutor :—" In the declarator, at the instance of the Bailies and Councillors of the burgh and barony of St Monance against Andrew Mackie and John Cochrane, re

¹ M'Kenzie v. Magistrates of Fortrose, March 9, 1842, (ante, Vol. IV. p. 93 Lord Moncreiff.)

pels the objections to the title of the pursuers to insist therein, and finds, No. 108. declares, and ordains in terms thereof, and decerns: And, in the original and supplementary advocacy at the instance of the pursuers of the declarator—the defenders in the action in the inferior court, insisted in at the instance of the defenders in the declarator—adheres to the interlocutors of 3d September, and 14th October 1840, repelling the preliminary defences in the said action; and, in respect that the petition in said action proceeds on the footing of the petitioners (the defenders in the declarator) being respectively proprietors of the two pieces of vacant ground to which it relates, or having some qualified right of property therein, or having, as proprietors of the rest of the premises contained in their titles, acquired a servitude over them, but of what kind is not specified, or that the act complained of would be productive of a nuisance to their undisputed properties; and in respect that none of these things have been duly established, recalls the interlocutors of 8th August 1840, and 28th June and 15th September and 1st November 1842; and, in particular, recalls the interdict thereby granted—assoilzies the defenders in said action (the pursuers of the declarator) from the conclusions thereof, and decerns; but reserving always to the said petitioners, or either of them, any right they may have as proprietors, burgesses, or inhabitants of the said burgh of St Monance, to the occasional uses of the said piece of ground, along with the other proprietors, burgesses, or inhabitants, and any right or liberty to them, or either of them, in any of these characters, to challenge or object to the exclusive or preferable occupancy of said ground by any other person.” *

Mar. 5, 1845.
Magistrates &
Town-Council
of St Monance
v. Mackie.

* “NOTE.—1. The Lord Ordinary is of opinion that the general title of the pursuers, as representing the burgh, comprehends the two pieces of ground in dispute, and that they would have a well-founded claim to them, to the effect concluded for in the declarator, even in competition with parties who had an express title, if these parties had not occupied, or had ceased to occupy, their respective portions as proprietors, and the occupancy had been with the burgh in the appropriate manner, and still more so, if the title was not express, but only in terms which might admit of being explained by possession, as comprehending the disputed ground, and absolute and exclusive possession as proprietors was not established.

“2. The import of the titles of the defenders is a point not free from difficulty.

“The title of the defender Mackie is a bounding title—the subjects conveyed being described by boundaries distinctly expressed on every side. The southern boundary is the matter in controversy. The oldest deed, not the original grant, but a charter of resignation in 1704, describes the south boundary as ‘the full line on the south.’ But passing over an instrument of sasine upon a precept of clare constat in 1738, the subsequent charters of resignation and adjudication, or sasines thereon, from 1739 downwards, contain a fuller explanation and description of the boundary on the south, according to the terms of which (and throwing out of view the disposition by John Mackie in 1772, and similar subordinate deeds, which are still less favourable to the claim of the defender than the charter from the superior) the Lord Ordinary, as at present advised, thinks that the ‘High

No. 108. The defenders reclaimed.

Mar. 5, 1845.
Magistrates &
Town-Council
of St Monanee
v. Mackie.

LORD JUSTICE-CLERK.—The first point which it is necessary in this case to consider is, the titles of the pursuers of the declarator—the Magistrates of St

Street' or 'street' mentioned in the titles must be held to form the southern boundary of the subjects conveyed. He thinks this is the sound conclusion to be drawn, both from the way in which the south boundary is described, and from the other boundaries when referred to; for if the south boundary were carried beyond the street to the bulwark, which the defenders take as the line of 'the full sea,' so as to include within it the disputed ground, then it would appear, that to the east and west no boundary would be given for that portion of the subjects so supposed to be conveyed; and this, although the titles in describing the boundaries plainly profess to give a boundary surrounding and enclosing on every side the whole subjects contained in them. And it may also be remarked, that the early state of possession in particular, as disclosed by the proof, is in conformity with this view of the south boundary, harmonising with it, and not consistent with the boundary lying further south.

"But assuming the street to be the boundary on the south, it follows that the title being a bounding title, it cannot be founded on as a title to any ground lying to the south of the street, even although there were clear proof of exclusive possession of it by Mackie and his predecessors for forty years and upwards, seeing that that would be possession in the face of, or without title, and not in support of it. But no party can prescribe any right in the face of the title on which he relies to found prescription; the title must be sufficient by its terms to cover the right claimed. Hence the rule of law is fixed, that no one can prescribe on a bounding charter, so as to acquire a right to property which is beyond the boundary to which his right is limited by the terms of the charter itself. 2 Stair, 8, 26, and 73; Young, 17th Nov. 1671; Morr. 9686, and other cases.

"These observations, in reference to Mackie's title, equally apply to that of the defender Cochrane. Indeed, the terms of his title are even more unfavourable to the plea of its including within its boundary the ground claimed by him.

"Supposing, however, that a different view were to be taken of the meaning and import of the titles of the parties, and that the description of the south boundary of their properties respectively, were held to be at least so ambiguous as to admit of explanation by possession, and that if fortified by a clear proof of exclusive possession by the defenders, as proprietors for forty years and upwards, of the pieces of ground in dispute, they would form good titles thereto, the Lord Ordinary apprehends that no such possession has been instructed in the case of either of the defenders, while there is established a sufficient possession on the part of the pursuers and their predecessors, to preserve their right in virtue of the general title of the burgh, to the exclusion of the competing claims of the defenders, or either of them. This appears to the Lord Ordinary to be the correct result, when the character of the possession by the defenders, as referable to a title of property, and the character of the possession of the burgh, that is of the burgesses, inhabitants, and others, of the ground in question, with relation to the nature of the subject, and the rights and uses to be exercised therein, as belonging to the burgh, are duly attended to.

"No doubt, in this view, there may be some difficulty with regard to the portion of the ground opposite to Mackie's premises, occupied by what in the proof is called the lumber-house, and which was built more than forty years ago. So far it may be thought that, applying the rule of *tantum præscriptum quantum possessum*, a sufficient prescriptive right and title to that extent at least has been established, still, under all the circumstances connected with that structure, including its position in part upon the bulwark, which seems to be public property, the Lord Ordinary hardly thinks that there is enough in the case to warrant that part of the ground being differently dealt with from the rest.

Monance. Although directly from Sir James Sandilands, yet it is a grant by him in terms of a Crown charter therein recited, granting to him the port and haven of St Monance, and erecting the same into a free port. The Magistrates have the full benefit, therefore, of the royal grant of the port and haven, with the rights of free port. This grant of the port and haven from Sir James Sandilands is anterior in date to any of the titles from the same family or their successors founded on by the defenders.

No. 108.

Mar. 5, 1845.
Magistrates &
Town-Council
of St Monance
v. Mackie,

The grant is not merely one of *free port within* certain extensive limits; it is a special grant of a *port and haven at a particular place*. A general grant of free port within certain limits does not import necessarily, and seldom grants, a right of property in the shores within the precincts of the same, but only the use, and the sole use, of the same for the purposes of loading or unloading goods, or subjects the use of the shore by the proprietors to the conditions and payments of the port. But a grant of the port and haven at a particular spot does convey, if the words do not exclude, the whole shore and beach of that port and haven for the purposes of the harbour as an adjunct or part of the same; so that the grantees of the port have a title of property in the same, and are entitled to make quays, or otherwise occupy the proper shore all round the port, to the exclusion of any appropriation thereof by individuals for any purpose as their private property. Craig and all the authorities so explain the nature and extent of the grant of a port and

"3. The plea stated by the pursuers of the declarator as a preliminary defence in the original action before the Sheriff, and which is brought before this Court by the supplementary advocacy for them, that the action was incompetent, as being at the instance of two parties, pursuers, who had no joint title and interest, and could at the most only go the length of having the instance limited to one of them as pursuer; and a minute has accordingly been lodged to the effect that, should the plea be sustained, Mackie is to stand as the party insisting in the action. But the Lord Ordinary considers the defence to be too critical in the circumstances. It may be that the titles of Mackie and Cochrane might be differently worded, and the proof of possession as to each respectively might not be altogether the same; but looking to the nature of the subject in dispute, and that Mackie and Cochrane were, in respect of their alleged rights therein, aggrieved by one and the same act done by the Magistrates and Council, of which the action complained; and that the application is founded, (whether justly or not is here of no importance,) not only upon the allegation of property in the disputed ground, but of nuisance to the other subjects belonging to them, it is apprehended that it would be too strict an application of the general rule to find that the union of Mackie and Cochrane, as joint pursuers, was incompetent. Even as resolving into a matter of expenses, which it truly does, the point is of the less importance, seeing that the proof in the action before the Sheriff has been taken as the proof in the declarator; and disposing of the case as the Lord Ordinary has done, its importance is still further diminished, the party insisting in the plea being in other respects the successful party, and having been found entitled to expenses generally, although subject to modification, in carrying out which it is however meant, *inter alia*, to relieve the opposite party from any expenses which can be shown to have been occasioned by that plea having been maintained.

"4. With respect to the ground of the interlocutor in the advocacy, and the reservation by which it is qualified, the Lord Ordinary has only to observe, that the reservation is in no way inconsistent with the decree in the declarator, the terms of the conclusions of that action leaving open all such questions as those to which the reservation refers."

No. 108.

Mar. 5, 1845.
Magistrates &
Town-Council
of St Monance
v. Mackie.

haven. Craig, who has treated fully of many of these subjects, is quite express on this point.¹ And, to make his meaning more explicit, he not only gives to the grantee the right to the sand or beach, "*quatenus maximus hibernus fluctus excurrit*," but goes on to add, as a further right, "*littusque ei adjacens etiam ad portum pertinet, ut locus sit ubi onera imponantur, et efferantur, et ad tempus servantur*."

The littus or shore is not what the tide covers; it is, on the contrary, expressly contradistinguished from that in this passage. It is the stripe of land adjoining the actual beach, where goods may be placed, and where the tide may be watched and the goods safely preserved—that shore which is necessary for quays, wharfs, and so forth. On comparing sec. 13, above quoted, with sec. 15, as to the shores within the precincts of the wider grant of free port within certain bounds, his meaning appears more emphatically. It is unnecessary to go over this particular grant, for in many passages it very clearly proves that the grant of the port and haven includes the full accesses and shores of the same. One object was to make "a sufficient bulwark thereuntil"—not a bulwark for the protection of the property of others, but a bulwark for the harbour; which means, of course, a quay so protected that it may be "a sufficient harbour for loading and landing thereuntil." Then all accesses and common passages to the harbour are granted, and the open space round the port is properly the common passage of the port.

Then all, getting rights in the town, were to contribute to the maintaining of the haven. Then (which I don't think unimportant) seisin is to be given at the full sea, and ground thereof, to which the bailies are to pass, and of which ground the symbols are to be delivered—earth and stone of the ground of the haven at the full sea, thereof as at the principal Manse of the same, which clearly denotes that the shore or littus was conveyed, so that even at full tide seisin could be given of earth and stone on the ground of the haven.

This view of the grant of the pursuers is of great use in construing or considering the proper import of the titles of the defenders. These are grants flowing from the same subjects-superior, although much later in date, of tenements in the town, at which this established port and haven existed long previously, and had been constituted by royal grant, first in favour of their subjects-superiors themselves, and secondly in favour of the Magistrates of their burgh of barony. Now, only the most express and inflexible expressions could warrant, in my opinion, the construction which would import into any of their titles a grant to the prejudice at once of the port and of all the other feuars, viz. a right to any of the proper shore, landing-places, or common passages of the port. On looking at these titles, I have never entertained any doubt whatever as to their proper meaning and legal effect. It is enough to advert to the strongest, which contains on the south, *one*, the boundary of the full sea—the next, the full sea and the High Street intervening on the south. The first description—containing the full sea on the south—was not repeated in any other title. The Solicitor-General said, if this title stood alone there would be an end of the question, for it would give clearly right down to the sea. Most assuredly not, in the circumstances of this case; for

¹ I. 15, 13.

the public street and common passage existed previously—belonged to the pursuers on the part of the community, and could not be included, by any construction, in the titles of one feuar in a burgh, to the actual stoppage of the passage of the whole town. This only shows that, in the construction of the titles of one property in a burgh, and adjacent to a port, you must look to the actual facts and to the predominating grant to the community of the streets and port. The other, again, I think, is perfectly conclusive, being free from all ambiguity—the full sea, the High Street intervening on the south. The meaning of that is, clearly, that between the property and the sea the street intervenes—comes between—cuts him off from the sea—is interposed. I know no other grammatical or sensible meaning. The later titles—containing the High Street and sea flood, and at last the common street—explain satisfactorily the use of the previous expressions. I have no doubt that the party has this benefit of the reference to the sea—that no grant can be made by narrowing the High Street or common passage of any ground between him and the sea to any other feuar. It was intended to give him the front to the sea open and clear—the street and the sea being in this way the boundary. But a right to the property of the shore or littus of the port itself, as between the street and the sea, is not within any reasonable construction of the terms. It is unnecessary to advert to the titles of Cochrane.

No 108.

Mar. 5, 1845.
Magistrates &
Town-Council
of St Monance
v. Mackie.

Such being the titles, I apprehend it to be quite clear that no acts of possession on the part of Cochrane, or as to the larger portion of the shore opposite Mackie's feus, are of the least importance at all, even in explanation of the titles. None of these acts appear to me to be exclusive—none to be material.

The only fact of the least importance is the lumber-house of Mackie, which has stood for more than forty years openly and unchallenged. I cannot take the statements that there was grumbling in the town as proof of challenge on the one hand; nor, on the other, the statement that he had to treat the Magistrates and others to whisky as proof of acquiescence. It seems to have been one of those open and flagrant usurpations of public property so common in Scottish burghs where there was influence among the council—certainly with the full benefit of law, whatever that may be, of not having been challenged.

But it is an usurpation without a title. If I am right in the construction of the title to the port and haven, and of the title to Mackie's tenement, one includes this spot as part of the common quay and landing-place of the port—the other expressly excludes it. The possession, therefore, is unavailing in point of law. The south wall of it is actually built on the bulwark of the haven belonging to the community, and it occupies a most important part of the quay which that bulwark was to form and protect—being at the very landing-place chiefly used, it would appear, for small boats. I think that this cannot, consistently with the titles, be taken as an act of possession explanatory of the meaning and construction of the same; but is clearly an unlawful occupation of ground to which the titles cannot be extended. Hence, if there is value or practical meaning in the rule of the law of Scotland—that to entitle a party to acquire that which is in the titles of another by prescriptive possession, there must be a title to which his own possession can be legitimately ascribed—this case appears to afford an instance of its application.

The case of the Magistrates of Culross v. Geddes, 24th November 1809, (in Baron Hume,) was strongly pressed upon us by Mr Cook. Being a Second Division case, his report of course has not the same value after he became clerk

No. 108.

Mar. 5, 1845.
Magistrates &
Town-Council
of St Monance
v. Mackie.

of the First Division as of those cases which he heard argued and decided. The case is quite different from the present in all the important particulars. 1. It did not relate to the shore of any port or haven, but to some of the shore of what was within the general territory of the burgh. 2. The magistrates had no grant of the shore along the properties of others through the territory of the burgh. They founded only on a right which gave them the burgh "*cum salinis salinaris sive salis patellis infra bondas*," &c. This was no grant of the sea-shore. Perhaps it was not easy for Geddes, however, to found much on that point, as his title was a *feu* from the magistrates. Still, if they had a right, the space was no part of the harbour, as appears from the papers and plan, but only of the shore within the general territory of the burgh. 3. Then the question related to the right of ground along the ordinary shore, acquired alluvione by the proprietor, whose boundary was the sea. 4. The titles were essentially different. This will best appear from the late Lord President's note-book when he presided in this Division. [Reads his note.]

As to the petition, I concur with the Lord Ordinary as to the disposal of it.

LORD MEDWYN.—I am for adhering also. I think the respondents have no sufficient title to the grounds south of the public street. As to Cochrane, this seems clear. "The common passage and full sea on the south," must mean that there is no ground beyond the common passage and between that and the sea to which this party has right—his boundary being the common passage. Now the title to Mackie, though in some of his rights differently expressed, seems to import the same thing. The two most important titles produced are the two charters of resignation by the superior in 1704 and 1748, with their *sasines*. In the first of these the south boundary is the full sea, and in the other the High Street and sea flood on the south. I hold these to be equivalent expressions. It cannot be supposed that it was intended to include under the first the public street of this burgh of barony, but to express by this description that there was no ground between the full sea and the street to be conveyed to the vassal, or, as expressed more accurately in the subsequent title, that the High Street and sea-flood made the boundary—the street having nothing beyond it to be appropriated under this deed between it and the sea;—in short, the two, the street and the sea-flood, being continuous, and thus both aptly described as the boundary. This, accordingly, is the interpretation put upon it by the *feuar* himself; for in the disposition granted in 1772 by the grandfather to the father of the present respondent, the property is said to be bounded "by the common street on the south," and this, too, is equivalent to another description in these titles and in two *sasines*, "the full sea, the street intervening"—implying, I think, very clearly the same as in the disposition of 1792, that the south boundary was the street, and that nothing but the street intervened between the sea and the property of the *feuar*. The proof which has been adduced does not fortify the title of the respondents, or show any exclusive possession of any part of the subject in dispute, with the exception of the lumber-house. Perhaps the most public act is contributing to keep up the bulwark. But, besides that, the haven with its bulwark is expressly mentioned in the inductive cause of the grant, stated to be to encourage the bailies and burgesses in their good intentions for erecting honest and sufficient houses, "and specially to the bigging and repairing of the said haven and bulwark therein." Hence the bulwark is conveyed to the magistrates by the superior; and I think by no act of possession could the respondents under their titles as above explained acquire right to this bulwark; and if they were endeavouring to secure a right to it by possession, the

No. 108.

Mar. 5, 1845.
Magistrates &
Town-Council
of St Monance
v. Mackie.

contribution to maintain the bulwark is easily accounted for, even without sup-
posing it to fall under the clause in the charter making it a burden on the burgessees
to contribute for this purpose at their admission as burgessees. It is quite clear
that the bulwark was given to the burgh, but I hold that more was given—I mean
beyond the bulwark—towards the burgh even without the necessity of founding on
the terms of the grant, which includes gaites (roads), wynds, vennels, and common
passages; for I understand, and so it is laid down by Professor Bell, Prin. 654,
that the grant of a harbour comprehends—1st, The natural access which makes a
safe landing-place; and 2d, The artificial operations by which it is improved for
the convenience and safety of navigation. I have no doubt that for time imme-
morial this fishing harbour had the benefit of the ground between the bulwark and
that was required for the street for fish-curing and barrelling fish during the proper
season, and for the fishermen baiting their lines, and used also for selling and
bringing off the fish, and that this ground, as so occupied, must have been included
in the profits, privileges, and commodities of the harbour conveyed by the grant.
The question of the lumber-house is attended with more difficulties, and at one
time I had doubts about it. But, although it has stood for sixty years, I have
not come to the opinion that Mackie has no title to found prescription on it. The
wall actually stands on the bulwark, which clearly does not belong to him,
and of course nothing erected on it can be acquired by him; and if his boundary
is the street, it is encroachment and usurpation on the part of him and his ances-
tors to have occupied the ground with this erection. And we cannot lay out of
our view that these persons were bailies, and influential in the burgh, and likely to
excite any murmur or objection there might be as to this attempted appropriation.
The reservation at the close of the interlocutor I think very proper, and if the
parties cannot settle their respective rights in the clause so reserved, I think it
will be better in a new action confined to the specific point than in the present
action, where so many other and inconsistent views have been taken by the respon-
dents of their rights, and I think it will be cheaper done in the inferior court.

Lord MONCREIFF.—There are here two questions, or rather two cases, re-
quiring judgment. One is merely a possessory question, raised by the proceedings
before the Sheriff, and the judgment thereon brought here by advocacy. The
other is the ultimate question of property, properly raised by the summons of
declarator in this Court. The Sheriff, of course, could decide only in the posses-
sory case; and thinking that there was a sufficient *ex facie* title, whatever doubt
might attend it in the trial of the ultimate question of property, to sustain the
ground of a possessory judgment, if reasonable proof of possession for the last
ten years were given, and that the proof led was sufficient for that purpose, he
gave judgment accordingly, but declaring expressly that it was in the possessory
action only that he formed any opinion on the effect of the titles.

But when the question is here on a declarator which raises the whole question
of heritable right under the titles, the Court is necessarily called upon to form an
opinion on that question in the first instance; because if it be in favour of the
respondents in the declarator, it would necessarily supersede the other question alto-
gether; and even though it may be against them, it may be so on grounds suffi-
cient to exclude the title to insist even in the possessory process.

On this question of declarator of property, I am, in the first place, of opinion,
that the title of the pursuers by their charter is sufficient in itself to cover a right
in the ground in question, either generally as part and pertinent of the harbour,

No. 108.

Mar. 5, 1845.
Magistrates &
Town-Council
of St Monance
v. Mackie.

or as comprehended under the description of the "common lanes, gaitts, wyndis, vennellis, and common passages to and frae the said town of St Monance and heavin thereof." I could not go quite so far as the Lord Ordinary, to hold that this title, without proof of prescriptive possession, or use and wont, would exclude a party who had an express grant of the specific ground in dispute, though he might not be able to bring clear proof of continuous possession on his part. But I have no doubt that it is a sufficient title to enable the pursuers to maintain the conclusions of their declarator, that the defenders have not, by the title-deeds founded on by them, or by any possession, proved any exclusive right of property in the ground in question, but that it belongs to the pursuers as part or pertinent of the harbour, or of the streets and passages of the town.

Supposing this to be clear, the next and the substantial question is, Whether, by the title-deeds exhibited by the defenders, this ground is comprehended within the boundaries therein laid down? Looking at the titles of Mackie, there can be no doubt that all of them are of the nature of bounding titles—a point which is of great importance, in so far as any thing may depend on alleged prescriptive possession.

But the first question is, What is the southern boundary of Mackie's feu by these titles?

It is a remarkable feature in the case, that the deeds produced vary in the description in the material words; and, if they are to be considered as discordant, it may be a question whether the earliest, the charter in 1704, or any of the later titles, ought to rule. I should have great difficulty in holding that the defenders could be so tied down to the terms of any of those later titles, or more especially to the mere disposition by John Mackie, the defender's father, in 1772, as to preclude any reference to the more ancient title, the charter in 1704. Unless there were a distinct title by prescriptive possession established in the other party, I do not see how the benefit of one title could be lost to the defender merely by a variance in the terms of other subsidiary deeds in the progress of his authors; and I am not of opinion that the pursuers have established any such prescriptive case. But one title may be explained by another; and though it is a natural question, whether the earliest should be explained by the later, or the later by the earlier, it appears to me that they should be all considered together, and that the Court should determine, by such consideration of them, what is the true boundary on the south which is intended to be laid down.

Now, I must own, that on first reading the terms of these titles, I had an impression rather adverse to the Lord Ordinary's interlocutor, conceiving that the description in the first charter in 1704, being simply "the full sea on the south," the expressions in the later deeds—"the full sea, the High Street intervening, on the south"—should be interpreted to mean that the actual boundary was the sea beyond the street, but only not comprehending the street as part of the property. I have come, however, to take a different view of the character and meaning of these words. I do not deny that there is a difficulty, but, on the whole, I now think that, on the one hand, it would be a very extraordinary form of excepting the street from the grant by the use of such terms; and, on the other hand, that the words admit of another and more natural construction.

It now appears to me that the real meaning of these titles is simply, that though in a certain sense the subject was bounded by the full sea, it did not literally extend to the margin of the sea, because the public street intervened, or came

between it and the sea, taken literally. It may be presumed that the High Street No. 108. of the town, or a road dignified with that name, had been there from the first ; and it has not been maintained that the ground now constituting the street, or which constituted it in 1738, was actually comprehended in the grant of 1704. If that were said, the occupation of it for the street would establish a clear case of prescription against the boundary expressed in the charter 1704. But it is not said ; and the just inference is, that when the boundary on the south was there described by the term " the full sea," that was not meant according to the literal signification of the terms, because it was stopt by the public street intervening or coming between the ground feued and the full sea. And then, the later titles are so expressed as to explain or bring out this as the real nature of the boundary—first, by the special description in seisin 1738 and seisin 1739 ; afterwards in the charter 1748, where it is simply the " High Street, and sea-flood on the south ; " and at last, in the disposition 1772, by the single expression, " the common street on the south."

Mar. 5, 1845.
Magistrates &
Town-Council
of St Monance
v. Mackie,

This is the view which I now take of these titles, and it leads me to the conclusion, that the real boundary intended in all of them was the street on the south, though in a certain sense it might also be said that the subject was bounded by the full sea as the ostensible boundary, apart from the nicety of the intervening street. But I do not consider this description as altogether unimportant in regard to the interest of the defenders, because I think that it has a force to this effect at least, to protect the defenders against any proceeding on the part of the Magistrates or others, by which the direct communication with the sea, and the openness of the space between the property of the defenders and the sea, might be obstructed. We have no such question before us at present, and it is all reserved.

With regard to the case on the possession—

1st, I am of opinion that the defenders have led no proof sufficient to establish a case of property by prescriptive possession. I will not go through the details of the proof, but I have no doubt that it is a failure. To make out such a case, there must have been complete possession on a sufficient title admitting of such a result. Here the title is clearly a bounding title, and the proof is directed to show either that the real boundary by the titles is different from that assumed, or that there has been some usurpation contrary to that title. I am of opinion that nothing has been proved sufficient to alter the natural and legal construction of the titles ; and, on the other hand, that there is no proof sufficient to establish a prescriptive right of property, either in opposition to the legal construction of these titles, or as affecting the principles by which such legal construction must be educed.

2d, There is a special difficulty about the lumber-house, which is proved to have existed on the ground above sixty years, without challenge.

But, if we hold the titles as constituting bounding titles, that act must be looked on as a usurpation, allowed to be done and to be continued by mere tolerance.

Of course, if Mackie's case fails, Cochrane's is still less sufficient.

I think the case of Culross essentially different, more especially after the explanation given of that case.

I think that the possessory question must also be decided against the original

No. 108. applicants; because, when it is found that they had no title of property in the ground, I think that the whole foundation of their application fails.

Mar. 6, 1845.

Hogg v.

Landles.

Lord Cockburn.—I do not understand the Court to give any judgment on the words, "full sea, and High Street intervening." Had this stood alone, I should have interpreted it as the sea, with the exception of the High Street; but I give no decision with regard to it. It must be interpreted by the subsequent titles; and I understand we do not go into that point, or give any opinion that might be referred to in a subsequent case. I agree with the rest of the Court.

THE COURT accordingly pronounced this interlocutor:—"Refuse both the said reclaiming notes, and adhere to the interlocutor reclaimed against on the merits, and on the reclaiming note for the Magistrates, alter the finding as to expenses—find the pursuers of the declarator entitled to expenses, both in the original action in the inferior Court, and in the conjoined processes in this Court, but exclusive of the expenses of bringing the supplementary advocacy, and that without modification—and find them entitled to the expenses incurred by them since the date of the Lord Ordinary's interlocutor."

ALEXANDER STEVENSON, W.S.—JOHN ROSS, S.S.C.—Agents.

No. 109.

HOGG, Pursuer.—Maidment.

LANDLES, Defender.—Hunter.

Mar. 6, 1845.

1st Division.

Process—Curator ad Litem.—A WOMAN, during the dependence of an action of damages at her instance against A for defamation, raised a declarator of marriage against B, who defended. A moved that the pursuer's husband should be sisted as a party to the action of damages. The Court appointed the pursuer's agent her curator *ad litem*, *valeat quantum valere potest*.

—Agents.

A, Pursuer.—*Maitland*.
B, Defender.—*Buchanan*.

No. 110.

Mar. 6, 1845.
A v. B.

Darnley v.
Kirkwood.

Process—Amendment of Libel.—Held incompetent to allow an amendment of the libel after the record is closed.

LORD ROBERTSON reported the following point to the Court. A husband raised an action of divorce against his wife for adultery. The precise date of the act was set forth in the summons; but after the record had been closed, and a proof taken before the Sheriff-commissary, it was discovered that 1843 had by mistake been put instead of 1844. This mistake ran through the whole record. The question was, whether the record being closed, it was competent to allow an amendment of the libel correcting this error?

Maitland, for the pursuer, admitted the general rule that it was incompetent to allow an amendment of the libel after the record was closed, but submitted that the Court might open up the record, and then allow the amendment.

Buchanan, for the defender, contended that the rule was imperative, and could not be evaded in the manner suggested by the pursuer.

THE COURT held that it was incompetent to allow the amendment, but instructed the Lord Ordinary to allow the pursuer to abandon the action on payment of modified expenses.

—Agents.

MRS AGNES DARNLEY OF RANKIN, Pursuer.—*Rutherford—Christison*. No. 111.
ROBERT MUIRHEAD KIRKWOOD, Defender.—*Penney*.

Prescription—Sexennial.—The acceptor of a bill of exchange died within the term of prescription, and his representative (also within the years of prescription) paid a sum of money to the holder, which was marked on the back of the bill as payment to account. In an action raised against the representative for the balance, after prescription had run, he denied generally all knowledge of the bill, and for which it was granted,—admitted the payment to the holder, without giving any satisfactory explanation of it, and pleaded prescription. The Court sustained the plea, and, no writ being founded on, held that resting-owing could not be established by the defender's oath.

Mar. 6, 1845.

ROBERT MUIRHEAD KIRKWOOD accepted a bill for £954, 14s., dated 15th May 1834, at twelve months, drawn upon him by Robert Rankin. Lord Cuninghame. Kirkwood died on 12th August 1839, without having paid the bill. On w.

No. 111. 15th April 1841, his son and representative, also named Robert Muirhead Kirkwood, paid £480 to account, and this payment was marked on the back of the bill. In 1844, Rankin being dead, his representative, Mrs Agnes Darnley or Rankin, raised action against Kirkwood, junior, for the balance of the contents of the bill, which the summons stated had been granted for borrowed money.

Mar. 6, 1845.
Darnley v.
Kirkwood.

The defender pleaded prescription.

The pursuer answered, 1st, That the payment to account proved constitution; and 2d, That resting-owing was established, in respect there was no presumption of payment by the acceptor, prescription not having run before his death, and the defender did not aver payment as his representative.¹

The defender denied all knowledge of the bill, and gave the following account on record of the alleged payment to account:—"As to the payment of £480 in April 1841, all that happened was, that the defender, Robert Muirhead Kirkwood, was told that the amount formed a debt of his father to Robert Rankin, senior, who was then alive; and, taking the statement for granted, he made the payment in question. But he and the other members of his family afterwards became convinced that the claim was not one which was admissible, at all events without further proof. The payment, be it observed, was within the years of prescription, and therefore it is quite open to the defenders to maintain the plea of prescription, either on the footing of no debt being resting-owing, or, which comes to the same result, of no debt having ever been due."

The Lord Ordinary pronounced the following interlocutor:—"1mo, Finds it specially averred in the summons, and not denied in the defences, that the bill for £954, 14s., specified on record, bears the subscription of the defenders' predecessor, the deceased Robert Muirhead Kirkwood, senior, as acceptor: 2do, Finds it admitted by the defenders, that the said Robert Muirhead Kirkwood, senior, died before the elapse of the years of prescription; and that the defenders, his representatives, do not allege that he paid any part of the said sum during his life: 3tio, Finds it also admitted that the defender, Robert Kirkwood, junior, as representing his father, the original debtor, did, subsequent to his father's death, and within the years of prescription, make payment of no less than £480 sterling to account of said bill: 4to, Finds that the defenders have not stated that they made any further payment to account of the said bill since the first partial payment, before specified, was made. Under these circumstances, finds it unnecessary to make any reference to the oath of

¹ Leslie v. Mollison, Nov. 15, 1808, (F. C.); Christie, June 19, 1833, (11 S. 744); Auld v. Aikman, July 7, 1842, (ante, Vol. IV. p. 1487); Frank v. Forster, July 13, 1842, (*ut sup.* p. 1515.)

² Ross v. Guthrie, Nov. 12, 1839, (ante, Vol. II. p. 6); Alcock v. Easson, Dec. 20, 1842, (ante, Vol. V. p. 356.)

the defenders, in respect that the constitution and resting-owing of the original debt are already sufficiently established by the judicial statements and admissions of the defenders; therefore repels the defence of prescription." *

No. 111.

Mar. 6, 1845.
Darnley v.
Kirkwood.

* "NOTE.—On examining the whole history of this case, the Lord Ordinary has a strong impression that legal and technical pleas are resorted to by the principal debtors, to evade a claim, manifestly well founded in substantial justice.

"The large debt which is now disputed, was contained in a bill for £954, 14s., granted by Robert Muirhead Kirkwood, senior, now deceased, to Robert Rankin. It was payable twelve months after 18th May 1834; due 21st May 1835; and consequently was not, even *ex facie*, liable to the objection of prescription till May 1841.

"Long before that period, Robert Muirhead Kirkwood, the acceptor, died;—and in April 1841, above a year before the prescriptive years elapsed, the defender, Robert Kirkwood, junior, the leading trustee of his father, acknowledged the debt, by paying £480, i. e. about one-half of it, to account.

"This payment is not vouched in the handwriting of Kirkwood, because the whole transaction seems to have been managed by parties ignorant of business, and the creditor in right of the bill reposed exuberant confidence in the members of his own family. But it is immaterial in what hand the payment is marked, as the fact of the payment is admitted.

"The defenders seem to have got other advice since making this honest payment, and they now plead prescription, alleging that they know nothing about the debt, and that the pursuers cannot establish the origin and constitution of the debt, except by their oath.

"The Lord Ordinary has explained the series of facts on which he has come to the conclusion, that the plea of prescription is not maintainable by the defenders; and as these facts are incontestable, the conclusion, in point of law, deducible from them, appears to be equally insuperable.

"The present case is of a peculiar nature, and there is no precedent in our books marked with the same specialties. Here the acceptor of a large bill died long before the years of prescription had elapsed. On his death, his representatives were applied to for payment, and they paid one-half of it to account within the years of prescription, thus giving the creditor the most unequivocal acknowledgment of the justice of the debt when they entered on the succession of the debtor, while their statement implies that they have paid none of the debt since; all which renders any reference to their oath unnecessary.

"The facts admitted here exclude the plea of prescription as effectually as it was held to be obviated in the late case of Mitchell and Ferrier, 23d November 1842, or in the earlier cases of Bryson against Aytoun, (4 Shaw, 180,) and Ritchie, 15th January 1836. In the last of these cases, it was properly laid down, that 'when judicial admissions are sufficient to elide prescription, there is no room for a reference to oath.'

"The defenders argue, it is a point of settled law, that when partial payments have been made, as in the present instance, within the six years during which summary diligence is competent upon bills, they do not interrupt prescription; and, on that ground, it is maintained that the payment in 1841 was not sufficient to preserve the bill libelled on from prescription; but the law as to partial payments on bills within the prescriptive period appears, from the cases cited by the last author, (see Thomson on Bills, 641-42, &c.,) to be by no means fixed by any authoritative decisions; but it is unnecessary to examine them minutely in the present instance, as in the analogous cases which have hitherto occurred, the questions generally related to partial payments by the original debtor, but here the question is, as to the effect of adoption of the debt within the years of pre-

No. 111. The defender reclaimed.

Mar. 6, 1945.
Darnley v.
Kirkwood.

Counsel were heard on 6th February, and the Court took time to consider. The case was advised this day.

LORD PRESIDENT.—I think this case is a very special one. If I had thought it raised a pure question on the construction of the statute regulating the sexennial prescription of bills, I should have wished minutes of debate. But I hardly think it does so. I think the findings of the Lord Ordinary are all right. I think the payment to account, though within the years of prescription, without any sort of explanation the least satisfactory, must be taken as a distinct admission that this was a good document of debt. The acceptor's subscription is not denied, and it is not alleged that he paid any part of the bill; and after his death, his son, as his representative, pays a sum to account; and there is no allegation that the balance was paid. Now is it possible to deny that this is sufficient proof both of constitution and resting-owing? We might find, if necessary, that prescription applies, but that the statements on record render reference to oath unnecessary. The only point before us is, whether the admissions on record are enough to render it unnecessary to refer to oath? I think they are. I am for adhering to the interlocutor.

LORD MACKENZIE.—The only question is this—and it has been decided by the Lord Ordinary *in terminis*—whether, holding prescription to apply, this is a case for an oath, or in which it is unnecessary to take an oath? I do not agree with the Lord Ordinary.

Prescription has run past all question; but then the question remains, is there proof of the debt by writ or oath, or by admission on record, for such admission is as good as an oath. I am not satisfied that resting-owing is sufficiently proved. The original constitution of the debt is admitted, but is resting-owing proved? What evidence have we of resting-owing by admission? The only admission is that of a partial payment, during the currency of prescription, by the representative. Though that may prove constitution, how does it prove the resting-owing of the balance? May not an heir pay a part of a bill without admitting that the rest of it is still resting-owing? We cannot with any safety draw the inference of such an admission. The party admits that he never paid any more; but that does not prove that more was resting-owing when he made the payment. It cannot prove that the ancestor had not paid the rest. The admission is consistent

scription, by the heirs and representatives of a deceased debtor; and when so adopted, it is thought the debt cannot be afterwards repudiated.

“It is well observed by Mr Bell, in his Principles, (§ 597,) that ‘it is not available to preserve a bill in force that the creditor has made affidavit and claimed under a private trust; but, when in the course of such trust, the debt has been recognised, it will be a bar to the plea on the statute.’ The just rule thus laid down is sufficient to govern the present case. The defenders here call themselves executors of the deceased Kirkwood, but in point of fact they are trustees, for the primary purpose of paying his debts under the trust-disposition, narrated in the libel of the ordinary action. As trustees, how could they recognise the constitution and justice of a debt like this more distinctly, than by paying one-half of it immediately after accession to their office? With deference, it would be a misapplication of the law of prescription, to hold it applicable to such a case.”

with the fact, that when the heir made the payment he paid all that was due. He No. 111.
says further, that he knew nothing about the debt or bill; and here it was that at
first I inclined to think the case of Christie, June 19, 1838,¹ in point. There the
party said that he had not paid, but that he did not know that the other co-obli-
gants had not, and the Court held him liable. I thought the decision wrong, and
did not concur in it; but I cannot now go against it. But the difference between
it and the present case is, that Lord Corehouse and the majority of the Judges
there, held that a party is bound to know whether a co-obligant has paid or not.
I cannot apply that to an heir. An heir very often knows nothing about his
ancestor's debts. He is not bound to keep an eye on them, for he cannot know
that he is to be heir.

The result is, that in my opinion the oath should be taken here yet. After
that all sorts of questions may be put to the heir; and if a satisfactory explanation
is not given, we may decide against him.

Lord Fullerton.—I consider this to be a case of very great importance on
the subject of the sexennial prescription applicable to bills—the more particularly,
as the argument on the part of the respondents truly involves an attempt to intro-
duce into this class of cases that somewhat bare interpretation of a statute, which
has been admitted in practice, in relation to the triennial prescription, and under
the Act 1579. In this last matter, the practice was so conclusive, the authority
of decision so insurmountable, that in the case last before us—that of Auld v.
Aikman, 7th July 1842²—I felt myself compelled to concur in the unanimous
opinion of the Court, to sanction a construction of that statute, which I cannot
help thinking it would be most difficult to reconcile, either with its letter or its
spirit.

But in the still later case, that of Paxton v. Forrester, July 13, 1842,³ in which
a reference was made, in a question regarding a bill of exchange, to the decision
in the case of Auld—the Court, though sustaining the plea of the sexennial pre-
scription on a different ground, expressly guarded themselves against the sup-
posed analogy, by stating, “that they would have hesitated in applying to the
sexennial the rule which, in the case of Auld, had been found applicable to the
triennial prescription.”

The question, then, is one purely on the construction of the Act 12th Geo.
III. cap. 72, made perpetual by the 23d of Geo. III. cap. 19; and certainly no-
thing can be more explicit or more stringent than those enactments. They pro-
vide, in the first place, that no bill shall be in force or effectual to produce any
diligence or action, unless such diligence or action shall have been commenced
within six years from the period at which such bill became exigible. But the bar
is not absolute; because, secondly, there is a reservation, that it may be compe-
tent, after the expiration of the six years, “to prove the debts contained in the
said bills and promissory-notes, and that the same are resting-owing by the oath
or writ of the debtor.”

In practice, the words of the statute have so far received a reasonable qualifi-
cation, that parties have been permitted, even after the lapse of the six years, to
set forth the bill in their summons; because, as the “debt contained in the bill”

Max. 6, 1845:
Darnley v.
Kirkwood.

¹ 11 S. 744.

² Ante, Vol. IV. p. 1487.

³ Ante, IV. 1515.

No. 111. might be proved after the lapse of six years, a reference to the bill *descriptione* was almost unavoidable.

Mar. 6, 1845.
Darnley v.
Kirkwood.

But the mode of proof required by the statute is absolutely imperative, and admits of no modification; and I think it important to guard against that misconception, which I cannot help thinking led the Court into the course of practice above alluded to on the subject of the Act 1759. In one of the earliest of those cases, that of *Leslie v. Mollison*, it seems to have been assumed that the Act 1579, framed in terms certainly not very unlike those of the Act now under discussion, introduced certain presumptions of payment, which might or might not receive effect according to the circumstances of each case. With great submission, there appears to me no foundation for such a view. Whatever general presumptions or probabilities may have weighed with the legislature in passing these statutes, they introduce no presumptions, but enact certain specific and imperative rules on the subject of probation; and, in particular, the Act relating to bills of exchange, on which no diligence or action has followed during six years, not only limits the mode of proof to writ or oath, but, what is of more importance, it entirely shifts the *onus probandi* from the apparent debtor in the bill to the apparent creditor. During the six years the bill proves itself, and the burden of disproving value or of proving payment lies on the debtor, and is, of course, limited to the writ or oath of the holder. After the lapse of six years, the burden of proving "the debt contained in the bill," and "that it is resting-owing," is laid upon the holder of the bill, and that, too, is limited to the writ or oath of his adversary.

Now, such being the case, I cannot see how there is any room for any appeal to presumptions or inferences supposed to arise from particular circumstances in the conduct of the parties, so as to exclude the operation of the statute. If neither diligence has been raised, nor action commenced during the six years, the enactment must receive effect; and the only question which the Court can entertain is, "whether the debt contained in the bill," and "that it is resting-owing," has been proved by the writ or oath of the debtor.

Now, that which I must hold to be the only competent view of such a case, is quite sufficient for the solution of the question between these parties as it is now presented to us. It is undeniable that diligence or action was not raised upon this bill within the six years. Writ of the debtor there is confessedly none; so that the pursuer, unless betaking herself to the other alternative of the statute, the oath of the debtor, can have no case.

No doubt it is said that there are admissions made by the defender, which supersede the necessity of a reference to oath; and I am not disposed to contest the principle, that, when facts are judicially and unequivocally admitted, such admissions may dispense with the form of an oath of reference. A party cannot well be allowed to maintain that he means to contradict, when on oath, that which on record he avers to be true. But the question, what, in such a case, a party admits, is one of some delicacy. It must be admission express and unequivocal, in order to take the case out of the statute. It must be admission, which, if made upon oath, would have proved the pursuer's case. But there are no such admissions here. Indeed, what are called admissions are at best but inferences or presumptions, from the defender failing or declining to aver or to deny something which the pursuer maintains he was bound to aver or deny; while, as it appears to me, the statute protected him from the necessity of doing

either the one or the other. In the Lord Ordinary's interlocutor, it is found that "it is not denied in the defences that the bill bears the subscription of the defenders' predecessor; that the defenders do not allege that he paid any part of the said sum during his life; and that the defenders have not stated that they made any further payment beyond the sum of £400." Upon these circumstances, it is held by the Lord Ordinary, that the constitution and resting-owing of the original debt are already sufficiently established by the judicial admissions of the defenders. Now, it appears to me that, if these conclusions were accurate, the sexennial prescription would be little better than a dead letter. How does the admission, even if made, of the authenticity of the subscription prove the debt contained in the bill, without the additional proof that it was given for value? If that were the case, then in ninety-nine cases out of a hundred—in every case, indeed, in which forgery was not alleged—the bill would be as good after the lapse of six years as before. Again, how is it proved that the bill remained resting-owing during the lifetime of the granter? Because "his representatives do not allege that he paid any part of the sum during his life." Why, this was just one of the points upon which it might be reasonably supposed his representatives possessed no information; and, from the possible consequence of which ignorance, it was the very object of the statute to protect them. After the lapse of six years, they were not called to allege any thing on the subject. It lay upon the other party not only to allege, but to prove that the debt was originally due, and that it was resting-owing. Indeed, the only fact which can be said to be admitted at all is, that of the payment of £480 by Robert Kirkwood, junior, after the death of the original acceptor, Robert Muirhead Kirkwood. But even this admission has been somewhat loosely dealt with. It is described as an admission of a payment to account of the said bill. This important additional qualification is nowhere admitted. The admission at the bottom of page 3 of the defences, makes no reference whatever to the bill, but merely bears, that the £480 was paid, on the statement that the amount formed a debt due by his father "to Robert Rankine, senior." But, besides, that was a payment made within the six years, which, even if proved by the writ of the defender to be a payment in reference to the bill, could not exclude the operation of the statute. Indeed, whatever may be the case as to payments made after the lapse of the six years, which may be held to be wavers of the plea of prescription altogether, and consequently acknowledgments of the validity of the document, payments within the six years are quite irrelevant.¹ Even as to the constitution of the debt, they could prove nothing beyond the amount of the sum actually paid. As to resting-owing, they afford no inference as to what may have been paid before, and what subsequently, to the particular payment, which is proved. And indeed the whole question admits of being brought to a very simple test, viz. whether these statements, or any of the statements on the part of the defender in the record, could, if made on oath by the defender, be held to prove the balance of the debt contained in the bill, and that that balance was resting-owing?

If they could not, which seems to me to be clear, we have no alternative but to follow the course prescribed by the statute, and to find that the only resource of the pursuer is proof by the oath of the defender.

No. 111.

Mar. 6, 1845.
Darnley v.
Kirkwood.

¹ Fergusson v. Bethune, March 7, 1811, (F. C.)

No. 111.

Mar. 6, 1845.
Darnley v.
Kirkwood,

LORD JEFFREY.—I am of the opinion last delivered. In the application of a clear and recent statute, we follow the safest and only legitimate course when we adhere to the precise direction of it. I hold, in the first place, that in actions on bills raised six years after the date of payment, the only legitimate proof is the writ or oath of the alleged debtor. I think the error in some of the decisions on this and the triennial prescription, which I cannot go along with, has arisen from a laxity in taking as *in loco* of writ or oath, to which the proof is, by the words of the statute, confined, certain statements voluntarily made by the procurators of the party in the course of the litigation—I mean, holding that the necessity of writ or oath may be superseded by the tenor of admissions, and these helped out by the construction of courts of law. I think a great laxity has thus been introduced, and I should certainly not take a step in advance in that course. I have great doubt about these admissions. In the Outer House, I took them as superseding the necessity of an oath, by holding them to be properly *scripta* of the party. But for that I should not have gone the length I did. On consideration, I think it is not a sound view. It is not the *scriptura* the statutes require, unless there was an express procuration to make and sign the statement. We have gone on grounds of convenience rather than otherwise—for that is at the bottom of it—that where a party has made a statement, his oath can only be in conformity with it, and it is therefore unnecessary to be at the expense of an oath.

The admissions here are not admissions of the verity of the debt now disputed; but it is said that the judicial mind of the Court being applied to them, the most probable inference is, that they must apply to the debt in dispute, and that the balance is not paid. I am confirmed by what has been so forcibly stated by the Lord President, in thinking that the party has not given on record any such explanation as to take off the natural inference from these admissions. It is just that the admissions and explanations may be put into the position and form required by the statute, that I think he should be examined on oath. Every reference to oath is before answer; the oath is to be construed and weighed. It is a remarkable fact, that almost all the cases which have been relied on by the pursuer, are cases in which the inferences, from certain partial admissions, have occurred in construing oaths on reference.

I adopt the opinion of the Lord Justice-Clerk in the case of Alcock, on 20th December 1842,¹ which I read with great edification.

The statute here requires the claimant to make out the debt by writ or oath of his adversary, the document having lost its virtue by too long keeping. It may be a question what will amount to an affirmative oath on the part of an heir, but I will not enter into that now. I reserve my opinion till I see what the tenor of the oath is. It may terminate with the statement, that he knows nothing at all about payment by the ancestor. I reserve for consideration what the construction of law would be on a mere *nil novit* by an heir as to the debt of his ancestor. I agree that the explanations on record are not satisfactory, but a party is entitled simply to say, I plead prescription. If you avail yourself of the mode of proof the statute provides, I will give such explanations as I may be bound to give, and the Court will judge of them.

¹ Ante, Vol. V., p. 356.

The case of co-obligants,¹ referred to by Lord Mackenzie, is not parallel. If you admit that you were once liable, and cannot say that you or another have discharged the obligation, you shall be liable. Where all the obligants are alive, I think they should all be examined, for the oath of one that it was fully paid will discharge the debt. But the distinction between the case of a co-obligant and that of an heir is quite plain. An heir, it may be coming from a remote quarter of the world, is not bound to know of the transactions of his ancestor.

No. 111.
Mar. 11, 1845.
Angus v. Scottish Marine Insurance Co.

I cannot hold that the mere payment of a certain sum affords, on an equitable construction, and viewing it as a jury question, a presumption that the whole is not paid. I do not think that is a legal construction in any case, but in a case of prescription I think it is totally inadmissible. The Court has gone much too far that way.

LORD MACKENZIE.—As to an admission on record, it is material to observe, that the recent statute says, after a record is made up and closed, the parties are foreclosed in point of fact. After that, I think the party could not recal an admission; and, if he swore the contrary, I doubt if his oath would be received.

THE COURT altered the interlocutor of the Lord Ordinary—sustained the plea of prescription—and allowed the pursuer to give in a minute of reference to the defender's oath.

REMY and WEBSTER, W.S.—GIBSON-CRAIGS, DALZIEL, and BRODIE, W.S.—Agents.

EWING ANGUS and COMPANY, Pursuers.—*Ingliston*.
SCOTTISH MARINE INSURANCE COMPANY, Defenders.—*Rutherford—Neavea*.

No. 112.

Jury-Court—Notice of Trial—Jury-Court A. S. 16th February 1841.—Where the pursuer of an issue has not given notice of trial at all,—Held incompetent for the defender to give notice of trial, although more than ten days have elapsed after the issue had been engrossed, signed, and lodged in the office in the Register-House.

AFTER issues had been engrossed, signed, and lodged in the office in the Register-House, a period of more than ten days elapsed, during which the pursuers did not give notice of trial. The defenders then gave notice of trial for the ensuing Glasgow Circuit. To this notice the pursuers objected that it was incompetent, in respect that the only case in which it was competent for a defender to give notice of trial, under the Jury-Court A. S. 16th February 1841, (which repealed all previous Acts of Sederunt,) was where the pursuer had given notice, but countermanded it, and did

Mar. 11, 1845.
1ST DIVISION.

¹ Christie, (11 S. 744.)

No. 112. not renew his notice within eight days after such countermand. The defenders answered, that even if the A. S. was to be so construed, it did not exhaust all the remedies competent to them; and where the pursuers failed to give notice of trial within the ten days, during which they had the privilege by § 10 of the A. S. of doing so, the defenders must then be entitled to give notice, or they should be subjected to hardship and injustice, such as the A. S. never contemplated.

Mar. 11, 1845.
Harvey v.
Miller.

THE COURT held the defenders' notice to be incompetent, Lord Jeffrey observing, that a supplementary A. S. should be passed by the Court.

—Agents.

No. 113. JOHN HARVEY, Advocate.—*Rutherford—Macfarlane.*
ROBERT MILLER and MANDATORY, Respondents.—*Maitland.*

Expenses—Process.—Where the Lord Ordinary, in awarding expenses, had modified them to a certain sum, the Court on the reclaiming note, considering the modification to be too small, allowed an account of the expenses incurred to be given in.

Mar. 11, 1845. IN this case, the Lord Ordinary, in dismissing an advocacy, found the advocator liable in expenses, which he modified to seven guineas. The respondents reclaimed against this interlocutor, in so far as it only found them entitled to modified expenses, praying that they should be found entitled to the expenses bona fide incurred by them, as the same should be taxed by the auditor.

2d Division.
Ld. Robertson.
T.

The advocator contended, that the Lord Ordinary had the best opportunity of judging of the amount of expenses that ought to be awarded, and that the Court were not in a situation to judge of the propriety of the modification.

LORD MEDWYN.—I am always disinclined to touch a modification of expenses by the Lord Ordinary. It is a fair principle to act on in many cases. But it would not apply in every case. Since the parties have come before us, we must consider whether the Lord Ordinary has not given too little. I am for sending the respondent's accounts to the auditor.

LORD MONCREIFF.—The Lord Ordinary has gone rather far in modifying the expenses to seven guineas.

LORD COCKBURN.—It is often a very useful practice to modify expenses to a sum. But the Lord Ordinary sometimes makes a mistake. He may think that seven will cover the expenses, when three times seven will not do it.

THE COURT accordingly allowed a portion of the respondent's account of expenses to be given in, and remitted it to the auditor for taxation—the charges contained in the remaining part being, on special grounds, considered inadmissible.

No. 113.
May 13—16,
1845.
Waddel v.
Waddel's
Trustees.

JOHN LEISHMAN, W.S.—JOHN CULLEN, W.S.—Agents.

JURY SITTINGS.

MISS ANN WADDEL and OTHERS, Pursuers.—*Rutherford—Maitland—* No. 114.
Buchanan—Moncreiff.

TRUSTEES OF THE LATE WILLIAM WADDEL OF SYDSERFF and OTHERS,
Defenders.—*Ld.-Adv. M'Neill—Sol.-Gen. Anderson—*
Whigham—A. T. Boyle.

Writ—Holograph—Insanity—Presumption.—Ruled, that where the granter of a holograph deed bearing a certain date was proved to have become insane at a period subsequent thereto, and died insane, there is no legal presumption that the deed was executed during insanity; but the party founding on the document is bound to support or adminiculate its date, which he may do by facts and circumstances of an indirect nature; and the deed itself, and the date expressed in it, are not to be thrown out of consideration.

VIDE ante, Vol. VI. pp. 160 and 1230.

This was a reduction of a holograph codicil, by which the late William Waddel disposed of the fee of his estate of Sydserrf and of his personal property to various parties, who, along with his trustees, were called as defenders to the action. The ground of reduction was, that the granter was insane when he executed the writing, and the issue sent to the jury was—

“Whether the holograph codicil, No. of process, is not the deed of the late William Waddel?”

Mr Waddel's trust-deed was executed on 24th January 1834, and, inter alia, directed his trustees to convey the residue of his estate to his nephew in liferent, and the heirs of his body in fee; whom failing, to any one whom he might appoint by a writing under his hand. His nephew died unmarried in September 1834. The codicil under reduction bore to be dated the 3d January 1835. It was written on and filled the first side of a sheet of foolscap paper; on the second and third sides of which there were four codicils, also all holograph, one dated 3d January 1835, two

May 13—16,
1845.
2D DIVISION.
Jd. Moncreiff.
Jury Cause.

No. 114. dated 6th May 1835, and one 9th October 1835. It was admitted that this paper of codicils was in existence on the 28th February 1836. On the 13th March of that year, Mr Waddel was removed to a lunatic asylum, where he remained, with the exception of a short interval, until his death.

May 13—16,
1845.
Waddel v.
Waddel's
Trustees.

Evidence was led both by the pursuers and defenders, with a view to establish, 1. The period of the commencement of Mr Waddel's insanity; and 2. The existence or non-existence of the codicil previous to the commencement of the malady.

Rutherford, for the pursuers, contended, that the evidence amounted to proof of a confirmed insanity in the end of 1835, or at least before the end of January 1836, more than four weeks before the admitted existence of the codicil. He further contended, that his Lordship should lay it down as law, that a holograph deed not proving its own date must be read as having no date, and that insanity being proved before the death of the granter, or the undoubted existence of the deed, there is a legal presumption, in a question with the heir-at-law, that it was executed during the period of insanity. He further contended to the jury, that there were strong presumptions from the evidence, that no such deed was in existence previous to Mr Waddel's insanity, and that the attempts of the defender to prove its existence during sanity had failed.

The Lord Advocate, on the other hand, contended for the defenders, that the holograph deed bearing a date in the handwriting of the party himself before any proof of insanity, and being in itself a rational and sane deed, it must be presumed that it was executed during sanity. But further, he contended, on the evidence, that it showed that the codicil must have been in existence about the time of its date, or at least before the commencement of the insanity, of which he said there was no proof till within a very few days of the 28th February 1836.

LORD MONCREIFF, in charging the jury, said—

The issue in this case is—Whether the deed, bearing to be dated 3d January 1835, is not the deed of William Waddel. This is the form of issue usually granted for trying the merits of a reduction of a deed, when the grounds of reduction set forth in the summons and record are such as, if proved, but to be proved in a reduction, will infer nullity of the deed. It would be the same, if the ground of reduction were forgery, or deathbed, or fraud, or inhibition, &c. &c.

It is in a negative form. But it puts the question as a negative, which it is incumbent on the pursuer of the reduction to prove. It assumes the existence of a deed, which, if not removed, will stand as the deed of the apparent granter. This is the basis of the present trial. For, whatever the pursuers may have at one time maintained, it is a matter finally decided by the Court, and now acquiesced in, that the pursuers could not object to the validity of the writing in question without establishing relevant grounds of challenge in a reduction.

Accordingly, the pursuers, by the issue, undertake to prove such a case, and as Mr Rutherford stated it; and if they had led no evidence, except simply putting

in the deed, the defenders would, I apprehend, have been entitled to a verdict as **No. 114.**
a matter of course.

But it may happen, in such a case, that, when proof of certain facts has been adduced, a burden may fall upon the defenders, either to prove by extraneous evidence, or to show to the satisfaction of the jury by the circumstances of the case, appearing on the face of the writings produced, or otherwise elicited, other facts sufficient to remove the effect of such proof by the pursuers, or to prevent the application of it to the writing in question. The issue being so very general, capable of being applied to such various grounds of challenge, in order to see what the real issue is, we must go to the summons and the record.

But, to understand the application of the reasons of reduction set forth, it is necessary first to look at the precise nature and position of the writing in question.

On the 27th January 1834, William Waddel had executed a trust-deed in favour of certain persons, by which he conveyed to them his whole property in trust for certain purposes specified, with an ultimate destination to any persons to be named by him by any writing under his hand, whom failing, his own heirs and assignees; and reserving power at any time in his lifetime, by any writing under his hand, to revoke or alter the deed, or to dispose of his property otherwise in whole or in part. This deed is not challenged on any ground. It is admitted to be a valid instrument in all respects, executed by Waddel at a time when he was of perfectly sound mind. This is a fixed point in the case. And the deed is even founded on as giving a special title of succession to the pursuers. So far we have got something certain in the case—that on the 27th January 1834 Waddel was of perfectly sound mind.

Circumstances occurred in the course of the year 1834, which essentially changed the operation of the trust-deed in the special purposes defined, particularly by the death of William Waddel, the testator's nephew, for whom the chief benefit had been intended.

Not stopping at present upon details, it appears that the testator had subsequently (for I suppose it is not doubted that it was subsequent to the death of the nephew) written certain documents as codicils or instructions under his trust-deed, to fill up the destination which had become blank, by such instructions to the trustees. The first of these codicils is the instrument under reduction, referred to in the issue as the deed bearing to be dated the 3d January 1835.

That deed is, of course, produced, and it bears to be executed in virtue of the powers reserved in the trust-disposition of 27th January 1834. It consists of several paragraphs, and in fact disposes of the whole property, heritable and moveable, though in few words, by instructions to his trustees; and it bears in the conclusion, "This paper is written and signed by me this third day of January eighteen hundred and thirty-five," these words being wholly written in words by the testator. Four other codicils, bearing later dates, are written on the same sheet of paper, all apparently holograph of William Waddel, and admitted to be so.

As the material codicil bears that it is all written with his own hand, there is authority for presuming that it was so, if the contrary were not proved or admitted. But as it is now admitted that it is holograph of William Waddel, no question of this kind arises.

May 13—16,
1845.
Waddel
v. Waddel's
Trustees.

No. 114.

May 13—16,
1845.
Waddel v.
Waddel's
Trustees.

William Waddel died on the 1st August 1840. He had been in a state of insanity for a long time before his death.

In this state of the case, before going deeper into it, the grounds of reduction are substantially two. 1. That the deed, not having been subscribed in the presence of witnesses attesting the subscription by their own subscriptions, is null and void, in terms of the statutes 1579, c. 80, and 1601, c. 5. And, 2. That, supposing it should be proved that the deed was written and signed by William Waddel, it does not prove its own date, or that it was written or signed on any particular day, "and the said William Waddel was incapable of executing any deed, in respect he was in a state of permanent insanity and mental derangement, and was non compos mentis;" and then, on a statement that he had been insane for a long period previous to his death, that this deed, if written by him, "was so done by him when in a state of insanity and derangement of mind." There is no other ground of reduction libelled. It is not libelled that the deed was obtained, or that it was written, through the fraud or undue influence of the defenders, or any of them, or of any other party. The grounds libelled, on which this issue entirely depends, are solely those which I have stated.

If the first of these grounds of reduction, that the deed is simply null, had been held to be well founded in law, there would have been no occasion for this trial; because, as the deed is certainly not attested in terms of the statutes referred to, if that circumstance simply rendered it null and void, it must have been so declared without the necessity of further trial or evidence. But the Court held otherwise, and on good grounds; because, ever since the date of these acts, the case of holograph deeds or writings—that is, deeds all written by a man's own hand—has been a known exception in the law against that inference of nullity, which exception is recognized by every authority, and in many hundreds of decisions. I shall say more of this immediately.

But it is also matter of fixed law, that the holograph deed does not by itself prove that it was written of the date which may be inserted in it. This proceeds on the obvious reason, that as no one attests the subscription, a deed may be antedated, to prevent the law of deathbed applying to it, on an anticipated contingency, or to affect some other right known to exist, or which may exist.

On this, accordingly, the second ground of reduction is founded. By itself, this would be of no avail, as I shall immediately explain. But it is coupled with an averment, that the testator was insane at the time of his death, and for a long time before; and that if the deed was written and signed by him, it was so done at a time when he was in a state of permanent insanity.

Now, it will be evident, upon this deduction, that, according as the evidence may stand, the real issue of fact for the jury is, Whether, at the date when this codicil shall be taken to have been written and signed, whatever that may be, the writer of it was in a state of insanity; or whether, on the other hand, either at the date which it bears, if that be shown to be the right date, or at any date when it may be proved to have been written and signed, or to have had a known existence as so written and signed, the testator was of sound mind, and had not fallen into the state of insanity averred. Though the thing might be expressed in different words, this I understand to be in substance the issue of fact for the jury upon the summons and record.

But as it is thought that there is or may be matter of law involved in it requiring direction from me, by which the jury must be guided, I shall not refuse to speak more precisely to that point.

And, in the first place, I am decidedly of opinion that the deed is not null. On the contrary, being holograph of the maker, it is by the settled law of Scotland a valid or probative writ to very many effects, and perhaps to all effects, except that it does not by itself prove its own date, where the date becomes material. Lord Stair lays down this in various parts of his work:—"Holograph writs subscribed are unquestionably the strongest probation by writ, and least imitable. But if they be not subscribed, they are understood to be incomplete acts, from which the party hath resiled; yet if they be written in compt books, or upon authentic writs, they are probative, and resiling is not presumed."¹

"And if the testament be holograph, it is valid," 3, 8, 34. "There are certain deeds or writings which are privileged, and will be held probative, though not attested in terms of the statutes." He specifies bills of exchange, cautionary obligations, &c., and then adds, "Holograph deeds have always been privileged, and do not require to be attested in terms of the statutes." "Wills or codicils must either be holograph or duly attested."²

Mr Erskine, in a passage referred to, but which was not fully read, holds the same doctrine:—"Sundry obligations even of the greatest importance are in so far privileged that they have the support of law, though they be destitute of some of the solemnities which are essential to other deeds. 1st, Holograph deeds, i. e. deeds written with the granter's own hand, are valid without witnesses, because one's handwriting through a whole deed is harder to be counterfeited, and therefore less exposed to forgery, than the bare subscription of his name and surname. This privilege is extended to obligations, the substantials of which are written by the granter himself.—Stair, Jan. 23, 1675; Vans, (Dict. p. 16885;) See Forbes, Nov. 30, 1711, Creditors of Spot, (Dict. p. 16868.) Holograph writings ought regularly to mention that they are written by the granter; in which case they are presumed holograph, unless the contrary be proved.—Durie, Dec. 9, 1635; Earl Rothes, (Dict. p. 12606.) But though this should be neglected, a proof of holograph will be admitted, either *comparatione literarum*, or by witnesses who saw the deed written and signed.—Forbes, June 11, 1711; Donaldson, (Dict. p. 11611.)"³ Mr Erskine then states the material exception to the general principle. "It is a rule that no holograph writing, without witnesses, can prove its own date; or, in other words, the date of a holograph deed is not proved barely by the granter's assertion in the body of it that it was signed upon such a day; otherwise he might, when he is not controlled by witnesses, antedate writings, by which his heirs might be cut off from the plea of deathbed, creditors-inhibitors from the benefit of legal diligence, or a husband from the defence, that his wife had granted the obligation sued upon after she was *vestita viro*. In questions, therefore, with the granter's husband, Durie, Jan. 20, 1636; Temple, (Dict. p. 12490;)—or his heir, Stair, June 24, 1681; Dow's, (Dict. p. 11477;)—or creditor-inhibitor, *Ibid.* June 21, 1685; Braidy, (Dict. p. 12275;)—or arrester, *Forbes*, July 22, 1708; Earl of Selkirk, (Dict. p. 4453,) the date of holograph

No. 114.

May 13—16,
1845.Waddel v.
Waddel's
Trustees.¹ 4 Stair, 42, 6.² 3 Stair, 4, 29.³ 3 Ersk. 2, 22.

No. 114. deeds must be supported aliunde by adminicles ; which adminicles must be pregnant where there is any suspicion of fraud."

May 13—16,
1845.
Waddel v.
Waddel's
Trustees.

The first part of this passage lays down the law clearly, that a holograph writ is not null under the statutes, but is privileged and probative without the solemnities required by them. The second part states the rule, that such a deed does not by itself prove the date expressed in it, but that, where the date becomes material, it must be supported by adminicles of other evidence. The case of deathbed is the material example. In the case of a deed by a wife before marriage, the holograph writ was not found ineffectual generally, but only ineffectual against the husband, unless the date should be supported as being before marriage, but with a reservation of the effect against the wife herself. The case of inhibition is also that of a third party ; but it was held to be perfectly competent to prove the date as before the inhibition. The case upon arrestment referred to was reversed in the House of Lords,¹ the holograph writ being expressly sustained.

But the general principle, that holograph writs are not null under the statutes, is expressly laid down, and is implied in all the cases ; and the same is laid down by Mackenzie,² and by Mr Bell³ in various parts of his works. See also observations of Lord Gillies in Smith against Mackay, January 27, 1825.

And it may just be observed, in practical illustration of this position, that where there is no case of deathbed alleged, if there were also no averment of insanity—that is, if it were admitted that William Waddel lived for years after executing the deed in a state of perfect soundness of mind, and never was insane at all, there could not be a question that this codicil would be perfectly effectual as a deed of instructions to the testator's trustees, and could not be objected to on any ground whatever.

It is only the averment of insanity which renders the date of this codicil of importance. But that averment, verified as it has been, does render the date in a certain sense, and to a certain effect, of essential importance ; and when it is so, undoubtedly the law is, that the holograph writ, though probative in other respects, is not simply and by itself probative of its own date. There is, indeed, a very difficult question, which was gravely discussed among the Judges in the case of Suttie⁴—viz. whether in a case of alleged facility or insanity, if there were no evidence respecting the date the one way or the other except the writing itself, there shall be an absolute presumption that it was written after that state of mind commenced, or at the date which it bears, or at some date before the testator became incapable ; and the leaning of the opinions is strong in favour of the deed in such a case, though no decision or positive opinion was given.

I know not that it is necessary for me in the present case to resolve that difficult question ; because there is here a great deal of evidence, bearing on the question of fact, whether this codicil was executed before Mr Waddel's state of insanity commenced or not. I shall only observe, that I think there is a material difference between the case of deathbed and that of insanity, though proved to exist at a certain period. In the case of deathbed, there is a fixed period of sixty days, which if a man does not survive after executing a deed concerning his heritage, the deed

¹ See Robertson's Reports, p. 1.

² Bell's Princ. § 20, 2231, 2232, &c.

³ Mackenzie, Vol. II. p. 311.

⁴ Suttie v. Ross, Feb. 3, 1828.

is reducible by his heir, as done when he had no lawful power to make it; and nothing in the nature or circumstances of the deed can avail against that legal presumption. But the man may have been perfectly sound in mind, and may have mediated a holograph writing, on purpose to avoid the effect of the known law of Scotland. In the case of insanity it is very different. A man may be insane before he dies, and yet it does not follow that he was insane all his life, or at any particular time of his life. There is no fixed period upon which a legal presumption can be hung. If it be barely conceivable that a madman should execute a holograph writing, perfectly clear, rational, and consistent in itself, and antedate it in order to avoid the effect of his madness, (which it is not, surely, in serious legal reasoning,) it is at least very improbable that he should fix upon a time precisely suitable for the business intended, and when he was perfectly sound in mind, and that all should be done in various successive writings in perfect consistency and rationality. The great probability is, that he would fix upon a time when his known insanity had begun. But remember that I am stating the point as in an issue on the simple ground of insanity, without any case of fraud and circumvention, or undue influence, being libelled.

If, again, it were to be held that, if there is insanity at the time of death, or for some time before it, you must presume insanity at whatever time the holograph writ was executed, the result would be, in very many cases, that no holograph writ could stand. In a vast proportion of the individuals of the human race, the mental faculties become impaired before death, especially in persons of advanced age; and the period of weakness or fatuity may be longer or shorter. If there were a legal presumption in every case, that every holograph writ was executed after the state of weakness began, I know not how it is that so many such holograph deeds or codicils have been sustained, and have been allowed to carry most important interests to the parties. As Lord Gillies put it in the case of *Suttie*,¹ a man may make his will and lay it by in his repositories, and live for twenty years after, and at last fall into a state of incapacity in the last months of his life—could we say that there is a legal presumption, without any evidence, that the deed was executed after he fell into that state? I should have the same hesitation which other Judges have expressed, in delivering that as matter of law, if it were necessary in the present case. But I should be inclined to say that, though the jury must be satisfied in regard to the date, to the effect of excluding the case of insanity, there may be presumptions of fact in the circumstances of the case, taking the deed itself as it stands into view, sufficient to satisfy a jury upon that point, without any direct evidence of the actual date, and without involving any question of law at all. In short, if I were obliged to lay down the law in a general proposition, in the case supposed, I should say that I could not, on the one hand, hold that there is any such legal presumption against the deed as the law now maintains; nor could I, on the other, say that there is no obligation on the holder of a holograph deed to bring such evidence as may satisfy a jury that the deed was executed at a time when the granter had not fallen into the state of insanity which may be proved. I think that he is bound to satisfy the jury of that

¹ See Report of Case, February 3, 1838, (Shaw, Vol. XVI.) and particularly the statements of Lord Gillies and Lord Corehouse.—(Read to jury.)

No. 114.
 May 13—16,
 1845.
 Waddel v.
 Waddel's
 Trustees.

fact; but that, in the absence of any proof to the contrary, if he does lay before them pregnant circumstances of real evidence, these, when combined with the date expressed in the deed, will be sufficient to warrant a verdict against the ground of reduction. At the same time it is certainly very remarkable, that not one case is to be found in the books, of a reduction of a holograph deed on the ground of insanity having been sustained on the ratio of such a presumption existing in the law, and that no institutional writer has laid it down that there is such a presumption.

I think, however, that, in the state of the present case, this point does not properly arise at all; for, I must further observe, that, in the strictest case in which it is incumbent on the party benefited by a holograph writ to support the date of it by evidence, so far as it is material, he is entitled to do so, not only by direct evidence, but by facts and circumstances. Even in the case of deathbed when that is alleged, though he may not be able to bring witnesses who either saw the deed written and signed, or saw it in a complete state more than sixty days before the grantor's death, he may yet prove the fact of its existence before that period, by circumstances of real or written evidence. And I am of opinion, and so direct you, that, in this question of evidence, the deed itself, and the date expressed in it, are not to be thrown out of consideration. The law is otherwise. Though the deed does not, by itself, prove the date, the rule is, not that it is to be taken as if there were no date expressed in it, but only that, at least in cases of any doubt, the date must be supported or adminiculated aliunde. The law is so stated by Erskine in the very passage already quoted. It is so found in express words in the case of *Dow*, referred to by him. In Professor More's *Notes on Stair*,¹ he states the law in the same manner, and particularly refers to a case in *Brown's Supplement*, III., pp. 200, 201, in which another case to the same effect is quoted, the rule being simply, that the date must be adminiculated in that case of deathbed.

But, even if it could be assumed as the rule that the deed should be taken as if it had no date, I could not tell the jury that it would not be competent to prove the date as having been before deathbed, by circumstances drawn from the substance of the deed itself and collateral matter; for, in the case of *Wemyss v. Hay*, reported June 5, 1821, on a point of form, the deed, though signed with witnesses, had no date at all; and after thirty-nine years, when the writer and all the witnesses were dead, the heir-at-law brought a reduction upon deathbed, thinking that the date could not be proved. But it was satisfactorily proved that the deed had been in existence long before the period of deathbed, by means of facts embodied in the deed itself, and collateral evidence applied to them.

After all, therefore, the question now to be decided is, Whether it is proved in this case that the deed was executed either of the precise date which it bears, or at some time while the testator was yet of sound mind, or was in existence at any fixed time before his insanity commenced; or whether, on the contrary, it is proved to have been executed after he had become insane? This is a question to be determined by the jury upon the whole facts in evidence.

But it is to be carefully observed, that there is no case involved in this issue upon an allegation of fraud and circumvention, or of undue influence employed to

procure the execution of the codicil in the form in which it stands. From the nature of the case, no such allegation could well be made. But, at any rate, there is no such ground of reduction libelled in the summons, or set forth in the record. And there is no plea to that effect. The case is simply on the defect of the deed as not proving its own date, subject to all the law on that subject, conjoined with the averment of insanity during a long period before the testator's death, and alleged to have existed at the time when the deed was actually executed. No. 114.
May 13—16,
1845.
Waddel v.
Waddel's
Trustees.

It is very necessary for the jury to attend to this, in order that they may not be misled by inferences attempted to be drawn from the evidence directed to a perfectly different issue, the supposition of this deed having been obtained by fraudulent artifices of Mr Henderson or some other person. There is no such case raised by the summons and record, and it cannot be implied in the form of the issue now under trial.

It may be proper also to observe, that we are not now trying any question concerning the deed executed of a very different date—27th February 1836—as to which the summons and record are altogether different. The pursuers had endeavoured to mix the two cases together; but the Court refused to allow this, and therefore, though there may be evidence led unavoidably which relates to the later deed, it is our duty to attend to the distinction.

The question, then, is upon the evidence in regard to the essential issue, Whether the deed—the codicil dated 3d January 1835 in issue, and nothing else—was executed after the insanity of the deceased commenced.

His Lordship then read over his notes of the evidence, and commented upon it at considerable length.

THE JURY returned a verdict for the pursuers.

J. CULLEN, W.S.—HOPE and OLIPHANT, W.S.—W. and J. COOK, W.S.—Agents.

SUMMER SESSION.

No. 115. MRS BELL and MRS RAMSAY, (Miss Macintosh's next of Kin,) Sol-
Gen. Anderson—Shaw.

May 21, 1845. GEORGE CHEAPE and JOHN MACINTOSH, (her Trustees.)—Rutherford
Bell v. Cheape. —Penney.

Competing Claimants.

Testament—Legacy—Vesting—Condition—Conditional Institute—Competition.—Legacy to A, his heirs, executors, or assignees, in the event of B, who life-rented the subject of it, dying without issue:—A predeceased B, having assigned the legacy: B afterwards died without issue: in a competition between the executor and assignee of A, the executor was preferred, in conformity with the opinion of a majority of the whole Judges.

May 21, 1845.

1st Division.
Ld. Robertson.
N.

MISS STAIR PRIMROSE conveyed her whole heritage to trustees, with a power of sale, and by relative deed directed them to pay certain legacies, and after that to pay the annual produce of the residue to Susan Buchanan during her life; and in case she should marry and have a child or children, to make payment of the residue itself to such child or children, and to the issue of such of them as might be dead, such issue succeeding to the share which would have belonged to their parents, if in life; but in the event of there being no child or children of Susan Buchanan's body, and no issue of such child or children existing at the time of her (Susan Buchanan's) death, the trustees were directed in that event to pay and make over the said residue to "Mary Macintosh, her heirs, executors, or assignees." This Mary Macintosh was the person to whom Miss Primrose had conveyed her whole personal estate, and whom she had appointed her executor.

Miss Primrose had, at various times, executed different deeds of settlement with reference to the trust. These are all narrated, and the material clauses quoted in the note of the Lord Ordinary. The admitted result of the whole at the date of the testator's death in 1820, is given in the preceding narrative.

Miss Macintosh died in 1828, (predeceasing Miss Buchanan,) leaving a trust-settlement, whereby she, *inter alia*, conveyed to her trustees her eventual interest in the residue of Miss Primrose's estate, then life-rented by Miss Buchanan.

Miss Buchanan was never married, and died in 1843; up to which time she received the interest of the residue of the proceeds of the heritage, which the trustees had sold.

On Miss Buchanan's death, the residue liberated by her, being claimed No. 115. both by Miss Macintosh's next of kin and by her trustees, Miss Primrose's trustees raised a multipoleinding.

May 21, 1845.
Bell v. Cheape.

The next of kin pleaded, in substance, that the legacy of the residue to Miss Macintosh was conditional upon the death of Miss Buchanan without children of her body, or their issue, being then alive; that Miss Macintosh having predeceased Miss Buchanan, and so died *pendente conditione*, the legacy never vested in her, and consequently she could not convey it; and the next of kin, as the legal executors, were entitled to it as conditional institutes.¹

The trustees eventually conceded that the legacy had never vested in Miss Macintosh, and rested their claim solely on the plea that they were Miss Macintosh's assignees to the legacy in question, and that assignees were conditionally instituted as well as executors, and excluded them as in all other cases.²

The Lord Ordinary pronounced the following interlocutor:—"Having heard parties' procurators on the claim for George Cheape and William Macintosh, trustees and executors of the deceased Miss Mary Macintosh, and also on the claim of Mrs Rosina Bell and Mrs Mary Ramsay, heirs-at-law and next of kin of the said Mary Macintosh; and considered the closed record, with the various deeds produced and founded on, Ranks and prefers the said George Cheape and William Mackintosh, as trustees foresaid, in terms of their claim, to the whole fund *in medio*, and decerns: Finds no expenses due to either party with respect to the present competition; and decerns." *

¹ Clelland, June 15, 1839, (ante, Vol. I. p. 1031;) Provan, Jan. 14, 1840, (ante, Vol. II. p. 298;) Johnston, June 9, 1840, (ante, Vol. II. p. 1038;) Thornhill, Jan. 20, 1841, (ante, Vol. III. p. 394;) Burden, 1738, (Cr. and Stewart, p. 214; 3 Ersk. 9, 9;) Buchanan, Feb. 12, 1830, (8 S. & D. 516;) Miller, 9 S. & D. 295; 7 W. S. 1;) Henry, Feb. 19, 1824, (2 S. & D. p. 605;) Bell's Illust. II. 447; Hope, Feb. 17, 1807, (Dict. App. Legacy, No. 3;) Beaton, June 7, 1821, (3 Ersk. 5, 2.)

² Lawson v. Stewart, 20th June 1827, (2 W. S. 625.)

* "NOTE.—By the original trust-disposition of Miss Stair Primrose, dated the 8th of January 1803, she conveyed her whole property, both heritable and moveable, to certain trustees, for the purpose of carrying into effect a settlement of her affairs, executed of the same date. On the 30th November 1812, she confirmed the trust-disposition, but revoked the deed of settlement, and made a new settlement, whereby, after providing various annuities and legacies, and leaving a sum of £1500 to her niece, Miss Susan Buchanan, she directed the residue to be thus disposed of:—'And with regard to the residue and reversion of my said estate and effects, and prices and produce thereof, after payment of the several annuities and legacies in the order before provided, I hereby direct and appoint my said trustees to make payment of the yearly interest or produce thereof to the said Susan Buchanan, during all the days of her life; and, in case she shall marry, and have a child or children, my said trustees are hereby directed to make payment of the reversion itself, after the decease of the said Susan Buchanan, to such child or children, and to the issue of such of them as may be dead, such issue succeeding to the share which would have belonged to their parents if in life. But,

No. 115. The next of kin reclaimed.

May 21, 1845.
Bell v. Cheape.

Counsel were heard on 21st June 1844, when the Court ordered cases

in the event that there shall be no child or children of the body of the said Susan Buchanan, or their issue existing at her decease, then, and in that case, the said reversion shall be divided into four equal parts, and shall be paid as follows; to wit, one-fourth to the child or children of the said General George Cunninghame, or their issue; another fourth to the child or children of the said Dr Charles Congalton, or their issue; another fourth to the said James Clerk, and failing of him, to the child or children of his body, or their issue; and the remaining fourth to the said James Walker, and failing of him, to the child or children of his body, or their issue.' By this deed, there was left to Miss Mary Macintosh a legacy of £1000; and by a codicil, dated the 16th of December 1812, the testatrix expressed her gratitude to Miss Macintosh, and desired that this legacy should be paid to her, and remain entirely her own, independent of any money she might have in her hands belonging to the testatrix.

"By a deed of alteration and additional settlement, dated the 21st of October 1817, proceeding on the narrative of the testatrix 'being deeply sensible of the attachment which Miss Mary Macintosh' had shown to her, and being desirous 'to testify my gratitude for the many obligations which I owe to her long-tryed friendship,' therefore she revoked the trust-deed in so far as it contained a conveyance of her personal estate, and conveyed the whole of that estate in favour of Miss Macintosh, whom she appointed 'to be my executor and universal intromitter with my said moveable estate and effects.' And, finally, with respect to the residue of the heritage which was to be liferented by Miss Susan Buchanan, and to be divided, failing her or her children, or their issue, into four equal portions, as above stated, the deed contained this provision:—'And, lastly, I hereby revoke and recal the direction and appointment made by me in the said deed of settlement with regard to the disposal of the residue and reversion of my estate falling under my said trust-disposition, and the prices and produce thereof, in the event that there shall be no child or children of the body of Miss Susan Buchanan, my niece, daughter of the deceased Dr John Buchanan, physician in London, and no issue of such child or children existing at the time of the decease of the said Susan Buchanan. And I hereby direct and appoint my said trustee, and the trustee or trustees who may be assumed by him in the event aforesaid, to pay over, dispone, or convey the said residue and reversion to the said Mary Macintosh, her heirs, executors, or assignees; and with and under the additions, variations, and alterations herein expressed, I hereby ratify, approve, and homologate the said deed of settlement executed by me in its whole heads, articles, and tenor.'

"Miss Primrose died in the month of February 1820, and her surviving trustee accepted and sold off the heritage. The residue was ascertained, and a deed of ratification granted on the 20th of February 1824 by Miss Buchanan and Miss Macintosh. This deed proceeds on the narrative, that the trustee had sold off the heritable property with their consent and approbation, fixes the balance in his hands, and for their respective interests in the succession of Miss Primrose, they expressly ratify the whole trust-management.

"In the month of January 1828, Miss Macintosh died. It appeared that, in the month of September 1818, she had executed a trust-disposition and settlement, and, on the 31st of January 1824, a deed of alteration and additional deed of settlement, in which, on the express narrative of her right to the reversion of Miss Primrose's estate, still liferented by Miss Buchanan, she conveyed this interest to her trustees for certain purposes. Miss Buchanan survived Miss Macintosh, but died unmarried on the day of 1843. The present multipointing was then instituted for the purpose of adjusting the rights of all concerned in the ascertained residue of Miss Primrose's estate. The competing parties are the trust-assignees of Miss Macintosh on the one hand, and on the other, her heirs-at-

to be given in, and laid, with the other papers, before all the Judges, for No. 115.
opinion.

May 21, 1845.
Bell v. Cheape.

law and next of kin. These last contend, that, under the settlement of Miss Primrose, no right to the residue of the heritable property vested in Mary Macintosh, seeing that she predeceased Susan Buchanan, the liferentrix, and that the heirs of Mary Macintosh, or her next of kin, as executors, are entitled as conditional institutes to take the residue which vested in them on Susan Buchanan's death, and to exclude the executors-nominate or trust-assignees of Mary Macintosh. The Lord Ordinary has preferred the trustees of Mary Macintosh, and sustained her right to make a settlement of the residue of the heritage left to her by Miss Primrose on the failure of Miss Buchanan without issue. His grounds are these :—

" 1st, This is clearly a question of intention, and that intention is to be gathered from the whole import and structure of Miss Primrose's final and subsisting settlements in favour of Mary Macintosh. In the recent cases on this subject, this principle is distinctly acknowledged and clearly brought out. Now, Miss Macintosh was in the first place named the executrix and residuary legatee of Miss Primrose as to all her movable property. In the second place, as to the residue of the heritable property, the trustees were directed, in the event of Susan Buchanan dying without issue, 'to pay over, dispose, or convey the said residue and reversion to the said Mary Macintosh, her heirs, executors, or assignees.' She was, therefore, the *persona prædilecta*, and was substituted in place of the parties who were to receive the residue as divided into four shares under the deed of 30th November 1812.

" 2d, Mary Macintosh was not called to the succession in respect of any relationship to the testatrix, but on the special ground of favours conferred by herself personally; and after her there is no destination over, as it is termed, or ulterior substitution. This, although by no means *per se* conclusive, is always a circumstance of great importance in ascertaining the intention, which, as already stated, is the *regula regulans* in all cases of this description.

" 3d, Neither is the destination to Mary Macintosh, and to her child or children, as in that to the children of the four parties originally called in the deed of November 1812, to the succession after Susan Buchanan and her issue. Nor is it a destination to an individual and the children of any particular marriage, as in the recent case of Wright v. Fraser, 16th November 1843, (Bell's Rep. Vol. VI. p. 78;) nor to a party and her executors, or next of kin, as in the case of Lawson v. Stewarts, 20th June 1827, (Wilson and Shaw, Vol. II. p. 625.) But, generally, it is a destination to Mary Macintosh, her heirs, executors, or assignees. She was unmarried. She was to receive the whole movable succession, to be at her own disposal; and the residue of the heritage was surely intended to be in the same situation, subject to the liferent of Susan Buchanan, and defeasible, no doubt, if she should leave issue. The testatrix could not have had in view the heirs-at-law, or executors of Mary Macintosh, being her next of kin, in contradistinction, and in preference to her executors-nominate or assignees. This is plain, because she expressly says that the residue is to go to Mary Macintosh, and her heirs, executors, or assignees, without distinction or limitation. Mary Macintosh survived the testatrix; and although it be true that she predeceased the liferentrix, and that her right, as well as that of her heirs or assignees, was defeasible in the event of there being issue of the body of Susan Buchanan, yet, under the terms of such a general destination, she surely was entitled, during the lifetime of Miss Buchanan, to grant an assignation of her eventual right, which, by her surviving the testatrix, had vested in the trustees for her behoof. The use of the expression assignees, in a deliberate deed of this description, prepared by a conveyancer of knowledge and experience, cannot be overlooked. Indeed it is a known rule of construction, that effect must be given, if possible, to all the terms employed in a legal instrument, all of which must be looked to in ascertaining the intention

No. 115. The following opinions were returned :—

May 21, 1845.
Bell v. Chespe.

LORD JUSTICE-CLERK.—In the consideration of this case, the strong inclination of the mind is to concur in the judgment of the Lord Ordinary, and to take the view which makes of the most value to the late Miss Macintosh (the lady so highly and specially preferred by the settlements of the deceased) this particular bequest of the residue of the estate under the management of the trustees. But this is a separate bequest, unconnected in form or expression, or the execution it is to receive, with the other provisions in favour of Miss Mary Macintosh, and relates to different property. The indications of general intention to be collected from the rest of the deed, and which in so strong a manner point out Miss Macintosh as the *persona prædilecta* in the testamentary arrangements of the deceased, do not occur in the part of the deed, or in regard to the bequest, on which this competition arises; and the provision itself as to the residue stands wholly unconnected with the other parts of the settlement. If this provision had been of the same character as the others, intended to take effect (according to one construction) at the same time, and capable of being connected with the others, as a part of the same plan of settlement, receiving execution as to all its parts in one way by the construction which general intention favoured, then the means of interpretation afforded by the evidence of preference would be most legitimately used and irresistibly strong.

But this is a separate, special bequest, having no dependence upon the rest of

of the granter. But it seems far more reasonable to hold that the conveyance, extending to the assignees of Mary Macintosh, was to be effectual in favour of such persons as she should assign to her eventual right, than to be limited to assignees, whose right was merely to be constituted after she had obtained full right to the residue, and when of course it was quite unnecessary to declare that her assignees were to succeed, as in that event they would take as matter of course, without any proviso in the original deed of conveyance.

"4th, This is not a question as to lapsed legacy. The parties are agreed that the destination of the residue was effectual, and the question is argued as to whether it vested in Mary Macintosh, or rather in the trustees for her behoof, so as to enable her assignees or executors-nominate to take in place of her next of kin. The case cannot be determined, as it was at last chiefly maintained on the part of the next of kin, on the authority of the case of *Graham v. Hope*, 17th February 1807, (*Morison voce Legacy*, Appendix, No. 8.) because, in that case, the legacy to the party and his assignees never vested in him, he having predeceased the testator. Mary Macintosh, in this case, however, survived Miss Primrose, and only predeceased the liferentrix.

"5th, In conclusion, the Lord Ordinary cannot help observing, that the right of Mary Macintosh was treated as a vested interest by all the parties, (as the deed of ratification shows;) and although, unquestionably, this cannot in any degree affect the question as to the intention of Miss Primrose, on which the case must be determined, it is satisfactory to find that the conclusion which the Lord Ordinary thinks ought legally to be drawn on this head is not inconsistent with what the trustee, and those acting in regard to the administration of this succession, held to be the true meaning of the settlement. The Lord Ordinary has gone over the various recent cases on this head, but has found none expressly in point; and, indeed, wherever the matter resolves into a pure question of intention, the deed of the testatrix must form the law of the case. Of course, it is more for the sake of analogy than of authoritative determination, that, in general, cases can be found to guide the Court on such a subject."

the deed—framed on a different plan, as it interposes another party as preferred to Miss Macintosh, in regard to the residue—is to be executed at a different time, and cannot be made, on any construction of it, equivalent, in the form of direct benefit, to the other provisions in favour of Miss Mary Macintosh. No. 115.
May 21, 1846.
Bell v. Cheape.

I fear, therefore, that the reference to the other parts of the deeds in favour of Miss Mary Macintosh, rather raises a conjecture as to what her wishes might have been, than affords materials for construing the terms of this particular bequest.

The first provision as to the residue is contained in the deed of 1812, and this clause must be looked to in the first instance, for the latter provision in the subsequent deed is introduced in the form only of an alteration on the former.

By the provision in the deed of 1812, Miss Primrose directs her trustees, as to the residue of her estate, to make payment of the yearly interest or produce thereof to her niece, Susan Buchanan, during all the days of her life; and in case she shall marry and have a child or children, the trustees are hereby directed to make payment of the reversion itself, after the decease of the said Susan Buchanan, to such child or children, and to the issue of such of them as may be dead—such issue succeeding to their parents' share. But in the event that there shall be no child or children of the body of the said Susan Buchanan, or their issue, existing at her decease, then and in that case the said reversion shall be divided into four equal parts, and paid as follows, &c., to two classes of persons, and two persons and their issue.

This is the form of the subsequent provision also, for there is only a change as the ultimate direction substituted by the deed of 1817.

I think it is clear that the legacies of these four equal parts were conditional legacies—conditioned expressly on there being no children, or their issue, of the said Susan Buchanan existing at her death—conditioned in substance, for it has no effect until the condition takes effect, but further conditioned also in form and direction to the trustees. The residue is of course held by trustees. But then it is to be observed—and this is not immaterial in the construction of such clauses—that it is vested in them by the general conveyance to trustees, and not by the terms of the clause as to the residue, so that the vesting in the trustees is not connected with the particular interests or benefits created by the deed; as, for instance, the residue is not conveyed to them in trust, nor is it said that they are to hold the residue for Susan Buchanan in liferent, and her children in fee; whom failing, for Mary Macintosh in fee. The intended benefit for Mary Macintosh is brought in only as a direction or appointment on the trustees to pay it over in a certain event after the lifetime of another party, to whom they are to pay the interest and proceeds of the residue. Hence the creation of the trust is not dependent on or connected with the intended benefits, so as to make a fee in trust for Mary Macintosh necessary by the structure of the deed for the fiduciary fee in the trustees.

Then, by the deed of 1817, the testatrix revokes “the direction and appointment made by me in the said deed of settlement, with regard to the disposal of the residue and reversion of my estate falling under my said trust-disposition, and the prices and produce thereof, in the event that there shall be no child or children of the body of Miss Susan Buchanan, my niece, daughter of,” &c., and “no issue of such child or children existing at the time of the decease of the said Susan Buchanan.”

And then it proceeds with another direction substituted for that event—“And I hereby direct and appoint my said trustees, and the trustee or trustees who may be assumed by them, in the event foresaid, to pay over, dispense, or convey the

No. 115. said residue and reversion to the said Mary Macintosh, her heirs, executors, or assignees, and with and under the additions, variations, and alterations herein expressed, I hereby ratify, approve, and homologate the said deed of settlement executed by me in its whole heads, articles, and tenor.”

May 21, 1845.
Bell v. Cheape.

1. This is a separate distinct bequest, in no degree connected with the remainder of the deed, and in execution and effect not affected thereby.

2. It is a direction or bequest conditioned expressly on a certain event—that at the death of Miss Susan Buchanan, there shall be no child of hers, or issue of any such child existing.

I think this is a conditional legacy, and that no interest vested in Miss Mary Macintosh during the lifetime of Susan Buchanan capable of being transmitted by assignation.

No facts are stated to raise even the belief that Miss Susan Buchanan was past child-bearing, or that Miss Primrose must have taken Miss Susan Buchanan to be past child-bearing, at the date of either deed. And if such enquiry were at all relevant, it is not likely that such could be her conviction, Miss Buchanan being her niece, and having survived till 1843. But any such enquiry is quite irrelevant, in my opinion, by the law of Scotland, in such a question as the present. It might lead to the extraordinary result, that the legacy might not vest for the first ten or fifteen years after a testator's death, and gradually become vested by the result of a physico-medical enquiry, which would be without precedent.

I must take the condition stated in the deed as one created and established by the testatrix—on which the bequest must depend—and therefore not capable of being superseded by extraneous and subsequent facts, as to the probability of the condition being purified or not. The only legal period for ascertaining whether the direction to the trustees to pay over the residue to Miss Mary Macintosh, her heirs, executors, or assignees, shall take effect, is the event, that at the time of the decease of Miss Susan Buchanan, there shall be no child of the latter, or issue of any child existing. Until that event shall occur, the deed stands with that condition in it—viz., that it is in that event only that the direction obtains and takes effect.

If the legacy is conditional, then I think it necessarily follows that it did not vest, so as to be capable of being transmitted by assignation.

A view has been stated to this effect, viz., that on the death of Miss Susan Buchanan, the assignees of Miss Macintosh then present themselves for payment, and may appear as conditional institutes, and entitled to take, in their own right, as much as her next of kin; and that their right in no degree is derived from Miss Mary Macintosh, but rests on the deed itself. I think this view of the case does not rest on any solid ground. It was urged in *Hope v. Graham*, and expressly rejected by President Campbell. The character of assignees is obtained exclusively by the act and deed of Miss Macintosh, and from her act and deed alone, and therefore the question must be resolved by the enquiry whether Miss Macintosh could transmit or convey the right by assignation. If she could not assign, her assignees cannot claim. The mere addition of the term assignees to heirs and executors will not of itself bestow a right to assign, if the character of the bequest, as it is given by the testatrix, excludes the power to assign before the event occurs which is to decide whether the party is to take at all.

Upon this point the authorities, which have been brought forward (as stated in the cases) since the date of the Lord Ordinary's interlocutor, and were not quoted to his Lordship, appear to me to be conclusive.

The case of *Burden v. Smith* (Craigie and Stewart's Reports, p. 214) is a very No. 115.
 weighty authority, and is directly in point. The case had been considered in the
 House of Lords with great discrimination as to the principles of Scotch law, for May 21, 1845.
 the part of the judgment as to the *legitim* corrected a very great mistake in the *Bell v. Chespe.*
 interlocutors of the Court of Session, and the other distinct branch of the case
 receives thereby higher authority. I can find no distinction between the present
 and that case. As Lord Glenlee says, in *Downie v. Buchanan*, February 12, 1830,
 in explaining the principle of judgment in *Burden v. Smith*—"Till the existence
 of the condition, there is no vested right which can be conveyed."¹

The case of *Hope v. Graham*, February 17, 1807, is also directly in point, and
 an authority of great weight. It was first found in that case that the legacy did
 not lapse; and that point having been fixed in the cause, the competition which
 arose on that footing seems to me to involve the very same question which has
 arisen in this case. The notes of the opinion of President Campbell appear to
 exhaust the question.

I am of opinion, "that it is the heir *designativè* that gets the legacy. General
Hope (Miss Macintosh) had nothing that he could settle."

LORD MONCREIFF, CUNINGHAME, and WOOD.—We concur in the opinion of
 the Lord Justice-Clerk.

LORD MURRAY.—I concur in all the views of this case which have been stated
 by the Lord Justice-Clerk.

LORD COCKBURN.—Neither this case, nor any other case of the kind, depends
 on the intention of the testator, unless with this qualification, viz. that there can
 be no evidence of intention, except the words used, and these construed legally.
 It is idle to speculate about intention, as deducible, like an ordinary fact, from
 general circumstances.

In reference to such circumstances, if they were applicable to the present ques-
 tion, much might be said on both sides. My belief is, that if the exact point that
 has arisen could be now put to Miss Primrose, she would be obliged to acknow-
 ledge that it had never occurred to her; and that therefore, whatever, after the
 matter was explained to her, she might wish to add to her settlement, she, at the
 period of its execution, had no intention about an occurrence of which she had no
 thought.

But all these conjectures are useless. She has died, leaving her meaning to be
 gathered by the law out of her now unalterable language. Whatever gratitude
 she had towards Miss Macintosh, she must be held to have intended to evince it
 solely by what her settlement, legally read, gives.

Now, the law has declared, that no legatee can assign as his a legacy, which,
 though its never vesting in him, was not his; except in the special case in which
 such a peculiar power is positively given. I am of opinion that no such power is
 given here. I see no trace of it whatever. This being held, the two cases of
Burden and of *Hope* (and others might be mentioned if they were required) are
 solemn decisions on the precise point now before us. Considering the importance
 of getting any rule on this subject fixed, I am very averse to be refined out of
 these well-considered authorities.

¹ 8 Shaw, 516.

No. 115. I therefore think that the interlocutor of the Lord Ordinary should be altered, and Mrs Bell and Mrs Ramsay preferred.

May 21, 1845.
Bell v. Cheape.

LORD IVORY.—I arrive at the same conclusion with the Lord Justice-Clerk.

I am of opinion, 1. That the residuary bequest "to the said Mary Macintosh, her heirs, executors, or assignees," was a conditional bequest. 2. That the nature of this condition was, that the bequest should take effect, only "in the event that there shall be no child or children of the body of the said Susan Buchanan, or their issue, existing at her (Miss Buchanan's) decease;" and hence, that there could be no vested right in any one prior to Miss Buchanan's decease. 3. That Miss Macintosh having predeceased Miss Buchanan, the bequest consequently never vested in her. 4. That not having so vested, she could not assign, or in any way transmit to others, what did not belong to herself. And 5. That in this situation the bequest came to vest, for the first time upon Miss Buchanan's decease, in the executors (*i. e.* not the *heredes facti*, but the legal heirs *in mobilibus*, or next of kin) of Miss Macintosh—and that it did so, not by force of any right transmitted to them through her—but directly in their own right, and by force of the original bequest itself;—they being called (though no doubt *designativè* as executors, yet truly) as conditional institutes, in the event of Miss Macintosh's predeceasing, as actually happened, the existence of the condition, upon which the whole operation and taking effect of the bequest depended.

I think there can be no question as to the soundness or sufficiency of the general grounds here stated—and it would not be difficult to support them by reference to authorities—though I doubt whether either the case of *Burden v. Smith*, or of *Hope v. Graham*, have that direct and express bearing upon the question which has been supposed.

I have carefully studied the pleadings (so far as still extant) in the case of *Burden*, and rather think that the decision there did not turn, either in this Court or in the House of Lords, upon the doctrine of conditional legacy. *Burden* (the husband) had there made two provisions, both of them conditional, in favour of his wife, "her heirs and assignees whatsoever;" the first, in an antenuptial contract between the spouses, which of course was onerous; the second, in a subsequent deed of obligation executed pending the marriage, which, on the contrary, was purely voluntary and gratuitous. As to both, the question arose, whether a deed of assignation executed by the wife, who had survived her husband, but predeceased the purification of the condition, was valid to carry them to her assignees. And, as regards the marriage-contract provision, it is clear that the judgment, both here (interlocutor, 19th February) and in the House of Lords (where it was affirmed) supported the deed, upon the express ground that the wife "was a creditor," and therefore vested (though but conditionally) from the very moment of contraction, in the whole right of debt, such as it was—a principle nowing applicable to the present case, but depending on the recognised distinction as to vesting, between the cases of obligation and legacy, agreeably to the brocard: "*Qui sub conditione legatum est, pendente conditione, non est creditor, sed tantum quando extiterit conditio. Quamvis eum qui stipulatus est sub conditione, placet etiam, pendente conditione, creditorem esse.*" (L. 42, De oblig. et Action.) As regards the voluntary provision, again, I am satisfied that the judgment of this Court (which also supported the wife's assignation) proceeded on the same grounds, distinguishing it, that is to say, from the case of legacy, and treating it (inter-

locator of 19th June) as a "conditional obligation" or "debt," "whereof the condition had not then existed." This was reversed by the House of Lords; and unfortunately it does not appear on what precise ratio. But taking the judgment as a whole, I should hardly think it safe to hold, that it was intended either to deal with the provision as a matter of legacy, or to decide one way or other as to a legatee's power, where the legacy is conditional, of assigning *pendente conditione*. Indeed, it does not appear to me, that the distinction in this respect between a conditional debt, as being so assignable—and a conditional legacy, as not being so—was ever seriously made a point of controversy between the parties. And the ultimate judgment is sufficiently borne out upon a different ground, without any necessity for touching on that doctrine. For the obligation of the husband in this second deed being purely gratuitous, it could not be set up either in the wife's person, or in that of her assignee, in competition with the onerous provisions which the marriage-contract of both spouses had settled on the children of the marriage. Now, the House of Lords decided (adding herein to the judgment of this Court) that "the children of the marriage were entitled"—the wife's assignee taking one-half in her right—"to the other half of the said 7000 merks, and also to the other half of the conquest;" and they further "declared, that the said children were entitled to a legitim;" and, with these alterations, they "remitted to the said Lords of Session to proceed accordingly." That is to say, as I read the whole matter, the House of Lords fixed the rights of parties upon principles, which, if they exhausted the entire succession of the husband as belonging to parties who held the character of creditors, excluded altogether from operation the gratuitous deed of obligation, and consequently all transmitted right under it in the person of the wife's assignee; and which, even if they did not *prima fronte* thus exhaust the entire succession, at all events opened the question, whether, and to what extent, any portion would be left over for distribution on other grounds—to which effect the cause was accordingly remitted, that necessary enquiry might be made.

If I am right in this view of the case of Burden, it really has no bearing upon the present question as a direct authority. And the case of Hope v. Graham stands, I am afraid, in a situation little more favourable. For, as Lord Robertson has observed, it is a material feature of that case, viewed in its bearing on the present, that the primary legatee predeceased the testator; and of course, such being the case, his testamentary deed could carry no right whatever to, and confer no power or faculty upon, the party, which was capable of enjoyment or exercise pending the testator's lifetime.

Thus far, however, both cases may be considered as not without importance. For Hope v. Graham may be taken as fixing, in concurrence with the doctrine of Erskine, that the legal meaning and effect of the word "assignees," where it occurs in deeds of bequest, is none other than that which belongs to it when it occurs in deeds of conveyance. And as to Burden v. Smith, again, if I am right in holding that both parties were agreed, that a conditional legacy is to be expressly distinguished from a conditional obligation, in this—that (contrary to what takes place in regard to an obligation) the legacy does not vest, and so is not assignable *pendente conditione*—it would seem to show that no one had at that time even thought of calling in question the doctrine which regulates the present case:—And if I am wrong in my reading of that case, and the true reading on the other hand be as assumed by Lord Glenlee in Buchanan, 12th February 1830, (viz. that

No. 115.

May 21, 1845.
Bell v. Chespe.

No. 115. the ultimate judgment in the House of Lords proceeded on the principle, "that a legacy, declared to be payable to a party, his heirs and assignees, in the event of two children dying before majority or marriage, did not lapse—neither did it vest to the effect of being carried by the marriage-contract of the legatee,") the case of *Burden* would come really to be a direct precedent on the important point in question.

May 21, 1845.
Bell v. Cheape.

After all, I doubt much whether the true state of the present question will be found, when duly considered, to turn upon any difficulty as to the legacy's having actually vested in the person of Miss Macintosh. For if it had so vested, her right in it might have been carried off in her lifetime by the diligence of her creditors, just as readily as it could have been conveyed by deed to her voluntary assignees. Now, I do not understand this to be maintained. On the contrary, such an argument would be incompatible with the doctrine, that even the assignees themselves fall here to take in the character of conditional institutes. If the legacy once vested in Miss Macintosh, all conditional institution must from that moment have flown off. The deed of the testator, and the destination therein contained, would in such case no longer have been operative. On the contrary, indeed, its destination would already have taken effect, and become exhausted, by the vesting in the primary legatee. I do not understand the Lord Ordinary to have given any countenance to such a view of the case. And yet, unless there was vesting to this effect, it is not easy to see how there can have been vesting, in the ordinary sense, to any effect whatever.

I conclude, therefore, that there was no proper vesting in the person of Miss Macintosh; and if there was no vesting, then I equally conclude that she could not transmit to others, by assignation or other deed of conveyance, what she had not in herself to convey.

Beyond this, there is, in my view of the matter, nothing requisite for the decision of this cause. But I rather think that the true gist of the question, as it has been latterly put, does not lie here, but involves a proposition of a different kind; and accordingly, as I understand, the chief ground of argument that has influenced the Lord Ordinary is—not that the legacy vested in Miss Macintosh, or that she could, as a consequence of such vesting, dispose of the legacy as a property—(though but conditionally)—of her own; but that, on the whole matter, there is evidence of the testator's intention to confer upon her a power or faculty of appointment over the legacy, whereby on the very opposite assumption—namely, that she herself had not attained, and might never attain, right on her own person—she was yet to be entitled to direct who should take in her stead, supposing that she failed *pendente conditione*, and while as yet the legacy had, properly speaking, vested in no one. Now, that such a power of appointment might have been given, needs not be disputed. But I read the deed in vain to find evidence of its having actually been given. And certainly such a power of modifying, and engrafting on, the testator's own destination, a destination at the will of another, is not to be presumed. The only circumstance, indeed, at all relied upon to this effect is the introduction of the word "assignees." But I cannot hold that sufficient. Indeed, so to construe that word would, in my opinion, be to overrule all practice and authority. Its true import and operation is given by *Erskine*, and confirmed by *Hope v. Graham*. And as to the observation, that such a construction (by depriving the word of all effect beyond what would at any rate belong to the grant, even were it not employed) substantially

No. 115.

May 21, 1845.
Bell v. Cheape.

reduces the expression to a mere unmeaning surplusage, it is really not more applicable in the case of the deed now under consideration, than it would be in that of any other deed whatsoever, the introduction of the word "assignees" being in no case necessary in order to confer the power of assignment, where the party is at any rate in the full right of the subject. I know of no case, accordingly, where the introduction of the word was held to confer a faculty or power, apart from what attaches naturally to an actual property in the subject. And, as regards the present deed more especially, there certainly are not two things given by it. There is not given, for example—in one event, (*viz.* Miss Macintosh's survivance of the condition,) the legacy—and in another, (*viz.* her predecease of the same condition,) the faculty of appointment, apart from the legacy. The clause of bequest is to take effect once and for all, as regards every case that could happen. And what it is intended by it then to give is the legacy itself, and the legacy only. Nor is there any provision made for the case of the legacy's not taking effect in Miss Macintosh as the legatee. All that is done is this:—If she succeed to the legacy, she has in that event both the legacy and the right of assignment. If she do not so succeed, she is in that event neither to have the legacy, nor the power of directing, by assignment or otherwise, who else shall have it.

LORD MEDWYN.—If I could go on the intention of the testatrix alone, I would have no difficulty in disposing of this case; for, considering the terms of affection and gratitude used by her towards Miss Macintosh, it is plain that Miss Primrose wished the bequest, if it took effect at all, to be the most ample in her favour; and I am persuaded, if she had been asked whether she meant Miss Macintosh to have the power of conveying it from her heirs to a more favoured party, she would have said, Yes; and I think the bequest of the residue affords proof of the increasing favour she had for her friend, and of the benefit she wished her to reap from it. But we must see if this intention has been properly given effect to. And if it be necessary that the bequest should vest in Miss Macintosh before she can assign it, I am afraid I cannot hold that it ever vested in her, as she did not survive Miss Buchanan. But then we must attend to the terms of the bequest; it did not lapse in consequence of the destination "to heirs, executors, and assignees." And the question is between the heirs *in mobilibus* of Miss Macintosh, and her trustees or assignees. Now, I think that Miss Primrose might have carried out her intention of making as ample a bequest in favour of her friend as possible, by conferring upon her expressly the power to assign her interest, even although it might never vest in her, nay, might never take effect at all. I see nothing to prevent such a condition being adjoined to a bequest of a residue, and Miss Macintosh plainly thought she had this power. But is it very different when the bequest is expressly given to her and her assignees? Under a bequest to A, his heirs and executors, although A does not survive, and it never vests in him, his executors would take as conditional institutes, of course taking nothing through A. Then, if the bequest be to heirs, executors, and assignees, why should not the assignee take also as a conditional institute, if A has nominated an assignee? He does not take through A, but in virtue of the testator's deed, just as much as the executors do. In this latter case, the law points out the parties who are to take, those who are the next of kin when the legacy opens, and not those who were so at the death of the legatee. In the case of the assignee, he is pointed out or named by the legatee, but still takes under the deed of the testator, just as the executors

No. 115. do; the law naming in the one case, and the legatee in the other. Now, in the present case, Miss Macintosh has specially conveyed her interest, and yet I do not see that properly the assignee takes any thing more through Miss Macintosh than her executors would do; and, therefore, I do not see the necessity of the bequest vesting to enable her to carry out the intention of the testatrix, that she might assign it. If it vested, there was no occasion for inserting the term assignees. It can be only necessary where it does not vest.

May 21, 1845.
Bell v. Chespe.

At the same time I see the difficulty which attends this view, from the cases of Burden and Hope; especially if we are to hold what Erskine says about a conveyance to heirs, executors, and assignees to be correct, that the addition of assignees are mere words of style, inferring the completeness of the grant rather than a substantive authority to assign. But I hesitate to hold this in the case of a special conveyance of a sum of money, and in the present state of our law. I think the term assignees, in such a deed as this, has a more appropriate meaning than when first used in a bond for borrowed money. But, be this as it may, if the case of Burden imports what Lord Glenlee conceived, and if Lord President Campbell's opinion in the case of Hope be correctly applicable to the present case—for there the legatee did not survive the testator, and the assignation, therefore, was not specially of the legacy as it is here—then I must be compelled to hold that, as the bequest did not vest in Miss Macintosh, she could not assign it.

LORD ROBERTSON.—I have very anxiously reconsidered this case, and although from the great weight of authority against me, I cannot feel the smallest confidence in the opinion which I have ventured to express, I am unable to come to any conclusion different from that to which my interlocutor gave effect. It is admitted on all hands that the question is one of intention, and of course it is essential to look minutely to the expressions used by the testatrix, more especially in the bequest immediately in question, and although attentively, yet subordinately, to the decisions which have regulated similar cases. Two are referred to as decisive of the present case—one of Burden v. Smith, in the House of Lords in 1738, and one in this Court, Hope v. Graham, in 1807. But while I feel the force of these decisions, I do not think them conclusive; and, superseding consideration of them in the mean time, I shall deal, in the first place, with the matter as an open question. It is of the utmost importance to analyse distinctly the settlement of Miss Primrose, attending specially to the terms of the conveyance of the residue in question, which is merely a movable right, and as to which the competition is between the assignees or executors-nominate of Miss Macintosh, a beneficiary under the settlement, and her next of kin only, and not with any party otherwise having right from the testatrix.

Miss Primrose first, in 1803, conveyed her whole property to trustees, whom she nominated her executors, for the purpose of giving effect to a settlement executed of the same date, or to any other she might execute. In 1812 she revoked this deed, and made a new deed of settlement—1st, For payment of debts 2d, Of certain annuities, including one of £60 to her niece, Susan Buchanan 3dly, When the annuities ceased, and a fund could be appropriated for the purpose then for certain legacies to Mrs Cuninghame in liferent, and her children nominally in fee; to Mrs Congalton in liferent, and her children and grandchildren in fee, in such proportions as Mrs Congalton, or failing her, Mary Macintosh, should

direct; and then to various other individuals, including £1000 to the said Mary Macintosh personally; 4thly, A sum of £1500 to the said Susan Buchanan, "her heirs, executors, or assignees," on payment of which sum the annuity to her was to cease; 5thly, Certain postponed annuities and legacies; Lastly, The residue was disposed of by a direction to the trustees, "to make payment of the yearly interest or produce thereof to the said Susan Buchanan during all the days of her life; and in case she shall marry and have a child or children, my said trustees are hereby directed to make payment of the reversion itself, after the decease of the said Susan Buchanan, to such child or children, and to the issue of such of them as may be dead, such issue succeeding to the share which would have belonged to their parents if in life: But in the event that there shall be no child or children of the body of the said Susan Buchanan, or their issue, existing at her decease, then and in that case the said reversion shall be divided into four equal parts, and shall be paid as follows:—to wit, one fourth to the child or children of the said General George Cuninghame, or their issue," and the other three-fourths, in like manner, to the children of parties named, and their issue.

No. 115.
May 21. 1845.
Bell v. Cheape.

It is most important to observe, that there is in this disposal of the residue no mention of the assignees either of Susan Buchanan, or of any of the other parties named after her. In December 1812, there is a codicil expressing strongly gratitude to Miss Macintosh, discharging any claim which the testatrix might have against her, and declaring her legacy of £1000 free.

Finally, in 1817, there is the important deed of alteration, expressive in still stronger terms of the gratitude and attachment of the testatrix to Miss Macintosh, revoking the trust-deed in so far as regards movable property, and conveying the whole "to the said Mary Macintosh, her heirs, executors, or assignees," and nominating her to be executrix. Next follows a revocation of certain legacies, and a new bequest in favour of Miss Jane Cuninghame "in liferent, and so long as she shall continue unmarried, and to her sister and nephew after named, in fee, of the sum of £600; and upon the marriage or decease of the said Jane Cuninghame I appoint the said sum of £600 to be divided as follows, viz. £300 thereof to the said Jane Cuninghame, or her heirs, executors, or assignees; the sum of £200 to Mrs Charlotte Cuninghame, and her heirs, executors, or assignees; and the remaining sum of £100 to Stair Scott, and his heirs, executors, or assignees." Here again, in certain cases, assignees are specially named, while in others they are omitted, and this apparently *ex proposito*, and not by any mistake. The last clause, on which the present question turns, is thus expressed:—"I hereby revoke and recal the direction and appointment made by me in the said deed of settlement, with regard to the disposal of the residue and reversion of my estate falling under my said trust-disposition and the prices and produce thereof, in the event that there shall be no child or children of the body of Miss Susan Buchanan, my niece, daughter of the deceased Doctor John Buchanan, physician in London, and no issue of such child or children existing at the time of the decease of the said Susan Buchanan; and I hereby direct and appoint my said trustee, and the trustee or trustees who may be assumed by him, in the event aforesaid, to pay over, dispose, or convey the said residue and reversion to the said Mary Macintosh, her heirs, executors, or assignees."

Taking this settlement as a whole—which I think we are bound to do—in order to find the true construction of the concluding clause, now alone in question, and which is in no way severed from the rest of the settlement, it appears to me that

No. 115. Miss Primrose intended that Mary Macintosh should have the power of nominating assignees or persons to succeed to her eventual and conditional right, to be fixed at her own pleasure, and did not intend that the heirs or next of kin of the said Mary Macintosh should take to the prejudice of such assignees or persons nominated. Had the word assignees been followed up by some such terms as these, "and that by assignation or deed of nomination during the lifetime of the said Susan Buchanan, or as soon after my death as the said Mary Macintosh may think proper," I presume there can be no question this would have been effectual. Miss Primrose had power so to declare, and no technical difficulty as to vesting would have vacated a bequest so expressed. But I think this is the true meaning and import of the clause when the conveyance is made, as it has been done here, to assignees. It must either mean this, or the word assignees must be held to be mere surplusage, to be struck out of the deed altogether; or it must mean a power to assign after the condition shall be purified, which, in truth and reality, is to give it no meaning or effect, for in that event the bequest became, to all intents and purposes, at the disposal of Mary Macintosh, and of course assignable at her pleasure.

Mary Macintosh is unquestionably the *persona prædilecta*—the sole executrix; and the gratitude of the testatrix is most amply expressed to her in the deed as the inductive cause of the whole arrangement in her favour. It is true that Miss Buchanan has a liferent of the residue of the heritage, and her children, should she any have, or their issue, if existing at the time of her death, but in that event only, are to have the fee. It is not destined to the heirs of such children or to their assignees; while in the same clause, and in direct contrast to that destination, the eventual right of Mary Macintosh is conveyed to herself, her heirs, executors, or assignees. The testatrix died, Susan Buchanan and Mary Macintosh being both alive. Why should the latter not have had the power of assignation of her right under this conveyance, although conditional, or how could the testatrix have meant, while expressly calling her representatives, to suspend the exercise of the power so conferred until it was entirely useless, by the absolute and unconditional right emerging? The settlement must surely be construed as at the death of the testatrix; and while I fully admit that it cannot be construed in one way, or in another, as there appeared to be a chance, or no chance, of children of Susan Buchanan, (an enquiry, I think, entirely *dehors* the will and incompetent,) it very humbly appears to me that the testatrix did in substance that which she was entitled to do by express terms, without risk of nullity—namely, so far favour Mary Macintosh—the person first called to the residue of the movables, and beyond whom there was no one called to the residue of the heritage, as to make a destination to her heirs or assignees, thereby conferring on her a useful and practical power of naming assignees whenever the testatrix died, subject, no doubt, to the conditions of the will—namely, Susan Buchanan's liferent, and the chance of existing children or grandchildren of hers excluding these assignees. I cannot apply to the use of the term assignees a mere empty and unmeaning sound, or ascribe it to mistake, or liken its employment in this deed of settlement, so specially framed, and drawing a distinction between conveyances to parties and their children, or the issue of these children, and to heirs and assignees, to what is said to have been its origin in the case of bonds. It seems to me more legitimate, and more conformable to the meaning of the testatrix, on the grounds I have stated, to hold it available in the very case which has occurred—namely, the preference of

Mary Macintosh's assignees to her next of kin. I do not understand how these next of kin, called under the word heirs, can maintain that they claim through Miss Primrose, the testatrix, to the exclusion of the assignees called along with them, and obviously so called to enable Mary Macintosh to exclude her next of kin if she thought proper.

No. 115.

May 21, 1845.
Bell v. Cheape.

The great difficulty in the case, however, arises from the rule as to vesting, and which is stated to be, that until the condition in any legacy is purified, there is nothing in the person of the legatee capable of assignation. Now, without denying the length to which this doctrine has been carried, I do not understand the rule to be so stringent that a testator cannot declare his will to be, that the conditional legatee shall have the power to assign or nominate his successor before the condition is purified. Such an intention, if clearly expressed, would be given effect to. The rule, therefore, has no resemblance to such a technical difficulty as might arise in the disposal of heritage by the use of the word bequeath in place of dispose, where the clear intention of the testator could not be carried out consistently with the principles established in the law of heritable succession. But if the words used in the conveyance of a movable right, although not so precise as if the deed had borne with power to assign during the subsistence of the condition, truly import that this was the meaning of the testatrix, and no *verba solennia* be requisite, and if intention be the regulating principle in all such cases, and this is satisfactorily gathered from the deed taken as a whole, I humbly think such intention so expressed must be supported. Every case of this kind must be determined on a view of its own specialities, and if the intention be clear, then I humbly conceive the difficulty of determination is removed. Such I understand to be the principle fixed by the more recent decisions, and I may specially refer, on this head, to what is so forcibly stated by the Lord Justice-General, in the case of *Provan v. Provan*,¹ 14th January 1840:—"Every case of this kind must depend on the special phraseology of the deed. We must look at it as a whole, and consider its provisions, in order to ascertain the will of the testator. This is the only rule of law a Court can follow in such questions. I have difficulty in thinking that there is a principle established by any decision or series of decisions on the subject. We are bound to give effect to the will of the testator, whatever it is."

It remains to consider the case of *Burden v. Smith*, 20th June 1738, reported by Lord Elchies, *voce* mutual contract, No. 7, and also noticed in his notes, page 301; and in the House of Lords, under date 27th April 1738, Craigie and Stuart's Reports, p. 214. In that case, the circumstances to be attended to were these:—1st, By the marriage-contract between John Burden and Margaret Fullarton, dated in 1709, the sum of 7000 merks was provided to the husband and his wife, and the survivor in liferent, and to the children of the marriage in fee; the conquest in fee to the children, and one-half of it in liferent to the wife; and in case of no children surviving the husband, or in case of their dying before majority or marriage, the fee of the equal half, both of the 7000 merks and of the conquest, and the liferent of the whole of the latter, was provided to the wife. 2dly, On 23d May 1722, John Burden conveyed his whole property, real and personal, in favour of his son Charles; whom failing, his daughter Clementina, subject to the provisions in the marriage-contract. "And in the event of their decease before mar-

¹ Dunlop, Vol. II. p. 298.

No. 115. riage or majority, he binds himself to pay to his wife, if she should happen to survive them, the sum of 6000 merks." 3dly, On the following day John Burden executed another deed, by which, as stated in the report of the House of Lords, "in the event of the death of his two children before majority or marriage, he binds himself, his heirs, &c. &c., to pay to the persons after-named, their heirs, executors, and assignees, certain sums of money, among which there is the sum of 8000 merks provided to his wife, over and above what she was entitled to by her marriage-contract, and by the deed executed by him on the preceding day." John Burden and his son having died, Clementina succeeded to the property, and Margaret Fullarton having intermarried with David Smith, she granted a general disposition in his favour, conveying all debts, sums of money, &c. &c., that were then due, or should be owing to her at the time of her death. She also nominated him her executor.

May 21, 1845.
Beil v. Cheape.

She having predeceased her daughter Clementina, a competition arose between Jean Burden, sister to the testator, confirmed executrix to Charles and Clementina and also as having obtained a conveyance from the heir-at-law of Mrs Smith on the one hand, and Smith, the husband, on the other. In Elchies' report, no note is taken of the conveyance under the deed of the 24th May 1722 having been granted to assignees, and indeed that word is not mentioned either in his report or notes. A variety of questions arose, two of which only bear upon the present case. The first regarded the provisions in the marriage-contract, and the Court Session found that Margaret Fullarton was a creditor for the provisions in the contract. They also found, by a separate interlocutor, that by the general disposition to David Smith, "He had right to all debts, comprehending conditional debts, whereof the condition had not then existed, as well as any others, and found that the 8000 merks contained in the conditional obligation of the 24th May, did belong to David Smith, her assignee, although she died before the condition could exist, or was purified."

In the House of Lords, it is said in the report to have been contended, 1st, With respect to the marriage-contract, that Margaret Fullarton being only an heir substitute, could not convey her right under that contract; and that even if she had this power, she had not exercised it *habili modo*, as her general disposition only conveyed debts. 2dly, That the father had no right to burden the estate with the 8000 merks; or, if he had this power, the legacy being conditional, and Mrs Smith having died before the contingency happened, it must be considered as a lapsed legacy. It also appears that the assignation of the 8000 merks was objected to as *inhabile*. The House of Lords, while affirming the judgment in so far as regarded the provisions in the marriage-contract, which were held to form proper debts, and to be covered by the assignation, reversed the judgment in so far as regarded the 8000 merks. But from the report it is not possible to see whether this was on the ground of the insufficiency of the assignation, or on the terms of the original bequest, or the power of the husband to make it; and from the notes of Lord Elchies,¹ as well as the Session papers, I should gather that the question chiefly agitated in this Court, was the sufficiency of the assignation to cover the bequest, and not the power of Margaret Fullarton to grant that assignation. I am the more strengthened in this view by the consideration, that in the

¹ Elchies' Notes, p. 301.

subsequent case of Graham against Hope, to be immediately noticed, this case of No. 115. Burden does not appear to have been referred to as settling any general question touching the import and legal effect of a conveyance to assignees, and indeed is not mentioned at all. I therefore think that the present case is not decided by that of Burden, which was, 1st, Not a competition, like the present, between the next of kin and assignee of the conditional legatee, but with the representative of the testator; 2dly, Was an involved question upon settlements of a different tenor from those here in question; 3dly, Was apparently, to a great extent at least, a question on the terms of the assignation, and on the powers of the husband to burden the estate with the additional provision to his wife; and lastly, Because I conceive all such cases must be determined on their own specialities. The grounds upon which I think the assignees should here be preferred, I have already endeavoured to explain.

I have looked into the appeal cases in the case of Burden v. Smith, and I find that five reasons of appeal are stated, which may be thus abridged:—1st, Had John Burden laid out the 7000 merks and the conquest as provided for under the contract of marriage, Margaret Fullarton, being only an expectant heir, could not convey such expectancy to her husband. 2d, The general disposition granted by her to her husband, which only conveyed what was then due, or to be due at her death, could not give right to the contingent fee; nor could the deed of nomination of executor do so, because the fee never belonged to her, but first vested in her heirs after her decease. 3d, The one-half of the 7000 merks and the conquest, settled upon the issue by the contract of marriage, vested in them, and the father had no power to charge the estate with the 8000 merks to the mother. 4th, If he could have charged the estate, in the event of their death before marriage or majority, being the contingency on which the provision was made in favour of the wife—yet she having died before the contingency happened, it was a lapsed legacy. 5th, Even if the half of the 7000 merks and the 8000 merks had been assignable and assigned, or could be claimed by Smith as executor, yet the children had right to *legitim*, which the father had no power to diminish. In this complicated state of the pleadings, and in a case so different in all its circumstances from the present, it does not appear to me that—if I have come to a right conclusion as to the intention of the testatrix, Miss Primrose—there is any general rule of law fixed by this judgment of the House of Lords to prevent effect from being given to that intention.

I confess that I feel much less difficulty with regard to the case of Graham against Hope, because there the legatee, Henry Hope, predeceased his father, the testator; and, until the death of the testator, nothing can be effectually conveyed by a *mortis causa* deed, so as to give the beneficiary a power of assignation, for the efficacy of the instrument depends entirely on the unaltered and last will of the grantor, and does not take effect to any purpose whatever during his life. On these grounds, and on the grounds stated in the note subjoined to the interlocutor—although with the greatest possible doubt and deference—I feel myself constrained to adhere to the judgment I have pronounced.

The case was advised this day.

LORD PRESIDENT.—I feel the force of the view brought forward by the Lord Ordinary, that Miss Macintosh was the *persona predilecta* among the various persons provided for in Miss Primrose's settlements, and think the question raised

No. 115. *between her assignees and her next of kin and legal executors one attended with difficulty. But I have come to the same conclusion with the majority of the consulted Judges, that the interlocutor should be altered, and that the next of kin of Miss Macintosh, and not her trustees, should be preferred in this competition. There is a manifest distinction observed in Miss Primrose's deed between the disposal of her personal estate—in regard to which she conveyed the whole to Miss Macintosh, and also appointed her “to be my executor and universal intromitter with my said movable estate and effects”—and the residue of her estate remaining in the hands of her trustees, and which had been produced by the sale of her heritable property and the surplus of her personal funds. The first is conferred on Miss Macintosh in clear and unambiguous terms, while the latter is to be held by the trustees for paying the liferent to Miss Buchanan, the testatrix's niece; and it is only after her death, without leaving any child or children, or issue of such child or children, that Miss Primrose's trustees are directed and appointed “to pay over, dispo, or convey the said residue and reversion to the said Mary Macintosh, her heirs, executors, or assignees.”*

This is a very special provision, and is very different from that with regard to the testatrix's personal estate. The functions of the trustees subsisted down till Miss Buchanan's death without issue, when, and when only, they are to convey and pay over the residue or reversion to Miss Macintosh, her heirs, executors, or assignees, though she survived the testatrix. She could make no demand on the trustees during the life of Miss Buchanan, and, as she died before Miss Buchanan, the period had never arrived when alone the trustees were entitled to act. When Miss Macintosh executed her trust-deed, she had only a *spes successionis*, and no right had vested in her by her deed in favour of her trustees; and in fact no vested interest was then held by her.

I concur, therefore, in holding that the words “or assignees,” in the settlement of Miss Primrose, are to be viewed as mere words of usual style, and not as if Miss Primrose, after making the provision as to the liferent in favour of her niece, had expressly destined the fee of the residue to Miss Macintosh, with power to her to assign her right to it at any time, by any deed under her hand, as observed by the Lord Justice-Clerk. It is only a conditional legacy, incapable of being assigned till it vested, that is given to her.

LORD MACKENZIE.—This case is not without difficulty. I am not sure that there has been any case in point—*vide* Lord Ivory's opinion. Yet I rather think that if the opinion of the Court of Session or House of Lords had been adverse to the doctrine of the claimants, it would somewhere have appeared, which I think it never does in any of these cases any where. Then there has been no vesting in Miss Macintosh. In truth that is given up both in the argument and the opinions. But, it is asked, why should not the provision go to her assignees as well as her heirs as conditional institutes? The words, “to pay over, &c., to the said Mary Macintosh, her heirs, executors, or assignees,” must be read, “to Mary Macintosh, whom failing, (i. e. at any time,) to her heirs or executors.” Must not these words apply also to her assignees? Must it not be read, *whom failing at any time, to her heirs, executors, or assignees?* But I rather think the answer must be, that the words *whom failing* cannot be held as prefixed to “assignees.” For these are not on failure of the first institute, but in place of the first by his or her deed of conveyance, for such is assignation. Assignees cannot therefore be regarded as heirs or executors are regarded. Heirs or executors

tion is a description of certain persons who shall by law bear a certain relation to the first institute. These may easily and naturally be called as conditional institutes, as destinees a branch of the destination. But assignees are no persons at all till an assignation is made, and it cannot be made till the right vests. If the word were, "*or nominees*," it would be different. These as destinees may, I suppose, be named by any body, vested or not, to succeed to any right of the testator, who has full power of disposal of the subject in any way he may express. They may be nominees of the first institute not vested, or nominees of the sheriff of the county for the time, or of any body. But, 1. It seems not clear that such mere nominees would be preferable to the heirs or executors, or whether the words would not be read, her "*heirs or executors, whom failing her nominees*." 2. Miss Primrose has not said "*nominees*," but has said assignees; and no competent assignation has been made, or could be made, the right not having vested. It is asked what the word assignees means? I read the words in this way, "pay to Miss Mary Macintosh, whom failing, whether before or after vesting, to her heirs or executors; or if she shall be able to assign, (*i. e.* shall be vested and shall assign,) then pay to her assignees." Thus her assignees, if they take at all, must take as deriving right through her, and so preferably to her heirs; and so not preferably to her creditors adjudging or arresting, not being mere nominees of destination, who must be preferable to her creditors, if she was not vested. I see little force in the favour shown to Miss Macintosh. A mere power of nomination of destinees could do her little good; and that is all that it can be pretended she had. The immediate vesting in her would have been a valuable boon to her; but that is not contended for.

LORD FULLERTON.—I so far differ from the opinion last delivered, that if I could consider the question as entirely open, and to be determined on principle or legal analogy, I should be rather inclined to adopt the reasoning of the Lord Ordinary. Not that I think there is room for doubt on the point of the vesting of the bequest. I think it clear, that until the death of Miss Susan Buchanan without issue, no right did vest in Miss Macintosh; and the Lord Ordinary does not rest his opinion on the supposition that it did so vest. He holds that no right in the legacy vested in any person, till the event, on which it was conditional, occurred; but that on that event, the right vested in the assignees of Miss Macintosh in the character of conditional institutes, as it confessedly would have done in her executors-at-law or next of kin, if she had died intestate. Considering the words of the deed, and the special principles on which all testamentary writings are construed, there are, to say the least, very plausible grounds for adopting that conclusion.

The testator directs, that on a certain event the trustees shall convey to Miss Macintosh, her "*heirs, executors, or assignees*." These last expressions are often used, as expressing merely the full and complete right of the donee or legatee, his perfect right to transmit, by intestate or testate succession, the right when vested in him.

But it is unquestionable, that in so far as regards the words "*heirs or executors*," they have a different and more exclusive meaning—*viz.* as expressing the testator's intention, that the individuals who are the legal representatives of the legatee shall take as conditional institutes—*i. e.* shall take the legacy though it never vest in the legatee. But it is difficult to see any very good reason why the same principle of construction should not be applied to the word "*assignees*;" and why that word should not, like the word executors with which it is coupled,

No. 115.

May 21, 1845.
Bell v. Chenepr.

No. 115. be held to mean the individuals named by the legatee, although the right never vested in the legatee himself. The reading is quite consistent in itself, and certainly is most agreeable to the presumable intention of the testator. He calls the executors and the legatee, evidently not out of favour to them personally, but out of favour to the legatee. It is their relation to the legatee as his successors which confers on them the character of legatees of the original testator; and, on the same principle, the relation of assignees—i. e. of persons whom the original legatee has substituted for his legal representatives—would seem entitled to receive the same effect.

May 21. 1845.
Bell v. Chespe.

In short, I rather think the most natural and obvious reading of a bequest in such terms is, that though it does not vest during the lifetime of the legatee, it imports, the conditional institution of his representatives, whether by intestate or testate succession, the word executors applying to the first case, and that of assignees to the latter.

But it was, perhaps, unnecessary to enter into any enquiry of the kind, because so far I agree in the opinion of the majority of the consulted Judges, that I think the question is no longer open. I think it was determined, both in the case of *Burden v. Smith* and in that of *Graham v. Hope*.

Lord Ivory, indeed, seems to raise some doubt as to the principle on which the case of *Burden v. Smith* was decided by the House of Lords. He seems to think that the reversal might have rested on the gratuitous character of the deed of the 24th May 1722, which excluded it from entering into competition with the onerous right arising under the marriage-contract and claim of legitim. But the judgment could not possibly have gone on that ground. It was found by the Court of Session, that the "8000 merks contained in the conditional obligation of the 24th May doth belong to David Smith, (the assignee of Hope,) though she died before the condition did exist, or was prescribed." And a finding on this point was indispensable, because Jean Burden, the other competitor, was not only executor of John Burden and the two children, but she likewise held a conveyance from the heir-at-law of Mr Smith to whatever estate, real or personal, he might be entitled to. The Court of Session found that the sum of 8000 merks went to the assignee; but the House of Lords reversed the judgment, and found that it did not go to the assignee.

Now, in the first place, I think the judgment implied that the deed of 24th May was not properly an obligation, otherwise there could have been no room for applying to it a rule different from that which was applied to the wife's right under the marriage-contract.

Secondly, if it was not considered as an obligation, it must have been viewed, and I think justly viewed, as a legacy; and the reversal clearly imported that such legacy could not be carried by the deed of the wife, the surviving legatee, before the right vested in her.

The judgment could not well rest on the supposed inadequacy of the funds, for no such element seems ever to have entered into the discussion; and, besides, it did not reserve any question which arose, in the event of the funds being sufficient to defray both the onerous and gratuitous provision of the testator; for, by the reversal, the right of the assignee to the 8000 merks, or any part of it, was completely excluded. Although the funds had turned out quite sufficient to satisfy both the onerous and gratuitous provisions of the testator, the assignee must have stood excluded by the reversal, and the 8000 merks must have gone

to the other competitor; and, in short, it was clearly a judgment that a conditional provision, framed in favour of a particular person, his heirs, executors, or assignees, was not assignable till the condition was purified.

No. 115.

May 21, 1845.
Bell v. Cheape.

Then, it appears to me that the other case of *Graham v. Hope* is equally conclusive.

There, the legacy was to Henry Hope, his heirs and assignees. He died before the testator; but he, by will, appointed his wife to be his universal representative. It was maintained on the part of those in right of the widow, that she, the executor-nominate, and not the executor at law, was the conditional institute, in whose favour the legacy ought to take effect. But in this she was unsuccessful, the Court ultimately preferring the brother and executor at law of the originally named legatees.

It is true that, in that case, the legatee died before the testator; indeed, that was the circumstance which gave rise to the competition. But the point there was precisely that which is raised here, viz. whether, in the case of a legacy to heirs, executors, and assignees, the word assignees is to be considered as constituting these assignees conditional institutes of the original legacy, entitling them to take in preference to the executor at law. That we decided in the negative; and it is clear, from the report, that the judgment went entirely on the force of the term "assignees," which the Court held to mean, not the representative nominate of the original legatee as conditional institute, but the person to whom the legatee made over the right after it was vested in him.

Holding that to be the meaning of the word assignee, in a bequest of this kind and by those decisions, we must hold that to be the true meaning, there can be no doubt that, in this case, the legal representatives of Miss Macintosh must be preferred.

LORD JEFFREY.—I agree with the majority of the consulted Judges, and for the reasons assigned in their opinions. That of Lord Cockburn expresses more nearly than any of the others the view I have all along had of the question, though I should have liked to see a somewhat fuller exposition of the grounds on which it is rested. I shall add, therefore, a very few words.

I agree with Lord Fullerton, that the case is settled by the authorities, and in the view he takes of these authorities. But I also think that it is rightly settled, and so rightly, that if now occurring for the first time, the decision should be as it is now about to be given; and it is therefore on its true legal merits that I now wish to say a little.

There are two pretty plain propositions which seem to me to settle the whole question. First, that the right to the subject now in dispute was never vested in Miss Macintosh; and, second, that no party claiming necessarily and exclusively in the character of an assignee of another, can ever take any thing that was not previously vested in the cedent. If these propositions are admitted, *cadit questio*; and I confess I do not well see how they can be denied. On the former, indeed, I think we are all agreed; and the latter, I confess, appears to me to be sufficiently established by the necessary import of the terms in which it is conceived.

It is said, to be sure, that a testator might give to an intended legatee (or indeed to any other person) a power of nominating the party who should take the legacy, in the event of its never vesting in the person for whom it was primarily provided; or, in other words, of naming a conditional institute to take it, in that event, directly from the estate of the testator; and though there might be diffi-

No. 115. culty, in some cases, in supporting such a delegation of the power of testation, I am willing, for the present, to hold that it might be so. But when the trustees of Miss Macintosh proceed to argue that the intention to confer such a power, and indeed the actual grant of it is to be inferred from the mere adjection of the word assignees to the bequest in her favour, they seem to me to maintain a proposition not only revolting in itself, and without the shadow of support from authority, but absolutely inconsistent with what I have always understood to be the fixed and necessary meaning of the very word to which so strange an effect is attributed.

May 21, 1845.
Bell v. Cheape.

The power supposed to be thus given, by mere implication, from the use of the word assignees, most certainly is not, even according to the view of the trustees themselves, a proper power to assign—that is, to convey some right, formerly in the cedent, to some other party—but, indisputably, and indeed as they expressly put it, a power merely to name a conditional institute, to take directly from the testator instead of the person so nominating, and passing by that person altogether, on the sole ground of she herself never having lived to have any vested right on the subject. So far, therefore, from holding that the extension of the grant to assignees, or parties taking through and from a person previously vested, imports a power to name conditional institutes, who can only take by passing altogether by that person, and in respect of her never having been vested at all, it appears to me that the very use of that word is necessarily exclusive of the constitution of any such right as that of a conditional institute, and directly inconsistent with any intention to make such an appointment.

I do not, however, mean to say, that though the word is in itself palpably inept, and unfit to express, or even to consort with any such intention, it might not, by plain declaration of a purpose to use it in that sense, become capable of effecting it. If Miss Primrose, for example, after devising this residue to Miss Macintosh, “her heirs, executors, and assignees,” had added, in express words, “by which devise to assignees, I mean that she shall have power to name any persons to whom the said residue shall go, in the event of her dying before the right to it could vest in herself; and hereby declare that, in such event, it shall be made over to those persons as conditional institutes,”—there probably would have been no doubt as to the sufficiency of the provision. But then it would have been effectual, solely because the testator had thus affixed an extraordinary, unnatural, and otherwise inadmissible meaning to the words originally used, and had in fact inserted in her settlement a clause, *de interpretatione verborum*, (such as occurs in many Acts of Parliament,) by virtue of which any arbitrary meaning, however inconsistent with its true and usual signification, may no doubt be affixed to any word whatever—provided only that the purpose and fact of its being used in that sense is expressed with sufficient clearness. In this way, I have no doubt that a testator might effectually declare that, throughout this deed, by the words heirs of entail I mean both heir and institute—by children I mean grandchildren—or even, that by John I always mean Peter. It might be a very absurd and capricious way of expressing his true meaning; but if it were clearly and fully expressed, I see no reason to doubt that effect would be given to it. All I have to say is, that, without some such extraordinary gloss, a devise to assignees of a subject which never came to the cedent, cannot possibly be held to mean the constitution of a power to name conditional institutes; and all we have here is such a naked and ordinary devise, without the slightest intimation of any purpose thereby to confer so unusual a power.

Neither is there any puzzle or inconsistency in holding that a devise to a party,

"and her heirs or executors," must of itself be a good constitution of such heirs and executors as conditional institutes, in the event of the party first called dying before the property vested in her—while a devise to "her assignees" could have no such effect. A person's heirs and executors are, in such a case, merely a class of persons fixed and designated by the law, and not in any degree constituted by, or dependent on, the act of the ancestor; from whom they, in these circumstances, take nothing but the relationship, by the denomination of which they are called, as third parties, and directly, to a share of the testator's succession. The heirs and executors of A B, in short, may be instituted (or substituted) in the settlements of a third party, though nothing was given in these settlements to A B himself, and just as the sons or brothers of A B might be—that is, as individuals designated merely by that relationship; but not dependent, in either case, for the benefit so conferred on them, on any right inherited or derived from the person to whom they are described as so related. The assignees of A B, however, are in a very different situation. They can have no existence but for the act and deed of their cedent; and whatever they take in that character must have been first vested in the cedent, and be directly derived from him (or her) only. There can be no assignee, in short, except where the thing to be taken in that character is *de facto* assigned, or made over, from one who had precisely the same right in it, which passes by such assignation to the assignee; and, therefore, it is a mere abuse of terms to talk of any one transmitting to his assignee what never was in his own person. The deed, taken by itself, is perfectly unequivocal and inflexible; and, unless declared by some very clear (and not very conceivable) intimation to bear (for the occasion) a strange and unnatural meaning, must *vi termini*, and *ex rei necessitate*, exclude all claim on the part of those whom it designates, for any thing which was not vested in the cedent. The way in which assignees come to be conjoined with original parties, first in bonds, and afterwards in other instruments, as matter of ordinary style, is well explained by Mr Erskine, and fully accounts for this superfluous insertion in the deed now under consideration, but can raise no real difficulty in such a case as the present. It was meant to clear the right of these claimants, in the event of Miss Macintosh having herself lived to be vested with the residue, and yet not obtain possession of it in her lifetime—but never can entitle them to take, as called to an independent succession.

No. 115.

May 21, 1845.
Guthrie.

THE COURT accordingly, in conformity with the opinion of a majority of the whole Judges, altered the interlocutor of the Lord Ordinary, and preferred the next of kin.

J. W. MACKENZIE, W.S.—J. and W. JOLLIE, W.S.—WALKER and MELVILLE, W.S.—
Agents.

GUTHRIE and BAXTER, Petitioners.—N. C. Campbell.

No. 116.

Bankruptcy—Trustee—Insanity.—Where the trustee in a sequestration had become insane, after his report of the resolution of creditors to accept an offer of composition had been prepared, but before it was signed, the Court allowed the report, signed by the commissioners for him, to be received and approved of.

No. 116. **MESSRS GUTHRIE and BAXTER** having been sequestrated, made offer of a composition to their creditors, which was duly accepted of by them, and the whole requisites of the Act having been complied with, the statutory report by the trustee was prepared under his directions, with a view to the discharge of the bankrupts. Before the report was signed by him, however, the trustee became deranged.

May 21, 1845.
2D DIVISION.
T.
Scott.
Weir v.
Heritors and
Kirk-Session
of Kilmodan.

In these circumstances the bankrupts presented a petition to the Court, praying that the trustee's report, signed by the sequestration commissioners for the trustee, should be received and approved of.

THE COURT, in the special circumstances of the case, granted the prayer of the petition.

ANDREW MURRAY, W.S.—Agent.

No. 117. **ANDREW SCOTT, Petitioner.—G. G. Bell.**

May 22, 1845.
2D DIVISION.
T.

Process—Petition—Curator Bonis.—WHERE the Lord Ordinary on the bills had, during vacation, made an interim appointment of a curator bonis, on a petition addressed to him, the Court, on an application being made for a renewal of the appointment under the same petition, ordered a supplementary petition to be lodged, addressed to the Court.

SCOTT, RYMER, and SCOTT, W.S.—Agents.

No. 118. **MARY WEIR OF MITCHELL, Advocate.—More—Pattison.**
HERITORS AND KIRK-SESSION OF KILMODAN, Respondents.—
Macfarlane.

Process—Advocation—Stat. 1 and 2 Vict. c. 86.—Held that an advocation by a pauper, of a finding of the heritors and kirk-session of a parish was incompetent, in respect, that a certificate of caution was not lodged with the note of advocation when received and marked by the clerk in the Outer-House, in terms of the Act 1 and 2 Vict. c. 81, § 2.

May 24, 1845.
1ST DIVISION.
Ld. Robertson.
N.

MARY WEIR OF MITCHELL presented a petition for aliment to the Heritors and Kirk-Session of the parish of Kilmodan, which was refused. She advocated, but did not lodge a certificate of caution along with her note of advocation, which, however, was received and marked by the clerk in the Outer-House.

The advocation was objected to under the Act 1 and 2 Vict. c. 81, § 2, on the ground that no certificate of caution had been lodged in terms of that section.

On the 14th March 1845, the Lord Ordinary pronounced the following interlocutor:—"In respect that the note of advocation, when received and marked by the clerk in the Outer-House, was not accompanied with

a certificate of caution, in terms of the Act 1 and 2 Vict. c. 86, § 1, finds No. 118.
the advocacy incompetent; dismisses the same."

The advocator reclaimed, and prayed that the objections to the competency of the note of advocacy might be repelled, or at least that it might be found competent for her still to find caution, and that a remit might be made to the Lord Ordinary to allow a bond of juratory caution, which she then produced, to be received.

She pleaded, that it was not necessary for a pauper to find caution in such a case as the present.

The respondent pleaded, that the terms of the Act were imperative; and that every note of advocacy was incompetent, if not accompanied by a certificate of caution having been found.

May 28, 1837.
Baxter v.
Smeal.

THE COURT adhered.

CHARLES SPENCE, S.S.C.—MACLACHLAN and IVORY, W.S.—Agents.

ROBERT BAXTER, Pursuer.—*Forman.*

EUPHEMIA SMEAL OF BAXTER, Defender.—*Cleghorn.*

No. 119.

Husband and Wife—Divorce—Adultery—Aliment.—Interim aliment and expenses allowed to a wife in an action of divorce against her for adultery, although the husband alleged that he was in destitute circumstances, and was applying to be admitted to the poor's-roll.

THIS was an action of divorce at the instance of the husband, on the May 28, 1845.
ground of adultery. The defender gave in defences, in which she denied the facts libelled in the summons, and stated, that in consequence of a quarrel with her husband, arising from his dissipated habits, he had turned her out of doors, in consequence of which she had been obliged to raise an action of aliment against him in the Sheriff-court of Edinburgh, which had been opposed, and was still in dependence. A motion was made on her part for *interim* aliment and expenses, and the Lord Ordinary pronounced the following interlocutor:—"Decerns and ordains the pursuer to make payment to the defender of ten pounds sterling, to account of her aliment, and ten pounds sterling to account of her current expenses in this process; and allows *interim* decree to go out for the same in the name of the defender, if not paid within ten days from this date." *

1st DIVISION.
Lord Cuning-
hame.
W.

After this interlocutor was pronounced, the pursuer executed a trust-

* "NOTE.—The payment, by the pursuer, of the sum awarded to his wife, to account of expenses of process, seems quite unavoidable. As to the small sum awarded for aliment, the pursuer made no statement to show that he could not afford at least 5s. or 6s. a-week for support of his wife. If he had made any specific statement as to his circumstances, a remit would have been made to the Sheriff, or a Commissioner, to enquire into them, and report."

No. 119. disposition for the benefit of his creditors. Thereafter he reclaimed, and stated, that he was in complete destitution, and was now making application to be admitted to the poor's-roll; and argued, that the obligation to furnish aliment arose only from the theory of the husband being the administrator of the goods in communion; and that, therefore, where there were no funds in existence, the obligation ceased.

MAY 28, 1845.
Stirling v.
Moray.

The defender pleaded, that she was entitled at any rate to decree for her expenses, in order that she might be enabled to rank in her husband's estate for them, along with his other creditors.

LORD JEFFREY.—If the defender will recover nothing under the decree, the pursuer has no interest to oppose it. He has hitherto maintained the suit out of his own funds, and, if he is determined to carry it on against his wife to the last shilling, he must spend a sixpence of it on her.

THE COURT adhered.

WILLIAM FERGUSON—JOHN KENNEDY, JUN.—AGENTS.

No. 120. **WILLIAM MORAY STIRLING, Pursuer and Charger.**—*Rutherford—G. Dundas.*

MRS CHRISTIAN MORAY OF HOME DRUMMOND, and OTHERS, (Heirs of Entail of Abercairnie,) Defenders.—*Sol.-Gen. Anderson—Marshall.*
CHARLES HOME DRUMMOND, Suspender.—*Henderson.*

Entail—Clause—Succession—Superior and Vassal.—1. Where the prohibitory clauses in an entail were introduced with the expression, "with and under this restriction and limitation, as it is hereby conditioned and provided," and the resolute clause was thus expressed, "and with and under this condition and provision," that in case the heirs should contravene, "the other before-written conditions and provisions, restrictions and limitations herein contained, or any of them," they should forfeit all right, &c.—Objection repelled, that the use of the term "other" in the resolute clause, rendered it vague and ambiguous, and defective in the necessary legal precision. 2. In a charter of resignation, which proceeded upon the procuratory in a deed of entail, a substitution, which in the entail had stood to "heirs whatsoever of the body," was changed to "heirs whatsoever;"—Held, that the destination in the charter was not an alteration of that in the entail, but that "heirs whatsoever" was a flexible term, which was to be construed by the terms of the entail upon which the charter proceeded as its warrant and to which it referred. 3. Objection, that a Crown charter of resignation was not capable of being recorded in the register of tailies under the statute 1685, c. 22, in respect of its not being the "original tailzie," or (holding it to be so) in respect it was not granted by one of "his Majesty's subjects,"—Held to be obviated by the authority given to record it in a private Act of Parliament. 4. Observed, that a destination in an entail to "heirs whatsoever," in the event of that destination coming into operation, would not render the entail inoperative against the heir in possession, if the succession of heirs-portioners were excluded.

Or date 14th March 1769, James Moray of Abercairnrie executed a deed of entail, whereby, with consent of Alexander and Charles Moray, (afterwards Moray Stirling,) his sons, he gave, granted, and disposed the lands mentioned, and granted procuratory for resigning in favour of, and for new infeftment to himself, during all the days of his lifetime, "and to the said Alexander Moray, my eldest son now in life, and the heirs-male lawfully to be procreated of his body; whom failing, to the said Charles Moray, my youngest son, and the heirs-male lawfully to be procreated of his body; whom failing, to any other son or sons lawfully to be procreated of my own body, according to their seniority, and the heirs-male to be procreated of his or their bodies; whom failing, to the heirs whatsoever to be procreated of the body of the said Alexander Moray, my eldest son; whom failing, to the heirs whatsoever to be procreated of the body of the said Charles Moray, my youngest son; whom failing, to the heirs whatsoever of any son or sons to be procreated of my own body; whom failing, to Susanna Moray, my eldest daughter," and a series of other substitutes; "whom all failing, to my own heirs and assignees whatsoever in fee, the eldest heir-female and the descendants of her body always excluding heirs-portioners, and succeeding still without division throughout the whole course of succession." The lands included in this entail were the lands and barony of Abercairnrie, and the lands of Panholes and Blackford, holden of the Crown; and the lands of Bullands and Over and Nether Bedralls and others, held of a subject-superior. This deed contained the prohibitory clauses usual in strict entails; the words employed in setting forth the prohibitions against sales, &c., being—"and with and under this restriction and limitation, as it is hereby expressly conditioned and provided." The entail further contained a provision, that Alexander Moray, and the heirs of entail, should be bound to pay annually to the entailor's creditors a sum of £500, until his debts should be extinguished; and with and under the provision, as it was thereby conditioned and provided, that in case any adjudication, &c., should be used against the estate, the party in possession should be bound to purge the same within a specified time. There then followed a resolute clause, applicable to failure to comply with these conditions. The general resolute clause then followed in these terms:—"And with and under this condition and provision, as it is hereby conditioned and provided, that in case the said Alexander Moray, the heirs-male of his body, or any of the heirs succeeding to the lands and estate before disposed, shall contravene the other before-written conditions and provisions, restrictions and limitations herein contained, or any of them, whether before or after the right to the said lands and estate shall devolve upon them—that is, shall fail or neglect to obey or perform the said other conditions and provisions, or any one of them, or shall act contrary to the said other restrictions and limitations, or any of them, excepting as is before excepted—that then, and in any of these cases, the person or per-

No. 120.

May 28, 1845.

2d Division.

Lord Cuning-

hame.

Stirling v.

Moray.

No. 120. sons so contravening shall, for him or herself only, ipso facto, amitt, lose, and forfeit all right, title, and interest, which he or she hath, or might fall to them, in the lands and estate before disposed," &c. This entail was duly registered in the register of tailzies.

May 28, 1845.
Stirling v.
Moray.

In 1773 and 1774, James Moray executed two other entails of the lands of Abernyte, and of the lands of Milntoun of Abernyte. These deeds proceeded upon the narrative of the previous entail of Abercairnrie, and were conceived in favour of the same series of heirs, and provided that the whole conditions and clauses of that entail should apply to Abernyte, and Milntoun of Abernyte, binding the heirs to make up titles thereto under those conditions and clauses, and to cause engross the same in the titles, under pain of irritancy. It was further provided, that the heirs of entail should be at liberty to sell the lands therein conveyed, under the condition that the price should be reinvested in the purchase of other lands in the neighbourhood of the estate of Abercairnrie, the rights of the lands so purchased to be taken to the series of heirs, and under the several conditions and clauses of the entail. These two entails were also duly recorded.

James Moray died without having any other sons than Alexander and Charles above named. Upon his death, Alexander, the institute, obtained from the Crown a charter of resignation and confirmation under the Union Seal, dated 6th August, and sealed 4th November 1777. This charter bore to proceed upon the procuratories of resignation contained in the above three deeds of entail. In the destination of this deed there was a change from the terms employed in the original entail—the substitution in the entail of the heirs whatsoever of the bodies of Alexander and Charles Moray, being altered in the charter to a substitution of their heirs whatsoever. The destination was in these terms:—

“Dilecto nostro Alexandro Moray de Abercairney armigero filio natu maximo demortui Jacobi Moray de Abercairney armigeri et hæredibus masculis ex ejus corpore legitime procreand. Quibus deficien. Carolo Moray filio natu minimo dict. Jacobi et hæredibus masculis ex ejus corpore legitime procreand. Quibus deficien. hæredibus quibuscunq. dict. Alexandri Moray. Quibus deficien. hæredibus quibuscunq. dict. Caroli Moray. Quibus deficien. Susannæ Moray filix natu maximæ dict. Jacobi Moray de Abercairney. Quibus omnibus deficien. hæredibus et assignatis dict. Jacobi Moray de Abercairney quibuscunq. in feodo, hæres fæmella natu maxima et posteri ex ejus corpore semper excluden. hæredes portionarias et succeden. constanter absq. divisione per ordinem totius successionis.”

This charter was granted under all the conditions, restrictions, and limitations, clauses irritant and resolute, specified in the entail of Abercairnrie, to which the other two entails referred. It contained a prohibition against possessing the estate upon any title other than that of the three entails, and referred to the destination in the entails in terms infer-

ring that the order of succession was the same as that contained in the charter. The *quæ quidem* clause bore, that the renewal of the investiture was granted in conformity with, and in virtue of, (*secundum* and *virtute*,) the procuratories in the original entails.

No. 120.
May 28, 1845.
Stirling v.
Moray.

Alexander Moray was infeft on this charter in the whole lands therein contained. In several renewals of the investiture which subsequently took place under the entails, the destination was repeated in the same terms as in the charter.

The lands of Bullands, Bedralls, and others, which were included in the original entail of 1769, being held of a subject superior, were not included in this charter, nor was any title made up to them by Alexander Moray, or the succeeding heirs of entail.

Upon the death of Alexander Moray without issue, he was succeeded by his brother, Charles Moray Stirling, who completed titles to the barony of Abercairney, the lands of Panholes and Blackford, and Abernyte and Milntoun of Abernyte, by special service to his brother as nearest heir of taillie and provision, followed by precept and sasine thereon.

On 29th June 1801, Charles Moray Stirling executed a separate disposition of the lands of Panholes and Blackford, under all conditions, restrictions, and clauses of the original entail of 1769, and in which the destination, as expressed in that deed, was reverted to. A Crown charter of resignation was expedè upon this disposition in favour of the maker and his eldest son, James Moray, for their respective rights of liferent and fee under the disposition, and the other heirs as there mentioned. Mr Moray Stirling and his son were infeft on this charter in July 1801. This disposition was never recorded in the register of tailzies, and was subsequently lost.

Charles Moray Stirling having sold the lands of Abernyte, and Milntoun of Abernyte, in virtue of the power contained in entail of these lands, purchased the lands of Fendoch, being part of the estate of Glenalmond, and the lands of Pittentian, Dullary, and Carrim. Of these lands he executed a deed of entail in 1808, which was duly recorded. The principle upon which the structure of this entail proceeded, was a precise and minute adoption of the provisions of the Abercairnie entail. The following is a sufficient specimen of the manner in which it was framed:—"But with and under the conditions, provisions, &c., specially after mentioned, contained in the foresaid deed of entail of the estate of Abercairney, which, with the foresaid order and course of succession, are thereby appointed to be engrossed in the charters and infeftments following thereon, and in all the subsequent procuratories," &c., "and other transmissions of the said lands and estate."

At the date of this deed, Charles Moray Stirling stood base infeft in the lands of Fendoch and Pittentian. His title to Dullary was previously complete. After executing the deed of entail, he obtained a Crown charter of resignation; but his base infeftments in Fendoch and Pittentian

No. 120. were not confirmed, and the charter therefore carried the superiority only, separated from the dominium utile. He was not infeft upon the charter, nor did he ever complete titles under the deed of entail to the property of Fendoch and Pittentian, or to the lands of Carrim, which were held of a subject superior.

May 28, 1845.
Stirling v.
Moray.

On the death of Charles Moray Stirling, his eldest son, James Moray, succeeded, and made up titles to the whole lands contained in the charter 1777, (except Abernyte and Milntoun of Abernyte, which, as above-mentioned, had been sold, and Panholes and Blackford, which had been disposed to him by his father in his lifetime,) by special service, as heir of tailzie and provision to his father, followed by infeftment. He was also served nearest and lawful heir of tailzie and provision in general to his father under the Glenalmond entail, and was infeft on the unexecuted precept in the charter in the superiority of Fendoch and Pittentian, and in the lands of Dullary. To the lands of Carrim he made up a fee-simple title by precept of clare constat.

In 1831, James Moray, with the consent of the requisite number of the heirs of entail, obtained an Act of Parliament for vesting the whole lands except Panholes and Blackford, the superiority of Fendoch and Pittentian, and the lands of Dullary, in trustees, with power to sell them for payment of debts which he had contracted. This Act proceeded, inter alia, on the narrative, that the charter 1777 had by prescription extinguished the original entail, and had become the ruling investiture of the estate, with the exception of Bullands and Bedralls. It enacted, that the trustees should make application to the Court of Session for warrant to record the charter 1777 in the register of tailzies; and the Court were authorized, upon this application being made, to grant warrant therefor, for the benefit of all and every person interested therein. It also provided, that such parts of the entailed estates as should not be sold under the Act, were to belong, and continue settled, upon the same series of heirs, and with and under the same conditions, &c., as were contained in the rights and investments of the estates, so far as then existing undetermined, and capable of taking effect, it being declared that valid and sufficient titles and infeftments for rendering the several deeds of entail effectual, according to the law of Scotland, should be made up in the person of Mr Moray, or the heir of entail for the time, under authority of the Court of Session, to those parts of the entailed estates which should not be sold, to which Mr Moray had not completed titles under the deeds of entail.

The charter 1777 was accordingly duly recorded in the register of tailzies in terms of the Act. The Parliamentary trustees had not occasion to sell any part of the estates vested in them by the Act.

On the death of James Moray without issue, the succession opened to his brother, William Moray Stirling, who made up titles by special service, as heir of taillie and provision to him, in the lands included in the

charter 1777, with the exception of Abernyte, and Panholes and Blackford. He also expedite a special service, as heir of taillie and provision to Panholes and Blackford, under the entail and Crown charter of 1801; and further served heir, in the same character, under the Glenalmond entail, and was infeft in the lands therein contained, with exception of the dominium utile of Fendoch and Pittentian, and the lands of Carrim. No. 120.

May 28, 1845.

Stirling v. Moray.

In August 1841, William Moray Stirling, having been advised that there was nothing in the state of the titles to limit his powers of free disposal, entered into a minute of sale of the above lands and estate to Charles Home Drummond, at the price of £250,980. He also brought against the heirs of entail an action of declarator, to have it found that he had power to sell the estate. At the same time a suspension of a threatened charge for payment of the price was brought by Mr C. Home Drummond, and the two processes were conjoined.

The Lord Ordinary having ordered cases on the whole cause,

The pursuer, Mr Moray Stirling, pleaded;—

1. That the resolute clause of the original entail of 1769 was defective—the use of the term “other,” in relation to the acts of contravention, upon which alone a forfeiture of the contravener’s right was to ensue, creating such an ambiguity and uncertainty as to its meaning, as to render it incapable of taking effect. The resolute clause had plainly been treated by the maker as a “condition and provision”—not as a “restriction and limitation;” and if an antecedent to “the other restrictions and limitations” pointed at by the clause was not to be found in the clause itself, it was plainly impossible to construe it with that degree of definite precision required by law.¹

2. By the charter of 1777, a material change was introduced upon the destination of the original entail, inasmuch as the charter, instead of the substitution in the entail of the heirs whatsoever *of the bodies* of Alexander and Charles Moray, had called generally their heirs whatsoever. This deed had become, by prescription, the ruling investiture of the estate, and the only title to be regarded, in order to ascertain the rights and obligations of the heirs called under it, the original entail having been extinguished by the prescriptive possession which had followed on the charter since Alexander Moray’s infeftment in 1777.² This charter was defective as a deed of entail, (1.) On account of the objection, above referred to, to the resolute clause. (2.) Because the substitution to heirs whatsoever of Alexander and Charles Moray could not be regarded

¹ Sharpe v. Sharpe, as reversed, April 18, 1835, (1 S. & M.L. p. 594;) Speid v. Speid, Feb. 21, 1837.

² M’Culloch v. M’Kenzie, May 17, 1826, affirmed July 28, 1828; Dickson v. Cuninghame, March 3, 1829; Paterson v. Purves, March 10, 1823, (S. App. Cases, Vol. I. p. 401;) M’Donald v. Lockhart, Dec. 22, 1842; Hope Vere v. Hope, Feb. 12, 1828, and March 5, 1833; Stair, B. 2, t. 3, § 43.

No. 120. as a proper tailzied substitution, or capable of being affected by fetters; and the pursuer being the last heir male of the body of Charles Moray Stirling, the operation of the fetters was at an end in his person, and he was not bound to continue the entail for the benefit of parties called under that, the most general of all terms of destination.¹ (3.) The crown-charter 1777 was not a deed capable of being recorded in the register of tailzies in terms of the Act 1685, c. 22. If it were to be regarded in the light of an original grant, it was not an entail in the sense of the statute, as not having been granted by any of "his Majesty's subjects," to whose deeds alone the statutory provision applied. And if it were to be viewed as a charter by progress, it was still without the provisions of the Act, which required that the "original tailzie" should be recorded.²

May 28, 1845.
Stirling v.
Moray.

3. In regard to the lands of Panholes and Blackford, the entail of these lands in 1801 was executed by Charles Moray Stirling, as having right, not under the entail of 1769, but under the investiture of 1777. As such, it was not a continuation of the old entail, although in terms and provisions it happened to be coincident, but a new and distinct deed; and, by the prescriptive extinction of the original entail, it had become the sole regulating title to the estate. This entail (independently of the objection to the resolute clause) was incomplete and ineffectual, as it had never been recorded.³

4. With regard to the lands of Bullands, Bedralls, and others, the entail of 1769 never having been completed by infeftment, in so far as regarded these lands, it could have no effect against the debts or onerous deeds, or against a sale by the pursuer, who was not only the heir of tailzie, but was also heir alioqui successurus.⁴

5. The entail of Glenalmond, from its defective structure afforded no

¹ Craig de Feudis, III. 3, 31; Richardson v. Stewart, July 5, 1821, affirmed April 8, 1824, (2 S. App. Cases, p. 149;) Duke of Hamilton v. Douglas, Dec. 9, 1762, (M. 4369;) Rose v. Rose, March 10, 1784, (M. 14955;) Molle v. Riddell, Dec. 13, 1811, (F. C.;) Hay v. Hay, July 24, 1788, (M. 2315,) affirmed April 7, 1789; Baillie v. Tennant, June 7, 1766, (M. 14941;) Tinnoch v. MacLennan, Nov. 26, 1817, (F. C.;) Roxburgh Case, W. & S. Appeals, Vol. VI. Appx. p. 98.

² Lord Kinnaid v. Hunter, Nov. 26, 1761, (M. 15611,) affirmed Feb. 18, 1765; Philp v. Earl of Rothes, Dec. 14, 1758, (M. 15609,) affirmed Jan. 16, 1761; Irvine v. Earl of Aberdeen, June 26, 1776, (Mor. App. Tailzie, No. 1,) affirmed on appeal, April 16, 1777.

³ Earl of Eglinton v. Montgomerie, June 22, 1842.

⁴ Douglas v. Stewart and Others, Feb. 22, 1765, (M. 15616—Bell's Cases, p. 168, note;) Russel, Ross, and Others v. Creditors of Kerse, Jan. 23, 1792, (M. 10300—Bell's Cases, p. 166;) Durham v. Baillie, as reversed on appeal, June 5, 1733, (Craigie & Stewart's App. Cases, p. 113;) Creditors of Carleton v. Gordon, Nov. 21, 1753, (M. 10, 258;) Syme v. Dewar, Feb. 1, 1803, (M. 15619;) Brown v. Bank of Scotland, Dec. 14, 1838, and authorities there cited.

effectual protection against a sale of these lands, inasmuch as, although it narrated the restrictions and limitations to that effect, expressed in the entail of Abercairnie, it did so in the way of recital merely, and not in such a manner as to incorporate them into the new entail, as substantive and independent provisions, applicable to the series of heirs and the particular estate with which the entailer was then dealing. As regarded the dominium utile of Fendoch, Pittentian, and the lands of Carrim, the entail never had been feudalized.

The defenders, the Heirs of Entail, pleaded ;—

1. The objection to the resolute clause was groundless. It referred to the prohibition against sales and alienations, which was one of the "other before written conditions and provisions" of the entail. The antecedent to the term "other" was to be found in the resolute clause itself, which was also described as a "condition and provision."¹

2. The pursuer's plea, founded upon the charter 1777, proceeded on the assumption that the destination in that charter was different from that in the original entail, and that the latter deed had been excluded by prescription. But, (1.) according to a true construction of the destination in the charter, it was identical with that in the entail 1769. The destination to "heirs whomsoever" was a flexible term, which might be construed as meaning heirs whomsoever of the body. That this was to be taken to be the true interpretation of the destination, might be established by explanations afforded by the context, or other parts of the deed in which the destination occurred—or even recourse might be had to another deed, if expressly referred to as setting forth the granter's true meaning. In the case of such an ambiguity occurring in the renewal of an investiture, recourse might be had, in order to interpret it, to the previous title. Upon these principles, the destination in the charter 1777, which was expedited as a renewal of the investiture, upon the procuratories of the original entails, could only be interpreted as a destination limited to heirs whomsoever of the body. In point of fact, as matters stood at the date of the charter, and taking into consideration the declaration that the eldest heir female should exclude heirs-portioners, and should succeed without division, the practical effect of the two destinations was identical.² (2.) The charter 1777 was an effectual entail, fenced with the necessary clauses, and duly recorded. The objections urged by the pursuer to its registration (even assuming them to be otherwise well founded) were obviated by the operation of the private

¹ Carrick v. Buchanan, (Jurist, Vol. XVI. p. 636.)

² Ersk. III. 8, 48; Roxburgh v. Lord Eldon, (W. & S. Vol. VI. App. pp. 54, 71;) Tisnoch v. M'Lennan, Nov. 26, 1817, (F. C. ;) Kerr v. Dickson, Nov. 1840, (ante, Vol. III. p. 154;) Ersk. III. 3, 20.

No. 120.
May 28, 1845.
Stirling v.
Morey.

No. 120. Act of Parliament, which authorized its being recorded in the register of tailzies.

May 28, 1845.
Stirling v.
Moray.

3. With regard to Panholes and Blackford, though these lands had been included in the charter 1777, yet no prescription quoad them had run in favour of the destination in that charter, (assuming that it was at variance with that of the original entail;) because, at the renewal of the investiture in 1801, the precise expression of the destination in the entail 1769 was restored; and upon this renewed title the estate was possessed. Quoad these subjects, the effect of the original entail had not been wrought off by prescription.

4. The pursuer was not entitled to decree finding that he was entitled to sell Bullands and Beddralls, because these lands stood vested by the Act of Parliament in the trustees for behoof of the heir of entail, with a direction that, in so far as not sold, a title should be completed to them under the entail by the heir for the time.

5. The various conditions and clauses of the Glenalmond entail, although introduced by the statement, "as it is by the said deed of entail (of Abercairnrie) conditioned and provided," were inserted as substantive conditions of the Glenalmond deed, the above expressions being merely parenthetical and explanatory. Besides, to this objection, as well as to the other, that a title had not been completed under the entail to the dominium utile of Fendoch and Pittentian, and the lands of Carrim, (which admitted of the same reply as to the objection with regard to Bullands and Bedralls,) there was this general answer, that the pursuer, as representing Charles Moray Stirling, was bound by the prior entails of Abernyte and Milntown of Abernyte to invest the price obtained by the sale of these lands in other lands, and to make an effectual entail of the same, in terms of the entail 1769.

The Lord Ordinary reported the case.*

* "NOTE.—In reporting this case to the Court, the Lord Ordinary has some hesitation in expressing any opinion upon several of the questions at issue, even on the elaborate discussion which they have received in the revised cases prepared by the parties, as further light will probably be thrown on these points by the deliberations of the Court before final judgment. As at present advised, however, the Lord Ordinary is bound to say that he feels great doubt, notwithstanding the able and anxious argument maintained for the pursuer, whether the objections stated by him, to the entails libelled on, are sufficient to liberate him from their fetters.

"I. The first plea raised is upon the phraseology of the resolutive clause of the original tailzie of 1769, which is said to be rendered equivocal and unintelligible by the incomprehensible use of the term 'other,' in its reference to the act resolved; but, viewing the whole expressions used in this tailzie, in connexion with each other, it is apprehended that this objection is not maintainable. The prohibitory clauses of the entail are admitted to be complete and unexceptionable, in the several restraints authorized by the Act 1685, and they are described as

LORD JUSTICE-CLERK.—There are some parts of this case as to which the effect of the Act of Parliament as to these estates is undoubted, and to which I

No. 120.

May 28, 1845.
Stirling v.
Moray.

limitations and restrictions of the rights of the several heirs substituted to the succession; after which, in a subsequent section of the tailzie, the resolute clause is introduced with these words:—‘And with and under this condition and provision, as it is hereby conditioned and provided, that in case the said Alexander Moray, the heirs-male of his body, or any of the heirs succeeding to the lands and estate before disposed, shall contravene the other before-written conditions and provisions, restrictions and limitations herein contained, or any of them, whether before or after the right to the said lands and estate shall devolve upon them; that is, shall fail or neglect to obey or perform the said other conditions and provisions, or any one of them, or shall act contrary to the said other restrictions and limitations, or any of them, excepting as is before excepted; that then, and in any of these cases, the person or persons so contravening shall, for him or herself only, ipso facto, amit, lose, and forfeit all right, title, and interest which he or she hath, or might fall to them, in the lands and estate before disposed.’

“It is difficult to hold such a clause as, in any respect, of doubtful import. From the generality of its reference to ‘the other before-written conditions and provisions, and restrictions and limitations, or any of them,’ it includes, with unusual comprehensiveness, the whole previous prohibitions of the tailzie. The resolving clause itself was manifestly treated by the entailor as a limitation and restriction, as well as a condition and provision of the deed; this was unquestionably the technical and correct description of the prohibitory clause; and, in the subsequent resolute clause, the entailor declares in express terms, that if any substitute shall contravene any of the other conditions or provisions, or restrictions or limitations of the tailzie, (thus directly including all the prohibitions,) his right shall cease. It would, it is thought, be a straining of construction, which even the rigour of interpretation required in entail law would not justify, to hold this resolute clause as ineffectual.

“II. The next objection is, that the tailzie of 1769 was altered by a charter expedite in 1777, in so far as the destination in the original tailzie to Alexander Moray and Charles Moray, and the heirs of their bodies respectively, was changed to their heirs whatsoever. But there are various grounds on which it is thought that this plea is insufficient to support the sale and the declaratory conclusions now insisted on by the pursuer.

“(1.) The terms ‘heirs’ and ‘heirs whatsoever’ are flexible; and though used in clauses of destination without a limitation to descendants of the body, they may be so subject to interpretation and construction, when it appears from other clauses of the same deed that this was the intention of the maker of the tailzie. The authorities quoted by the defenders, and, in particular, the speech of the Lord Chancellor Eldon in the Roxburgh case, fix this point beyond the power of question.

“(2.) The same doctrine must apply a fortiori to charters of renewal. When flexible terms are used, they cannot be stretched beyond the meaning and purpose of the proprietors who pass them. But there are various clauses in the charter of 1777 which show, in the most direct and unequivocal manner, that the party who obtained that charter had not the most remote intention to change the order of succession prescribed by the original tailzies. In particular, the charter proceeds on the procuratories contained in these very tailzies, and these procuratories themselves are specially referred to in the *quæquidem* clause of the charter. These procuratories, of course, set forth the substitution of heirs in whose favour resignation was to be made and the new charter granted; and they describe and define the heirs of Alexander and Charles Moray, who are called in their proper order, to be the heirs of their bodies. When the warrants are thus explicit, and are referred to in the body of the charter, it is apprehended that they may be compe-

No. 120. will advert in the outset. I fully agree, that if the conditions and provisions of the deeds of entail are ineffectual, the Act of Parliament has no effect whatever in

May 28, 1815.

Stirling v.

Moray.

tently founded on to explain and construe the flexible term used in the dispositive clause of the charter.

"It admits of no dispute in general, that destinations to particular classes of heirs, set forth in the dispositive clause of a conveyance, (when these are described by a flexible term,) may be explained and qualified by a subsequent clause in the same deed. The authorities as to this are so numerous, and many of them are quoted in the papers, that they need not be enumerated here. But it seems to be maintained, in the present instance, that the charter cannot be restricted by any other instrument, however distinctly referred to, which is not quoted or repeated in substance in the charter itself. But the Lord Ordinary knows of no authority for that doctrine. Questions as to succession do not arise with creditors, but intestate heirs, and so must be governed, even in the strictest tailzies, by the intention of the makers or granters of settlements and charters. Hence, when heirs are called under the terms and conditions of a specified deed, quoted by name and date in a succeeding charter of the progress, it must be always competent to ascertain, by the original deed referred to, the legal import of every heir's claim when it depends on a phrase of flexible import in that charter of renewal.

"Indeed the case which here occurs is treated both by Craig (Lib. II. Dig. II. § 10) and Erskine. In noticing changes of destination by error, and without the consent of those interested, Craig says, '*Itaque si prima investitura ita concepta sit, ut vassalli heredes masculi succedant; per renovationem feudi, licet expressum contineat heredibus quibuscunque, agnatis tamen præjudicari non censent;*'—as Mr Erskine lays down, in substance, the same doctrine, (II. 3, 20,) when he observes that charters by progress are, in dubious clauses, to be interpreted agreeably to the original one. This is conceived to be applicable even to tailzies, in questions of succession among heirs.

"(3.) The law as now settled in questions of this description, is well illustrated by reference to the decision in the Craigiehall case, which is founded on both parties, and was truly the converse of the present. In that instance, it will be recollected that, by the first entail, the estate was destined generally to 'the descendants of the first substitute,' (a phrase at one time in some use among conveyancers;) but the second entail was to heirs-male, whom failing, to the heirs-female of the body of the maker's second son (the first substitute.) The last was in unmistakable and inflexible terms, and consequently, when fortified by prescription, they formed the law of the fee, and controlled the original destination. If the original destination of Craigiehall been to heirs-male of the body of the first substitute, and then to heirs-female of his body; and had the second entail been to 'the descendants of the second son, as called 'by the original tailzie,' it is apprehended that the term 'descendants,' as a flexible term, and when so used would not have effected an alteration of the original destination.

"On the contrary, that very point occurred, as nearly as possible, in the case of Graham of Morpeth, which was anxiously and elaborately discussed a few years ago, both in this Court and in the House of Lords. In that instance a contract of marriage, executed in 1748, contained a conveyance in the dispositive clause of a considerable estate to heirs-male of the spouses, whom failing, to heirs-female after which the procuratory of resignation in the said deed contained the following singular clause:—'That the eldest son and his descendants shall always succeed preferably to the younger sons and their descendants,' under which clause a female descendant of the eldest son claimed the estate from the second son of the marriage; but it was held, both in this Court and in the House of Lords, that the term 'descendants' being flexible, must be understood as in accordance with the destination in the primary clause. Lord Hermand's observation on that case is alike correct and well put:—'Heir is a generic term, and may be modified for heirs of the body, heirs of a marriage, heirs of investiture, heirs of line, heirs-male

supplying any defects in the clauses of the entails, and was not so intended. I have sent for and considered the Act of Parliament, which is not fully quoted in the pleading.

No. 120.
May 28, 1845.
Stirling v.
Moray.

But heirs-male is specific and exclusive of females. A man may be heir-female; but a woman never can be heir-male. The expression "descendant" is equally generic, embracing heirs male and female, as called by the deed in which they occur.—See Fac. Coll. 20th June 1816, and 1 Wilson & Shaw, p. 353.

"(4.) Even if the charter of 1777 could be viewed as a new and separate deed of entail with an altered order of succession, it would be effectual against the pursuer, as it contains all the statutory prohibitions, has been recorded in the register of tailzies, and the feudal title expedite by the pursuer upon it is complete.

"It is objected that the registration is insufficient, because the Act 1685 requires the original tailzie to be recorded, and a charter by progress cannot, it is argued, be viewed as an original tailzie. But, in the first place, the registration here was authorized by the special statute obtained by the heir in possession in 1831, and that seems of itself to obviate any plea founded on the Act 1685; and, in the second place, the pursuer and other heirs seem to be barred from pleading that the charter of 1777 was not the original tailzie, as, according to his interpretation, it was the first deed in which any change was made in the order of succession appointed by the original tailzie. Indeed, if the pursuer's construction of the clause of substitution be correct, the charter would be contrary to its warrants—the procuratories on which it proceeded—as these, in express terms, were limited to heirs of the bodies of Alexander and Charles Moray.

"(5.) Were the charter of 1777 to be held as a new and different tailzie from that of 1769, it would still be binding on the pursuer. Granting, for the sake of argument, that the destination to the heirs whatsoever of Alexander and Charles Moray was a never-ending and inexhaustible substitution—descendible, in the language of Lord Redesdale, to the whole children of Japhet—it would not invalidate the entail, if the division among heirs-portioners were aptly and effectually excluded. The permanence, or even the perpetuity of the entail of a Scots estate, if executed according to the provisions of the Act 1685, is not inconsistent with the policy of that statute.

"The sole ground on which an entail on heirs whatsoever was first held to be ineffectual, was because heirs-portioners were not excluded in the tailzies which were the subject of discussion. That was the ground of decision in the case of Culzean in 1761, (Dict. 15412,) and in the later cases of Farquhar v. McCulloch, in 1838, (1 D. & B. pp. 121 and 545.) But the charter of 1777 is liable to no such exception, as it closes the series of substitutions with this express provision, '*semper excluden. hæredes portionarias et succeden. constanter absque divisione per ordinem totius successionis.*' The continued subsistence of such an entail, even where the succession opens to heirs whatsoever, is implied in the decision of the late case of Mure, both in this Court and in the House of Lords. (See 15 Sh. 581, and 3 S. & M.L. 237.)

"III. It is maintained that, at all events, the fetters of the entail are inapplicable to lands called Panholes and Blackford, because the late Colonel Moray Stirling, the father of the pursuer, in 1801, executed a new entail, departing from the phraseology used in the destination of the charter of 1777, and recurring to the precise terms of the original tailzie of 1769; and the objection stated to this last title is, that it was not recorded in the register of tailzies. The Lord Ordinary can hardly think that it would be safe or consistent with any rational view of the law of entail, or of conveyancing, to sanction such a plea. If the charter of 1777 deviated from the entail of 1769, it was competent and proper for the heir in possession, within the years of prescription, to correct the error, by making up a new title conform to the entail. There is neither authority nor principle for holding that the deed of rectification must be viewed as a new tailzie. The title stands on the original tailzie, to the registration of which no objection is stated.

No. 120.

May 28, 1845.
Stirling v.
Moray.

But 1. I apprehend, that as the estates are all vested in the trustees by the Act itself with power to sell, while the heir in possession has only right to draw the rents, no sale by him can be effectual or complete; and hence, in the suspension, I have no doubt whatever that the charge on this ground alone could not be sustained. This would be of small importance, however, if in the Declarator it were found that the pursuer had right to sell, as the suspender and charger of course perfectly understood each other in the matter of the intended sale. But, in point of form and title, it cannot be disregarded as to the sale stated to have been actually made while the estates are vested in trustees.

The case of Brown has no application to this point, being only a demand on the bank to pay over to creditors the money deposited in the bank under the operation of the Act of Sederunt, which demand was made after it was found that the entail did not protect the estate against the diligence of creditors, and when the money could no longer be applied in terms of the Act of Parliament.

2. But there is another point under the Act of Parliament, which is of more importance. I am of opinion that the Act of Parliament excludes altogether the questions raised as to the lands, to which it is said no titles have been made up under some of the deeds of entail, even if there had been any solid ground open to the pursuer on these points; for the Act of Parliament, obtained on the application of the pursuer's brother, and with the consent of the heirs, and binding on them all, makes it an express condition and provision, that to all these different lands, having narrated fully the state of the rights under which they were held,

“ IV. The next plea of the pursuer is founded on the state of the titles to Balaclava, Bedralla, and others, which, it is said, stand on a tailzie recorded but never feudalized, and that these particular lands are thus left open to the onerous contractions and alienations of the heir in possession, as found in the cases of Douglas and of Kerse, and others; but the Lord Ordinary is inclined to think that the speciality noticed by the defender, which is to be found in no prior case on record, is a conclusive answer to the objection. The whole lands noticed under this head are vested in statutory trustees, and so, *ex vi statuti*, belong to them, and are placed beyond the contractions of the heir, till a valid title is completed conformably to the entail, and in terms of the Act of Parliament. There does not appear to be any principle or precedent on record for overruling that plea, keeping in view the peculiar enactments of the statutes under which the lands were vested in the statutory trustees, long before the sale now under suspension.

“ V. The last objection urged by the pursuer is founded on the terms of the entail of Glenalmond, executed by the deceased Colonel Moray Stirling in 1808. This deed is said to be so framed, that the prohibitions and forfeitures provided for in it are those of the lands of Abercairnie, the entail of which is frequently referred to in the new entail, and not to those of Glenalmond, which alone were settled by the deed of 1808.

“ If the pursuer's construction of this last tailzie were correct, there might be room for some of the most weighty pleas successfully urged in the late case of Eglington, and the sale or alienation by the pursuer quoad Glenalmond would be effectual; but the Lord Ordinary doubts if the entail of this estate fairly admits of the reading proposed by the pursuer. It is no doubt unnecessarily and anxiously repeated, that the conditions and limitations of the new tailzie are in conformity with the original tailzie of Abercairnie; but the fetters appear in every essential clause to be applied to the lands thereby disposed—i. e. to the lands of Glenalmond. The case requires no further explanation in the present stage of the cause.”

and that a title under the entail had not as yet been completed, there shall be made up valid and sufficient titles in the person of the heir of entail, under the authority and with the approbation of the Court; and, until that is done, these lands are vested in the trustees by the Act of Parliament. If the entails are in themselves defective, then these titles will not entail the estates beyond the terms of the entails. But all these lands, to which no title under the entail had been made up, having been transferred to and vested in the trustees, it was quite a competent and effectual provision, as a condition of the Act, and is binding on the pursuer, that to these lands, before the right of the trustees shall be determined, valid titles shall be made up to them respectively under the different deeds of entail including them. I have no doubt that this is perfectly complete and effectual, and that the separate questions raised as to the right to possess these lands on apparençy, and to disregard the entails, is excluded, and excluded not only inter hæredes, but as much also in a question with an onerous purchaser, (supposing Mr Charles Home Drummond, being an heir of entail, could claim that separate character,) for the lands are in the mean time not held on apparençy by the heir of entail at all, but are vested effectually in trustees.

No. 120.

May 28, 1845.
Stirling v.
Moray.

In the third place, I am of opinion that the express provision and declaration of this Act of Parliament altogether excludes the question whether the charter 1777, supposing it to be inconsistent with the entail 1769, and to create a new title, was an instrument of the character which otherwise could have been effectually recorded under the authority of the Court in the register of tailzies. I apprehend, that when authority was specially given for registering that charter as a deed of entail by this Act of Parliament, as the arrangement sanctioned by the legislature for this estate, it is no longer open to enquire whether there might have been objections to that form of deed, if presented for registration, without such authority. Being registered by the authority of the Act of Parliament, I am of opinion that it is a recorded entail, and that any such objection is altogether excluded—excluded not only in a question inter hæredes, but with every third party.

To save returning to this point, which, however, in the view I take of the charter 1777, would not arise at all in this case, I wish to add, that I do not think the question as to the competency of registering this charter is decided by any of the cases referred to, or is to be taken as a point on which, in my opinion, the pursuer could clearly have prevailed. But I give no opinion on the point.

To the above extent, I am of opinion that the Act of Parliament has conclusive effect in this case.

But it leaves the construction and effect of the deeds of entail of course open for consideration, and therefore there are a variety of points on which our judgment is required.

1. I am of opinion that the resolute clause in the entail 1769 is perfectly sufficient, and the pursuer's construction of it unsound. Probably the argument of Mr Marshall, as to the construction of that clause, if read by itself, as to the meaning of the word "other," as it occurs in that sentence, isolated from the rest of the deed, is well-founded; and, at any rate, I do not think that effect can warrantably be denied to a clause so clear and so comprehensive, because there happens to be introduced into it one word such as "other," not very correctly or appropriately, but without any real detriment to the sense and import of the clause. But this critical objection is raised solely by taking this sentence by itself without the context, of which it forms a part, and to which it manifestly refers. And I

No. 120.
May 28, 1845.
Stirling v.
Moray.

am surprised to see that the defenders have allowed the clause to be commented on without any notice of the context, to which it so manifestly refers; for, when the preceding provision is read, then the reason for introducing the word "other" is very apparent, and it comes in quite correctly. Upon turning to the deed, it will be seen that there is a full and anxious set of prohibitions and conditions, which are stated with very great particularity, and the last of which is a kind of obligation imposed on the heirs of entail to pay a certain sum annually to clear off the entailer's debts, with a provision to free the estate from any adjudication which might be led against it.

The failure to fulfil this obligation required obviously a different sort of resolute clause (an irritant was inapplicable) from the irritant and resolute clauses appropriate for the enforcement of prohibitions; and hence that provision or obligation, having been introduced after the prohibitions, is followed up immediately by a resolute clause specially adapted for itself, and applicable to no other condition; and then after ending that, the deed goes on, "and with and under this condition and provision, as it is hereby conditioned and provided, that in case the said Alexander Moray, &c., shall contravene the other before-written conditions and provisions, restrictions and limitations, herein contained," then the acts of contravention are declared null in appropriate terms, and the contravener's right resolved. Now, here it is plain, from the context, that *other* relates to the prohibitions, &c., to which the special resolution attached to the obligation to clear off debts and diligence was inapplicable.

I think this perfectly clear, when the deed itself is read, and not one clause taken out of it by itself.

2. I do not think that the destination of the charter 1777, which is merely a title made up in professed conformity to, and expressly and by plain declaration under, the entail 1769, is inconsistent therewith, so as to establish a new and different destination. Substantially, there is no difference. But as the charter did not profess to make any alteration—as it proceeded on the entail, and as that is declared in it—I think we must take terms which are flexible with reference to the entail, and that there is no real change.

As to Panholes and Blackford, this question, however, would be wholly superseded, as the destination in 1801, and the title on it, clearly brought the lands back to the destination of the charter 1769 within the years of prescription, even if there had been any inconsistency whatever to harm the entail and the first investiture. And it was not necessary to record that deed, which was only a step to rectify the title in conformity with the original and recorded entail.

3. The disposition and entail 1808 is clearly effectual against the pursuer; and if there were any defect in it, he must fulfil the obligation thereby declared and acknowledged, and in which he represents the granter, and could not ask for a decree finding that he was entitled to disregard it. But I am of opinion that this entail is correctly and effectually drawn, and that the reference to the prior deed in no degree interferes with the direct imposition of the fetters by that deed itself on the heirs taking these lands—for in every single instance, besides the reference to what is provided by the original deed, there are words of direct provision by that new deed itself, which, according to the most strict grammatical forms, impose the conditions stated to be in the original deed on the succession to and holding of the lands under this new deed.

In the view I take of the case, the above opinion exhausts all the points. I

have only to add, that, if it had been necessary to consider the point, I do not think that Mr Charles Home Drummond, himself an heir of entail, could be entitled to be considered, and that, too, at the instance of the heir of entail in possession, who alone argues that he is to be so taken, as a third party onerously contracting with the heir in possession. I am not prepared to hold that an heir bound by the entail can, in order to defeat the rights of an elder brother, enter into a sale, and then pretend that he is to be regarded not in the character of an heir of entail, even if this were a true and onerous sale. However, Mr Charles Home Drummond does not maintain that plea; on the contrary, he concurs in resisting the action, and expressly on all the other grounds stated by the other defenders. I must assume that this is done sincerely; and it is only the pursuer, the heir in possession, who wishes to bestow on him the character of an onerous bona fide third party, which he does not claim.

Lord MEDWYN.—I have not considered the private Act further than is stated in these papers. And I have only to give my opinion on the matter brought before us in this case.

I think the objection to the resolute clause in the tailzie 1769, that the introduction of the word *other* makes the clause unintelligible, and therefore inoperative, is not well founded. The case is argued as if the entailer considered the resolution of the right of an heir, in the event of contravention, a condition and provision, so that, when he provides against the effect of contravening "the *other* before-written conditions and provisions, restrictions and limitations, herein contained, or any of them;" and further specifies them generally, as if "he shall fail or neglect to obey or perform the said other conditions and provisions, or any one of them, or shall act contrary to the said other restrictions and limitations, or any of them,"—it is argued that this distinctly refers to the whole conditions, &c., in the prohibitory clauses, which embrace all the restraints noticed in the Act 1685, and therefore, that there is, in this view, no objection to this clause. But I rather take this view of what was the meaning of the framer of the entail, that, having imposed the condition on his heirs of paying off £500 annually of debts then affecting the estate, the entailer imposed the burden of redeeming or purging any adjudication, or other legal diligence for these debts, within three years; and the person not redeeming or purging is to forfeit his right to the lands, and the same, with the right of redemption, is to devolve on the person next in succession, who is to declare the forfeiture *quam primum*, and redeem and purge that diligence within two years; and if this is not done, he is to forfeit his right, which is to go to the next heir in succession. Then follows the irritant clause applicable to all the other conditions and prohibitions; so that when the entailer speaks of the heirs contravening the *other* before-written provisions, I think it distinctly applies to all the others, except the one immediately preceding, for which a different forfeiture was required—a forfeiture only of the right of the heir, but no irritancy of the debt on which the diligence followed. The contravention of the *other* provisions, such as prohibitions to sell, contract debt, &c., was to be attended with both, and therefore are aptly designated as the *other* conditions, to which this clause was to apply. There is then no uncertainty to what prohibitions the irritant and resolute clauses apply.

This tailzie was recorded, as intended to be the regulating title of the estate. But it is said that the charter 1777, which followed on it, was not made up in

No. 120.

May 28, 1845.

Stirling v.

Moray.

No. 120.
May 28, 1845.
Stirling v.
Moray.

terms of it, in as much as the destination to Alexander and Charles Moray respectively, after heirs-male of their bodies, was to their heirs whatsoever, instead of being to the heirs of their bodies. That this was an oversight, is very plain. The charter followed on the entail, and proceeded on the procuratories in it. In all respects it was the same, with the same clauses and conditions in the entail, with this single variation in this part of the destination, and then follows the long ulterior destinations which have produced such a host of heirs of entail, as are here cited as defenders. The term heirs is flexible, and will embrace heirs of the body as well as other heirs; and I cannot look at this charter, or the conduct of the parties, without being satisfied that there was no intention to alter the terms of the destination; nor in holding that, if thought necessary, the pursuer, in this question inter hæredes, must, as the heir of the entailer, be bound to rectify the title; and, in so holding, I do no wrong to the intention or understanding of the parties interested in these estates.

This charter 1777 has been recorded in the register of tailzies, in terms of the private Act of Parliament, so that if it were held that this really was a new entail, it would be effectual against the pursuer. I know no objection to an entail being effectual, that it first appears in the form of a charter, nor any objection to it being recorded; and the next destination to the pursuer, in consequence of his having no heirs-male of his body, though only to heirs whatsoever, will not have the effect of destroying the entail, because of the express exclusion of heirs-portioners throughout the whole course of succession.

As to Panholes and Blackford, in consequence of a title having been made up in 1801, in terms of the destination in the original entail 1769, and different from that in the charter 1777, if this last differs from the other, as possession has followed on the title 1801, it seems abundantly clear that no prescription by possession on the charter 1777 has worked off the terms of the original deed 1769, which was duly recorded, and the pursuer, as the heir of the entailer, is bound to make up titles, and hold under the recorded tailzie.

As to Bullands, these lands are included in the entail 1769, but no title has ever yet been made up to them. The pursuer holds them on a personal title, and can only make up a title to them under the entail in terms of the Abercainnie Entail Act, and he can only receive this title from the trustees, in whom the lands are at this moment vested, under the conditions of the entail; and it is only after he has vested himself with a title that he can ask the Court to interpret the character of that title.

The objection to the entail of Glenalmond 1808, that the restricting clauses are narrative of what is contained in the entail 1769, and are not applied to these lands, seems not well founded. The words do impose the conditions as well as narrate them; but further, if it were so, the pursuer, as representing his father, would be bound, in terms of the entail 1769, to entail these lands so purchased, in lieu of the lands of Abernyte, in a valid manner, and therefore cannot succeed in his present action to defeat the entail.

Perhaps I may be permitted to add, that I should have been well pleased if I could have entertained a different opinion in this case.

LORD MONCREIFF.—I shall express my opinion shortly on the several points which are raised in this case. In general, I think that no good ground has been shown for holding the entail or entails in question to be ineffectual.

1. I am of opinion that the general irritant and resolute clauses are expressed in an apt and sufficient manner. The objection taken is, that the words, "shall contravene the other before-written conditions and provisions, restrictions and limitations," &c., do not specify with sufficient distinctness the precise cases in which the clause is to be called into operation. I can see no difficulty or ambiguity in it. The objection is founded on the use of the word *other*, which may not be very usual in such a clause; for there can be no doubt that, apart from any effect of that term, the words employed are perfectly sufficient to cover all the general prohibitions against selling or alienating, contracting debt, or altering the order of succession. And if there were nothing else in the form and connexion of the sentences, to explain the particular use of that word *other*, in consistency with the obvious meaning and effect of it, so to protect the general clause of prohibition, I should think, with the Lord Ordinary, that it would be most reasonably interpreted as referring to the resolute clause itself, as distinct from the "other before-written" conditions, provisions, restrictions, and limitations.

But I own it does appear to me, as to your Lordship, that there is another very simple explanation of the use of that word, arising from the connexion in which the clause stands with the immediately preceding clauses of the deed. After the general clauses of prohibition, there is a very stringent obligation laid on the testator and heirs to pay, in a particular manner, all debts due by the entailor, and other burdens affecting the estate; and this is fortified by a very anxious and precise resolute clause, applied to the event of any adjudication being led for any such debts or burdens, and that of their not being purged within three years, whereby the heir so failing to purge such adjudication is declared to forfeit all right to the estate; and the same condition and forfeiture is applied to the next heir entitled to succeed, and so on. It will be observed, that the events thus provided for neither required nor admitted of any proper irritant clause; the assumption being, that the debts did legally affect the estate, and that neither they nor the adjudications led upon them could be annulled. The concluding part of these clauses is, "Provided also, that the heir so redeeming, and all the heirs succeeding to them, shall be liable to the same conditions and irritancies to which the heirs contravening and failing were liable." Now, it is immediately after this that the general irritant and resolute clause is introduced in the form I have already mentioned—"and with and under this condition and provision," &c. The writer of the deed had apparently reflected that, as the immediately preceding conditions admitted of no application of an irritant clause to them, neither did they require the application of any additional resolute clause, complete clauses of forfeiture to the particular events so provided for having been already expressed in ample terms. Apparently, under this idea, and with perfect correctness, both grammatically and in technical precision, he goes on to provide, that if any of the heirs shall contravene the *other* before-written conditions or provisions, restrictions and limitations, or any of them, that is, &c., not only shall such heir contravening forfeit all right to the estate, &c., but "all debts contracted, deeds granted, and acts done, contrary to the conditions, &c., shall be of no force, strength, or effect, and ineffectual and unavailable," &c.

It seems to me to be impossible to miss the true meaning here expressed. The clause, by the use of the word *other* in the hypothetical part of the proposition, has an evidently reference to all the before-written conditions, &c., other than those

No. 120. immediately preceding, to which ample clauses of forfeiture had been already applied, and to which the clause of general irritancy also intended could have no relation. In other words, it is a general clause resolute and irritant, to protect all the general conditions and prohibitions, as distinct from the special provisions as to the debts of the entailer or his ancestors, or other burdens which might legally affect the estate, as to which he had imposed obligations, and provided forfeitures, but could not declare any irritancy.

May 28, 1845.
Stirling v.
Moray.

This appears to me to be the simple explanation of the clause. But, if it were not so, or in so far as it may be necessary, I also think that it admits of the explanation adopted by the Lord Ordinary.

2. For the reasons very clearly expressed in the Lord Ordinary's note, I am of opinion that the charter of resignation and confirmation which was expedited in 1777, cannot have any effect to relieve the pursuer of the fetters of the original entail 1769.

I concur in all the reasons stated in the Lord Ordinary's note. This being a charter of progress, I apprehend that, in any question of succession, if such a question arose, it must be interpreted with reference to the warrants on which it proceeds, as embodied in it, and all the clauses of the charter itself, showing that the flexible term "heirs whatsoever" used in it must be sustained to the definite meaning expressed in the warrants recited. But no such question of succession has arisen; and I have no idea that such a casual discrepancy in the expression as to one branch of the destination, between a charter of progress and the original entail, can have the effect of doing away the operation of the material clauses of that entail.

If it could be taken otherwise, it must be said that the charter imported an entire alteration of the entail 1769—that it was a warrant for new infeftment, upon resignation in the superior's hands. Very singular if it were so, being contrary to the procuratory of resignation on which it proceeded. But take it to be so. It must then either be an entire new title, or it must stand on the old title. And if it is to be taken as a new title, it has all the clauses of a strict entail duly engrossed, and it has been recorded in the register of tailzies. It is said that it is not the original tailzie, which is what the Act 1655 requires to be recorded. But this is changing the ground, and shifting the hypothesis of the argument. If the question rests on the entail 1769, it is recorded; if it must be taken as on the entail 1777, as a title on resignation for new infeftment, that must be considered as the original entail in this question; and that also has been duly recorded under authority of the Act of Parliament. If the pursuer were to place the title on the procuratory of resignation, it would be fatal to his whole argument. I am further of opinion, that the termination to heirs whatsoever, even if the event had occurred when it should take effect, would not render the entail inoperative against the heir in possession; because I have always understood that, according to all the authorities, if the succession of heirs-portioners be excluded, it is a good and effectual entail in favour of each heir-portioner in her order.

3. I am of opinion that the deed executed by Colonel Moray Stirling in 1801, as to the lands of Panholes and Blackford, cannot be regarded as a new entail, requiring separate registration. It is, indeed, a special title made up on the old entail, for the purpose of correcting an error in a previous title, and distinctly made to depend on the original entail. If it had been otherwise, it would have been an act of contravention. I think that it did not require registration.

4. I am of opinion that the answer made to the plea as to the lands of Bullands and Bedralls is also good. No. 120.

The plea is, that no feudal title has been made up as to these lands on the entail 1769. From this the pursuer infers, that these lands, as held in apparen-^{May 28, 1845.}cy by a ^{Stirling v.} party who was also the heir alioqui successurus, were liable to the diligence of creditors, according to the case of Ross of Kerse, and other cases; from which he jumps rapidly to the conclusion, that he has now power to sell them. The first part of this plea might be all well, if these lands had been actually adjudged by a creditor, before they became vested in trustees by Act of Parliament. The creditor's diligence might have been effectual, while, according to the express words of the Act 1685, and the terms of the entail, the heir suffering such an adjudication to proceed would have been liable to a declarator of irritancy of his right to the whole estate. How far the same rule would be extended to the case of a voluntary sale by a party not infeft, is a very different question. I doubt it much. But it cannot arise here. How can any purchaser be allowed to say, that he purchased on the faith of the pursuer's title as heir alioqui successurus, and not on his title as heir-apparent of entail—after these lands had been fully vested in trustees by Act of Parliament, and the pursuer can get no title on which the form of a sale could be effected, except a title made up upon the entail for the purpose of carrying the trust into effect? Till he makes such a title, the entail stands vested in the trustees, and no other title can by possibility be obtained. It seems to be an invincible speciality.

5. Under the fifth head of objections, the pursuer, besides renewing several points of argument which I have already considered, raises a new and peculiar plea, founded on the form of the entail of Glenalmond and others, which is, no doubt, a new and special entail.

I have examined that entail minutely; and I am really unable to find that there is any defect in it.

The lands of Abernyte and others were included in the entail 1769. But a special power was given to sell them, provided that, within a limited time, the heir selling should purchase other lands of equal value, and execute a new entail of them, under all the conditions of the old. Charles Moray Stirling did exercise the power, by selling the lands of Abernyte, &c.; and having purchased the lands of Glenalmond, &c., he executed the entail 1808, in fulfilment of his obligation. The question is, whether that is an effectual entail?

It appears to me to be very correctly drawn according to its purpose; except that it adopts the words of destination in the charter 1777, instead of those in the entail 1769. I have already spoken as to the effect of that variance. But, on other respects, the deed narrates the charter, and specially the entail 1769—the power of sale given—the sale and purchases—and the obligation to make the new entail; and the granter then proceeds, in implement of that obligation, and under all the conditions, &c., expressed in the deed 1769, to dispoise these lands to the series of heirs called; but in the end of the dispositive and tenendas clause he bears—“But always with and under the conditions, provisions, &c., hereinafter specified.” Then comes the procuratory of resignation, in which all the entailing clauses are inserted verbatim as they stand in the deed 1769, but not at all depending on the reference to that deed, but substantively as the conditions of the resignation of the special lands resigned. It is “with and under the

No. 120.
May 28, 1845.
Stirling v.
Moray.

restrictions after written." It bears, no doubt, "as it is by the said disposition of the estate of Abercairnie expressly conditioned and provided," &c., in order to show that the granter is following out his obligation correctly. But the conditions, prohibitions, and clauses irritant and resolute, are all specifically applied to the special lands disposed and resigned.

The pursuer observes, that the deed should have borne a clause appointing all the conditions, &c., to be engrossed in the charters, and infeftments following hereon, &c. I apprehend that this proceeds on a mistake in law; because I know of no law which requires such an injunction to be expressed in any entail. The statute requires the fact to take place, in order to render the entail good against creditors. But no law requires this to be expressed in the entail itself, in order to render it valid.

Yet there is a mistake in fact also; for there is such a provision in this deed, (p. 55, G,) which I hold to be substantive as a condition of the resignation of the special lands.

On the whole, therefore, I cannot find any solid ground for holding this entail ineffectual. As to the circumstance of no infeftment having followed on it, the answer already made as to the other lands meets the objection. They are vested in the trustees. But, separately, Charles Moray Stirling only held these lands by personal titles, under an obligation to settle them by strict entail. How can the pursuer get a title by which to sell them, which will not be qualified by that obligation? The cases of Ascog and Queensberry appear to me to have no application to such a case.

LORD COCKBURN.—I. *Abercairnie*.—I am of opinion that the objection founded on the word "other," that has been taken to the entail of Abercairnie, is one that cannot be sustained. The entailer has chosen to describe his resolute clause itself as a "condition and provision." He says that the estate shall only be held under "this condition and provision"—viz. that effect shall be given to the resolute clause. After this he was almost compelled, in referring to the provisions in the prohibitory clause, to describe them as "the other" provisions, because they actually were so. They were *other* in reference to the resolute provision. This part of the case appears to me to be quite clear.

The next question arises on the charter of 1777. This charter, it is said, has become the ruling title; and, on this assumption, two objections are taken.

1. One is, that the destination in the charter in favour of "heirs whatsoever," leaves the pursuer as free to sell as if it had been to heirs and assignees.

If the charter had altered the entail, and the estate had been possessed upon it for forty years, the entail might have been extinguished by prescription. But the charter does not alter the entail. On the contrary, it confirms and renews it. It is a corroborative, and not an adverse, title. In making one part of the destination in the charter to "heirs whatsoever," Alexander Moray did not merely intend to denote heirs whatsoever of the body, but, in legal construction, he actually does denote this. The case of Roxburghe fixes that it is competent, or rather indispensable, to take the author of a deed's whole relative language into view, in assigning the due meaning to one of his doubtful or flexible terms. Of course his relative language in the same deed may, in general, from its mere proximity, be more conclusive than similar light derived from a separate deed. But I am not aware of any authority or principle for altogether excluding separate, though con-

acted, deeds. And there is no occasion on which a flexible term is more subject to explanation by a separate instrument, than in the case of a supposed difference between a deed renewing an investiture, and the investiture meant to be renewed. No. 120.
May 28, 1845.
Stirling v.
Moray.

Now I cannot read this charter without seeing, in every part of it, that Alex-Moray corroborates and renews the entail. In particular, it is distinctly implied in the whole of his language, and of his provisions relative thereto, that the destination of the two deeds was understood by him to be the same. The charter would be made absolutely unintelligible by its being supposed to be different. I therefore think that the flexibility of the words, "heirs whatsoever," in the charter, must, by construction, be fixed into "heirs whatsoever of the body," as in the entail.

Being of this opinion, I have no occasion to dispose of the pursuer's plea, that an entail which opens to heirs whatsoever, has thereby necessarily come to an end. When we are obliged to dispose of this point, we shall do so; but not sooner.

Moreover, even the charter contains a prohibition, duly fenced, against selling, which is effectual against the pursuer.

2. But this raises his next point, which is, that the charter has not been recorded, and could not be so; partly because it is not the original entail, and partly because it is a deed flowing from the Crown, and not, as required by the Act of 1685, from one "of his Majesty's subjects."

There is, apparently, some inconsistency in the pursuer's reasoning here. For at one time maintains that the entail is extinguished by prescription—so utterly extinguished, that it cannot be even referred to as explanatory of the meaning of the term; and having thus, for one purpose, set up the charter as the sole existing title, he then maintains that the charter could not be recorded, because it was not the sole title. However, I assume the charter to be now the regulating investiture. Then the objection is, that a Crown charter cannot be recorded as a deed of entail by a subject. This, so far as I recollect, has not been determined; and when we were obliged to determine it now, I suspect that the point would not be so far as the pursuer supposes. But we are not required to determine it. This seems to me to be settled by the fact, that this particular charter was pointed to be recorded by special statute; and this, as the pursuer states, (case, 10,) on the ground that it had become the ruling investiture. I cannot hold the Act of Parliament to be of no authority.

II. *Bullands, Bedralls, &c.*—The pursuer's plea, as to these lands, is, that they have always been possessed on appanage or personal title—i. e. the title to them having never been feudalized—the entail of 1769, quoad them, is inept.

For a sufficient answer to this, I do not think it necessary to go beyond the present statute. That Act has vested these lands in fee-simple, though under trust, in certain trustees, who are appointed to sell them, or to secure them, for the heirs of tailzie. In this situation, how can the pursuer sell what he is not vested with, even personally? These lands, whatever claim he may have upon them, are at present not his. As to the observation that a private statute cannot affect third parties, if there was ever any authority for it, it has lately been put down, emphatically, in the House of Lords.

III. *Glenalmond*.—The objections taken to the entail of this estate that was executed in 1808, seem to me to be groundless.

That entail is not, as the pursuer argues, imperfect from its containing no proper operative clauses of its own, but merely referring to the fact that such clauses

No. 120. exist in the entail of 1769. It certainly does refer to that prior deed as containing certain clauses. But it does not merely refer to the fact of these clauses being there. It refers to them in order to adopt them. And it does adopt them, positively and directly, by re-asserting them as clauses of its own.

May 28, 1845.
Stirling v.
Moray.

It is said that the entail of 1808 is itself defective. But even if this were the fact, it would not avail the pursuer. Entailed land had been sold under the original tailzie, but only on the condition that land better placed for the principal estate should be purchased with the price, and brought under that entail. If, as the pursuer says, there has been a failure to reinvest, then, instead of taking advantage of this failure, he is bound to correct it. He himself has no right to the bought land except under the entail.

IV. *Blackford and Pankholes*.—The pursuer's plea, as to these lands, is, that they are held under a separate deed of entail of their own, executed in 1801, and that this entail has never been recorded.

It is admitted that this deed is lost. In this situation I do not see how we can proceed upon it, until it be restored by a proving of the tenor.

If we are to proceed upon it as upon the Crown charter of resignation, by which it has been followed, I think the question, in reference to the existing argument, not clear. But I am probably in some mistake from misapprehending the facts.

As I understand, these lands were separated from the rest of the estate, and were made the subject of a new entail of their own in 1801; and they have ever since, or at least have for some time past, been held neither under the original entail of 1769, nor under the charter of 1777, but under this new and separate title of their own of 1801. If these be the facts, I do not as yet see a good answer to the pursuer's objection, that the deed of 1801 has never been recorded. That its execution was unnecessary, and that the destination and provisions are the same with those of the entail of 1769, and that the author's object was only to remove these lands from the charter of 1777, and to entail them the better by bringing them under the very words that occur in the deed of 1769, are all considerations which, though well founded in point of fact, appear to me to be irrelevant or unimportant. Whatever the object was, it was effected by means of a separate entail; and if it be true that the estate has been possessed for forty years, or that it was possessed at the date of the recent sale solely on this distinct deed, how can we escape from the consequences of its not being recorded? The identity of its terms with those of the entail of 1769, is surely immaterial. Suppose two estates to be effectually entailed by a single deed. An heir thinks it safer to have two deeds. So he withdraws one of the estates, and places it under a deed, identical with the other, of its own. No substitute objects to this, or obliges the heir in possession to make up his titles correctly, or compels the new deed to be recorded. While matters stand in this position, a purchaser, seeing nothing on the register to obstruct him, buys the estate. I do not see that the transaction can be set aside by saying that the second deed was useless, or the same with the first one. The purchaser is not bound to look beyond the facts, that the estate he bought was held under a deed, which, whether useless or not, formed the title of possession, and was not recorded.¹ It has been said that this is all removed by

¹ See Stewart, 23d May 1844.

the fact, that the purchaser himself is here an heir of entail. But this point has **No. 120.**
 not been argued, nor indeed do I see a plea for it on the record. The applica-
 tion, moreover, of such a plea as against a purchaser who happens to be also a **May 28, 1845.**
 substitute in the entail, would require great consideration. It is said the purchase **Ministers of**
 is fictitious. If this be the fact we should not decide the cause. I assume that **Edinburgh v.**
 we are applying the law to a real transaction. **Magistrates.**

THE COURT accordingly pronounced this interlocutor :—" In the suspension,
 suspend the letters simpliciter, and decern ; and, in the declarator, find the
 pursuer not entitled to obtain decree, in terms of the conclusions of his
 libel, or any of them, and therefore assoilzie the defenders, and decern."

DUNDAS and WILSON, W.S.—JARDINE, STODART, and FRASER, W.S.—A. and C. DOUGLAS,
W.S.—Agents.

MINISTERS OF EDINBURGH, Pursuers.—Sol.-Gen. Anderson—Inglis. No. 121.
MAGISTRATES AND TOWN-COUNCIL OF EDINBURGH, Defenders.—
Rutherford—Marshall.

Burgh—Corporation—Trust—Annuity-Tax—Church.—In an action by the
 Ministers of Edinburgh against the Magistrates and Town-Council for arrears of
 annuity-tax, which were alleged to have been rendered irrecoverable by the culp-
 able neglect of the latter in failing to appoint stentmasters in terms of the statutes
 thereanent ;—Held, that the performance of this duty was imposed upon the Ma-
 gistrates and Council as a body of statutory commissioners, and not upon the
 burgh itself, through them, as its representatives and administrators ; and that the
 property of the Incorporation could not be subjected to liability for acts done by
 them when not acting in their proper official capacity.

PRIOR to the year 1625, there had been several grants from the Crown **May 28, 1845.**
 in favour of the city of Edinburgh, of church lands and other property **2d Division.**
 belonging to the Popish clergy, which were intended to be applied to a **Lord Ivory.**
 certain extent in support of the Ministers of the city. **T.**

The assessment for their maintenance, commonly known by the name
 of the annuity-tax, originated in the year 1625, in certain articles which
 were proposed by King Charles I. to, and answered by the Magistrates
 of the city.¹ These articles, as contained in an act of the Town-Council,
 of date 2d March 1625, regarded (articles first and second) the subdivi-
 sion of the city into parishes, and the appointment of eight ministers. In
 the third article the King proposed that each minister should be provided
 with a sufficient maintenance of not less than 2000 merks Scots, to be paid

¹ Maitland's History of Edinburgh, p. 274.

No. 121. by the people that lived under their care, and that either by imposing a certain annuity upon every house and tenement within the parish, as done in London, or by some other convenient means; and, till this should take effect, that the town should bear the charge of the whole. The answer returned to this article was, that the ministers of the burgh were already provided with a stipend of 1200 merks, "payed to them conform to the agreement made with them at thair entrie to thair charges;" and, "since the common guid is not abill to sustain the burthen alreddie imposed theirupone, and of reasone aucht not to be thralld to the payment of the ministers' stipend," and as the desired augmentation craved mature advisement, the Magistrates entreated his Majesty to give them permission not to answer the same at that time. By the fifth article, the right of patronage was to be conferred on the Magistrates. The tenth article was in these terms:—"Since the Proveist, Baillies, & Counsell, as patrones of the Kirkis of the said Burgh, at the entrie & admissioun of ilk minister agrie with him for his stipend, that it sall not be leasume for him to exact any other duetyes from his parochines, but sall ressaue his stipend from the saids Proveist, Baillies, and Counsell, conform to the agriement, and acquiesce therein."

May 28, 1845.
Ministers of
Edinburgh v
Magistrates.

These proposals and answers were confirmed by Act of Council, 28th September 1625, and were afterwards ratified by the King in Council, the stipend continuing "at 1200 markis Scottis for each minister, as they ar presently in use to payt; and how soone the distributione intended sall be perfyted by the best means they can find, and with all possible diligence, they sall agrie upon such an augmentioun" as might be fitting for a sufficient maintenance to each of them.

On 18th March 1634, an Act of the Privy Council was passed, on a remit from Parliament, authorizing 12,000 merks yearly to be raised from the inhabitants, according to the house-rents, for the support of the ministers. The Act of Parliament, as narrated in this Act of Council, after setting forth that it was consonant to equity and reason that those who enjoyed the blessing of the Word of God, and of hearing the same preached, should contribute to the maintenance of the ministry, proceeded—"And the common good of the Town, which has been given to them for maintenance of policie, has been that way employed through the inlaick of other sufficient means for entertaining the Ministrie of the said Burgh; For remeid whereof, and to the end that these who serve at the altar may be entertained aff the altar, and the said common good may be rightly applied to the use whereunto the same has been appointed, Our Soverand Lord and Estates forsaid statute and ordain that the sum of twelve thousand merks shall be uplifted yearelie af the whole inhabitants and indwellers within the said burgh, (the Lords of his Majestie's Counsell and Session being onlie excepted,) and that according to the quantitie and proportion of the mails which they pay, or the houses where they reside may pay: And for this effect, ordain the Provost, Baillies, and

Counsell of the said burgh, to appoint and make choice of four sworn men out of ilk parish within the said burgh, who, upon their oaths, shall value and estimat the mailles of the houses of the said burgh, and shall give in ane roll thereof under thair hands, what every house presentlie built and possest may, cummunibus annis, in constant rent pay of yearlie mail;” and because new houses might be built, and others come to decay, “Therefore, ordain the Provost, Baillies, and Counsell of the said burgh, ilk year, or ilk twa years, as they shall think expedient, to appoint new stentors and valuers for valuing of the said house mailles: And according to the said valuation and distribution, and division of the said soume, declares the whole indwellers and inhabitants to be subject to contribute to the entertainment of the said Ministrie, according to the rolls to be given furth to such as shall be appointed by the said Provost and Baillies and Counsell for ingathering of the said soume, under the subscription of their common clerk: And in case of refusal of any person, ordains the said Provost and Baillies to direct their officers to poind their goods, &c.; and ordains the said sums so ingathered, to be applied only for sustentation of the said Ministrie.”

No. 121.

May 28. 1845.

Ministers of
Edinburgh v.
Magistrates.

By charter from Charles I., of date 23d October 1636, the Crown ratified and approved of “*Capita et articulos concordationis confect. inter dictos Prepositum, Ballivos, Consules et Communitatem dicte civitatis nostre Edinburgine, et ministros intra dictam civitatem,*” in all its clauses and conditions, and more specially the clause, by which it had been agreed that the Provost, Bailies, Council, and community of Edinburgh, and their successors, should have the right of patronage of all the city churches. The charter further gave and granted to the above parties the patronage of all the churches of the city already built, or that might thereafter be built.

On 19th June 1649, an Act of Parliament was passed ratifying former warrants for the annuity therein recited, and authorizing an increased rate of six merks from every one hundred merks of house-rent, to be levied by the deacons of the kirks for payment of the ministers’ stipends.

This Act set forth, that the Estates of Parliament “having taken in consideration the petition of the Lord Provost, Baillies, and Counsel of Edinburgh, in name of the Ministers and wholl inhabitants thereof, desiring that the annuitie of fyve merks upon every hundredth merks of mail wtin the said Toun, imposed in the preceding Session of Parliament, for making up the soume of nyntein thousand merks yerelie, for the maintenance of sex ministers, might be augmentit, and a greater quota imposed for making up that soume, accoreding to the declaration and provision in the Act of Parliament made thereanent,” in respect that the five per cent was not sufficient to make up this sum, the Estates having considered their former Act of Parliament made for that yearly imposition, and being willing that the town should be well furnished with a sufficient number of able and well-qualified ministers, did therefore ratify and con-

No. 121. firm the said Act of Parliament. This Act, which was dated 2d March 1649, set forth, that the Estates of Parliament having considered the petition of the Town of Edinburgh, for approving and ratifying the Act of the Committee of Estates, for a yearly imposition upon the house maills and others for the maintenance of the six ministers, together with the Report of the Committee of Bills thereanent, and being very sensible of the constant affection of the town of Edinburgh to religion, and their eminent zeal and desire for providing and establishing a sufficient number of able and well-qualified ministers for their several kirks: "And taking also to their serious consideration the vast charges they have been at in building of thair kirks and uther publick works, in advancing great sommes of money for the use of the publick towards the maintenance of the caus and the promoting the Reformation, and the great loss they have sustained from thair great troubles and distractions, and being desirous to encourage and enable thame towards the maintaining and provyding of a sufficient number of able and well-qualified ministers:" Therefore, the Estates of Parliament ratified an act of the Town-Council, of date 20th October 1648, "concerning their resolution to have twelf ministers constant wtin the said burgh;" and also ratified the said act of the late Committee of Estates of 28th December 1648, for the yearly imposition of the sum of 19,000 merks upon the house maills, to be a constant provision for six of the twelve ministers of the burgh, with the alterations and additions following. It was then enacted that 5 per cent should be imposed upon the rents, to make up the sum of 19,000 merks yearly, to be a constant provision to six ministers within the burgh, that each minister might have a stipend of 2700 merks, and 400 merks for house maill. In case of it being found that an imposition of 5 per cent would not make up the sum of 19,000 merks, it was stated in the Act, that Parliament, upon report of what should be wanting, would take into consideration what further quota should be imposed for making up that sum. "And also, it is hereby ordaint that the said imposition shall be always collected be the deacons of the kirk, to be deliverit to the treasurer of the kirk sessionns, and it is not to come in the hands of the Toune Counsell, nor to be applied to any other use than is above writen."—"And seeing by the foresaid annuitie and imposition the said toune of Edinburgh will be the more enabled to entertain twelf ministers, it is hereby ordained, that they use all diligence for getting their kirks provydit with twelf ministers, and for keeping always that number full for the guid and instruction of the whole inhabitants thair of; and when any of the number of the sex ministers provydit be the foressad imposition shall vaik, the stipend or stipends of any of thais sex vaikand shall be disposed upon ad pios usus, conform to the Act of Parliament, be the kirk session of the said toune, with advyce of the committee aftermentationat, appointit for decyding of questions and differences." It was far-

May 28, 1845.
Ministers of
Edinburgh v.
Magistrates.

ther enacted, that the annuity should be imposed after exact survey, by **No. 121.**
 four sworn men in every parish, of whom three were to be citizens, to
 be chosen and sworn by the Town-Council, and the fourth by the Col- **May 28, 1845.**
 lege of Justice, with certain provisions in the event of their failure to **Ministers of**
 appoint. It was further set forth, that "the Estates of Parliament hav- **Edinburgh v.**
 ing now found by the value of the wholl hous maills truelie and faith- **Magistrates.**
 fully taken up by divers surveys of sworne men, and now last, by an ex-
 act survey of the elders and deacons of the sessione, with the advice of
 the Dean of Facultie and uthors, members of the College of Justice,"
 that the 5 per cent was insufficient to raise the 19,000 merks, it was
 enacted, that the imposition should be raised to six per cent, to be
 collected by the deacons of the kirks as before expressed. The Ma-
 gistrates of the burgh were further ordered to see the Act obeyed and
 performed.

Of date 6th June 1661, an Act of Parliament was passed, which con-
 tained, inter alia, the following recital:—"And seing the teinds rents
 and others belonging to the Citie for the vse and maintenance of the Mi-
 nisters of the said Citie Ar far short and not proportionable nor sufficient
 for such ane number of Ministers as is necessary ther; And the said toun
 haveing been at vast charges for building of Churches and public works
 vpon that & other occasions The Cōmon good and Patrimonie therof is
 exhausted and overburthened, and vpon the considerations forsaid the in-
 habitants of the said burgh who hes the comfort and benefite of the
 preaching of the Gospell and ministerie within the same, be the space of
 liverse yeers vntill this tyme hes been in vse to pay for the provision
 and stipend of sex of the Ministers of the said burgh a yeerly imposition
 of ānuitie at the rate and proportion of Sex merks for & effeirand to each
 hundreth m̄ks of the maill & rents of all the duelling houses;" and con-
 sidering that there is not a more easy or effectual way for paying the
 stipend of the said six ministers than in the manner and by the imposi-
 tion foresaid, and that it was necessary that the same should be settled
 by a perpetual law in all time coming; Therefore his Majesty, with con-
 sent of Parliament, did statute and ordain, that the stipends of six
 of the ministers of the burgh should be imposed upon, and paid by the
 inhabitants, tenants, and occupiers of the several dwelling-houses, &c., of
 the city, without the exemption of any house or persons, at the rate of
 six merks for every 100 merks of rent. And to the effect "that the
 said ministers be not frustrat of the payment of thair stipends," it was
 enacted, that the payment of the annuity should be quarterly, "and that
 the same shall be collected be the deacons of the kirks, or be a collector
 to be appointed for that purpose be the Magistrates and Councill of the
 said burgh, in their option, and as they shall think expedient for the
 same." It was further declared, that this imposition should not prejudice
 or be derogatory to the liberties and privileges of the College of Jus-
 tice. "And it is further ordained that the said ānuitie & imposition

No. 121.

May 28, 1845.
Ministers of
Edinburgh v.
Magistrates.

shall be layed vpon all the inhabitants tennents & occupyers of the saids houses within the said burgh After exact survey be four sworne men in every parochie who shall survey and value the house mailis aforesaid whair of tuo shall be Citizens to be choisen & sworne be the toun Councell & other tuo shall be nominat choisen & sworne be the Colledge of Justice or such as they Shall appoint And the roll of the rents being subscrived be the saids four survayers in everie parochie Shall be the vnalterable rule of collecting for that yeer except be warrand & authority of the Cõmissioners vnderwritten in so far as concerns the members of the Colledge of Justice And if the Colledge of Justice refuse or delay being required be the Magistrats of Edr. as followes Vizt. the president of Session & Dean of facultie to be required in tyme of Session vpon Sex dayes and in tyme of yacance vpon tuentie dayes In that cace the Magistrats and Councill of Edr. are to have power after the said requisition and expyreing of the tyme and dayes of requisition re~xtive to nominate choice & sweare such of the Colledge of Justice as they shall think fit for survayeing and valueing the said house mailis, and if the members of the Colledge of Justice shall either not accept or not concur in the said employment being required Then & in either of the saids caices, the remanent of these persones choisen and sworn be the toun Councill Shall have power to goe on in the said employment and act be themselfe without the members of the colledge of Justice not accepting or concurring as said is."

The Act further ratified and approved the possession and use of payment of the annuity, since the same had been in use to be paid; and ordained all persons resisting, or who had not made payment of their proportion of the annuity since the same was in use to be paid, to make payment of the same; requiring and commanding the deacons of the kirk and collectors, one or more, to be appointed "be the Magistrates and Councill of the said burgh," to uplift the annuity, both at to arrears and in time coming. "And that the Magistrates of the said burgh sie this whole Act and ordinance obeyed and put to dew execution according to the tenor thair of, and do all things necessary for that effect."

By the statutes 7 Geo. III. c. 27, 25 Geo. III. c. 28, § 65, and 26 Geo. III. c. 113, § 21, for extending the Royalty, it was enacted, that the "Lord Provost, Magistrates, and Town-Council of the city shall have full power to appoint stentmasters to levey from the proprietors," &c., of houses built upon the extended royalty, "an equal portion of the cess annuity, poor's-money, and watch-money payable by the inhabitants of the city of Edinburgh, in the same way and manner as the same are now levied within the present royalty."

By the Act 49 Geo. III. c. 21, which was passed, inter alia, for the purpose of extending the royalty, for erecting two new churches, and for further regulating the revenues of the city applicable to the payment of

the ministers' stipends, it is enacted, § 17, " And, to prevent all doubt respecting the legality of levying and applying to this and similar purposes the annuity of six pounds per centum on the rents of houses, shops, booths, cellars, and premises, which the said Lord Provost, Magistrates, and Council have been in use to levy within the city, along with the other funds or revenues which are applicable, either in whole or in part, to the payment of ministers' stipends ; Be it enacted and declared, that the said Lord Provost, Magistrates, and Council, and their successors in office, shall be, and they are hereby authorized and empowered, not only to levy as they have hitherto been in use to levy, the said annuity of six per centum upon the yearly rents of all inhabited houses, shops, booths, cellars, and premises within the said city and royalty thereof, whether extended by the said recited Acts, or by this Act, and to apply the same as they have been hitherto in use to apply it, along with the aforesaid other funds or revenues, as far as those other funds or revenues are so applicable, for the payment of the stipends of all the ministers of the present churches of the said city and royalty ; But also to apply an equal proportion of the said annuity in common with the aforesaid other funds or revenues, in so far as these other funds or revenues are so applicable, for the payment of the stipend or stipends of such minister or ministers as may be appointed to the churches which are required to be built under the authority of this Act, in manner before mentioned."

No. 121.
May 28, 1845.
Ministers of
Edinburgh v.
Magistrates.

By § 18, it is enacted, " Provided always, and be it enacted, That the right of patronage of the churches hereby required to be built, shall belong to, and be vested in the Lord Provost, Magistrates, and Council of the said city of Edinburgh, and their successors in office, in the same manner, to all intents and purposes, as the right of patronage of the churches within the ancient royalty of the said city belongs to and is vested in them."

By a judgment of the Court, of date 11th June 1813, in an action at the instance of the Ministers, directed against the " Lord Provost, Magistrates, and Council of the City of Edinburgh, for themselves, and as representing the whole community of the said city," it was found " that the pursuers and their successors, as ministers of Edinburgh, have the sole interest in, and exclusive right to, the entire produce and benefit of the annuity libelled of six per cent on the rents of inhabited houses and others, and that the defenders are liable to hold compt and reckoning with the pursuers and their successors for the produce of said annuity since the date of citation to this process, and in all time to come, and to pay over the same to them termly and yearly as libelled, and decreed ; but, of consent of the pursuers, assoilzie the defenders from the claim for the arrears of said annuity preceding the date of said citation, or the admission of any of the pursuers to the benefices, and locarn."

No. 121.

May 28, 1845.
Ministers of
Edinburgh v.
Magistrates.

In June 1815, a contract was entered into between the Ministers on the one part, and the Magistrates "for themselves, as present Magistrates of the city of Edinburgh, and for the whole council and community of that city, defenders" in the above action, in reference to this judgment. By this agreement the parties engaged not to disturb the judgment by appeal or otherwise, and the Ministers agreed to accept of a certain amount in lieu of their claims for arrears, and for stipend down to the years 1820 or 1825. "Which several sums the Lord Provost, Magistrates, and Council, bind and oblige themselves and their successors in office, and the community, to pay" at the terms specified. In consideration of these payments, the Ministers assigned the Provost, Magistrates, and Council, to all right and interest competent to them in the annuity assessment; and as the "said Lord Provost, Magistrates, and Council, have already vested in them the right of levying and uplifting" the annuity, so it was declared, that in respect of the counterpart of the contract, and during the currency of it, they should be entitled to apply the whole proceeds assigned for the proper use and behoof of the community without any accounting. The agreement was to come to an end either at Martinmas 1820, or at Martinmas 1825; in either of which events it was conditioned, "That upon such expiration of the present agreement, the Lord Provost, Magistrates, and Council of the said city of Edinburgh, for the time being, shall, from and after that period, be accountable to the Established Ministers of that city for the time being, for the whole produce of the funds awarded to them by the Court of Session, with the exception of being allowed to make such deductions as they have claimed for the expense of collecting."

Previous to the year 1818, the stentmasters, according to whose survey and valuation the annuity-tax was directed to be levied, were from time to time regularly appointed by the Magistrates and Town-Council. But in that year a practice commenced, and continued till the year 1836, according to which the stentmasters were not chosen or sworn in by the Town-Council, but received their appointments from the Magistrates alone as commissioners of supply. In the year 1836, doubts having been raised at meetings of the Town-Council by certain members of that body as to the legality of the existing mode of appointment, the opinion of counsel was taken upon the subject. In conformity with the opinion returned, and with the view of trying the general question of the legality of the appointment of the stentmasters from 1818 to 1836, the Council procured one Robert Winter, jeweller, to present a bill of suspension, as of a threatened charge, for arrears of annuity assessment. The bill was reported on cases to the First Division, when the Court passed the bill, the Judges expressing an opinion that the appointment of stentmasters for the above period had not been made in terms of the statute. In consequence of the opinion thus indicated, the arrears of annuity-assessment, applicable to the years from 1820 to 1836, remained outstanding and

unrecovered. These arrears for the above period amounted, conform to No. 121. certificate from the collector of the assessment as at 9th July 1838, to May 28, 1845. £11,056 : 11 : 9½, exclusive of interest. It was alleged by the Minis-Ministers of ters, that the change in the mode of appointing stentmasters in 1818, Edinburgh v. was made without their knowledge or that of the rate-payers, and that Magistrates. they had not become aware of these irregularities till the year 1836—no party having any right to interfere with the Council in the performance of their statutory duty, and there being no means of knowing whether it was legally and regularly performed.

The Incorporation of the city of Edinburgh having become bankrupt, was sequestrated, at 1st June 1833, by the 3d and 4th Will. IV. c. 22.

Of date 27th October 1838, the then existing incumbents of the city churches brought an action against the Lord Provost, Magistrates, and Town-Council of Edinburgh, setting forth the above mentioned irregularities in the appointment of stentmasters, and that they were produced by the culpable neglect or omission of the Magistrates and Council to perform the statutory duty committed to them by the above recited statutes; that by their deviation from the course there prescribed, the Magistrates and Council in their corporate capacity were liable for all the consequence of their culpable neglect or omission, and their violation of the provisions of the statutes; that arrears of the annuity-assessment, applicable to the years from 1820 to 1836, to the extent of £11,056 : 11 : 9½, had been thereby rendered irrecoverable, and that "the pursuers, as beneficiaries, are entitled to the whole proceeds of the said assessment, having suffered loss and damage to the extent of this sum of arrears, in consequence of the culpable neglect and irregularities of the said Magistrates and Council, and are entitled to demand payment of the said sum from the Magistrates and Council, and to attack the estate and effects of the city liable for their debts, in satisfaction of this claim." That the defenders had then in bank a sum of £8000 remitted to them by the collector of the Leith revenues, which was deposited in the city's account for special purposes, and was not protected from voluntary alienation, or from the diligence of creditors by the operation of any Act of Parliament. The summons concluded for payment of £4908 : 4 : 9, being the arrears applicable to the years from 1833 to 1836, (the arrears for the preceding years being the subject of a claim upon the trust-estate, created by the statute sequestrating the city in 1833,) out of the free alienable revenues of the city, and particularly out of the above special fund of £8000.

The Magistrates and Town-Council stated the following amongst other defences to the action :—

(7.) The defenders acting in optima fide and gratuitously in the matter, and having followed the precise course which a previous practice of nearly twenty years had established, and having no directions or in-

No. 121. structions whatever to the contrary from the pursuers, are not liable in damages.

May 28, 1845.
Ministers of
Edinburgh v.
Magistrates.

(8.) Moreover, even if a claim for damages was maintainable at all, it is not maintainable as a claim against the Corporation or the corporate estate.

(10.) Generally, and on the whole matter, the defenders are not resting-owing the debt libelled, or any part thereof.

The statements made by the defenders in reference to the irregularities libelled in the appointment of stentmasters were as follows:—That in the year 1818, the full number of stentmasters existed, but in the course of that and the following year two vacancies were filled up by the Magistrates as commissioners of supply; and that these appointments were authorized by the Town-Council, and acquiesced in by all concerned. That during the period from 1819 to 1836, the successive Magistrates appointed stentmasters under the statute, &c., regarding the cess or land-tax, the stent-rolls made up by these stentmasters being, on final adjustment, adopted by all concerned in the annuity and other assessments, and acted upon by the collector of the annuity and poor's-rates: That, in 1833, a new set of Magistrates and Town-Councillors came into office, under the provisions of the Municipal Reform Act, when they found a body of stentmasters officiating under the statute, and, in the bona fide belief that they had been regularly appointed, they did not interfere with the persons thus in office; and no requisition was made upon them by the Ministers to appoint new stentmasters. Subsequent to the sequestration of the city, it was admitted that two appointments of stentmasters had taken place; but it was alleged that in the districts to which the stentings of these parties applied, there was little arrear of annuity for the years libelled left unpaid, which would, under any circumstances, have been recoverable. The defenders further averred, that no loss had been sustained by the pursuers, from the manner in which the stentmasters had been appointed, the average of the collectors of the annuity for the years libelled on from 1833 to 1836, being greater than that for the two succeeding years of 1837–8, when the irregularity in the former mode of appointment had been rectified.

The Lord Ordinary ordered cases, and thereafter pronounced this interlocutor:—"Sustains the seventh, eighth, and tenth defences, as sufficient to elide the action, and therefore assolvies the defenders simpliciter: But, in the circumstances, finds no expenses due." *

* "NOTE.—The Lord Ordinary, after repeated and most anxious consideration of the important questions stirred between the parties, has come at last to be satisfied that the action cannot be maintained.

"1. He is of opinion that the trust for behoof of the Ministers, created by the statute, is not a trust in which the general community or corporation of the burgh

The Ministers having reclaimed, their Lordships of the Second Division appointed the case to be argued in presence of the whole Court. No. 121.

May 28, 1845.
Ministers of
Edinburgh v.
Magistrates.

can be considered as the trustee. In this view the analogy afforded by *Pearson of Balmadie's case* (Dict. 13098) is important; the taxation here, as there, 'not being imposed upon the town's common good, but upon the inhabitants severally, for their money, and the Magistrates not being countable to the town for the taxation of money.'

"It is very true that the statute appoints, as trustees, the official persons constituting the Magistrates and Council. But from this it does not necessarily follow, that these parties represent the community in administering the trust so conferred. If a private party were to mortify certain lands for behoof of the clergy, and vest the administration of this estate in the Magistrates and Council, it is clear that the latter would not represent the community in the discharge of their proper trust functions, and, consequently, that the community would not be answerable for the manner in which they should either execute or fail to execute their office. Does it make any difference that the trust is created, not by a private party, but by an act of the legislature. In point of principle, the Lord Ordinary cannot think it does. The Magistrates and Council represent, and are entitled to bind the community, only in what concerns the administration of the common good, which is the estate of the community. But they do not represent the community in the administration of such a tax as the annuity-tax, which forms no part of the common good, and affects no direct interest of the community in that ordinary relation in which the Magistrates and Council stand towards them as their administrators, but which, on the contrary, wholly and exclusively belongs to the Ministers, and as such falls to be administered in the sole and undivided right, not less than for the sole and undivided behoof of these same Ministers. In such a case, the Magistrates and Council properly are administrators for, and represent the Ministers only. They are not administrators for, nor do they represent the general community or corporation of the burgh.

"On this ground, without going further, the Lord Ordinary is prepared to adopt the rule laid down in *Balmadie's case*, that the community or corporation is 'not liable for their Magistrates, who had not this power by their office,' (i. e., not apart from the statute, and as a natural adjunct and necessary condition of their office,) 'but by the Commission of Parliament therefor.'

"And, indeed, when the whole frame and structure of the statute, as regards the duties thereby imposed, are considered, the conclusion thus arrived at comes out in the clearest light; for, by the terms of the statute, it is not solely upon the Magistrates and Council that the duty of appointing stentmasters is laid. It is laid upon them in combination with the College of Justice. And though no doubt, from some cause foreign to the construction and intendment of the statute, the College of Justice has come practically to be dropped out of the combined trust which the legislature had it thus in animo to create; still, that which is but an accident in the case, does not and cannot affect the character of the trust itself, as that trust was originally constituted on the face, and according to the conception of the statute. Now, just suppose that the College of Justice, instead of no longer taking a part, had been from the outset, and was still, in active co-operation with the Magistrates and Council as to this matter of the stentmasters—and it is asked, would it be possible to separate that mere portion of the duty which fell to the Magistrates and Council, as if it constituted by itself alone a distinct trust to be administered for the corporation of the burgh? On the contrary, is it not clear that the statutory trust implies the existence and combined operation of a complex and heterogeneous body, all the several parts of which are, in their respective places, to act for behoof, not of the burgh, but of the Ministers, as sole beneficiaries. Plainly, therefore, in this its first and original combination, the statutory trust was not a trust of which the burgh as a corporation (seeing the burgh could never be represented by any body, whereof the College of Justice formed a part)

No. 121. The Magistrates and Town-Council argued, 1. That the duty of appointing stentmasters under the statute having been imposed upon
 May 28, 1845. Ministers of
 Edinburgh v.
 Magistrates.

was to be regarded as administrator. But if so, how is it possible that the mere disappearance of the College of Justice out of the combination, should operate a change in this respect? If the burgh, as a corporation, was not administrator of the trust when the Town-Council and the College of Justice were acting, as they were intended to act, in conjunction, it surely is not more to be considered so, now that in carrying the very same trust into execution, the Council has, by an unlooked-for accident, got to perform both its own proper functions, and those of its co-trustee, the College of Justice.

"This view clears the question of all difficulty which might otherwise seem to arise from an argument which has been reated on the supposed analogy of such cases as *Innes*, 6th February 1798, Dict. 13189, and those others referred to by the pursuers, where the corporations and common good of burghs have been subjected for the escape of prisoners from the burgh jails; for, in all such cases, the radical obligation lay upon the corporation itself, and the Magistrates and Council, &c., merely acted as the corporation's representatives and administrators in the special matter. Of course, if a corporate body, in a proper concern of its own, be compelled to use the agency of its office-bearers, it must, by familiar application of the maxim, '*qui facit per alium, facit per se*,' be responsible for the actings of these office-bearers within their delegated province. The distinction here is, that the statute imposes no duty, and consequently no obligation on the corporation; that the Magistrates and Council consequently do not act by delegated authority from, or at all as representing the corporation; and, therefore, that the whole ground and basis of liability as against the corporation, which existed in the cases referred to, are here wanting.

"In truth, if there be an argument from analogy, at all afforded by the cases in question, it would seem to fix the Magistrates and Council as representatives and administrators not of the community, but of the Ministers themselves. For the Ministers being sole beneficiaries under the statutory trust, and it being for their exclusive behoof that that trust is operative, it follows that, on the same principle on which the Magistrates and Council bind the corporation, in all matters in which the corporation is their constituent, they must equally bind the Ministers in matters connected with the annuity, in which the proper constituent is the latter body. For example, if in enforcing payment by diligence from any of the tax-payers, an accidental error or irregularity were to take place, whereby the diligence was rendered illegal, is it possible to maintain that the damage thereby arising should be thrown on the common good, instead of upon the annuity fund, which it was the object of the diligence, as a diligence for behoof of the Ministers, and not at all of the community, to enforce.

"2. In the next place, even though the community (as acting through the medium of the Magistrates and Council) were to be regarded as the trustees, the Lord Ordinary would still be of opinion, that in the admitted, or at least undisputed circumstances of the case, there is no ground for subjecting them to damages.

"To bring out such a result, a case would require to be made against them, of such a gross malversation as would be sufficient, in the case of an ordinary trust, to subject the individual trustees in personal liability.

"The Lord Ordinary does not think it reasonable to visit the blunder that has here been the ground of action with such extreme severity. The character of the trust, taking it in all its bearings, he holds substantially to have been, as regards the proper corporation of the burgh, and the proper corporate officers and estate, of gratuitous execution, and, as such, to fall within the category, in reference to which it is laid down by *Erskine*, (3, 1, 21,) that '*where only one of the parties is benefited by it, the other is liable only de dolo, vel lata culpa, i. e. for dolo or for gross omissions, which the law construes to be dolo*;' or, as he etc-

them not as a corporation, but in the character of a separate parliamentary body of trustees, no claim, arising out of the alleged irregularities in

No. 121.

May 28, 1845.
Ministers of
Edinburgh v.
Magistrates.

where (3, 3, 36) expresses it, 'only for actual intrusions, or for such diligence as he employs in his own affairs.'

"Now, tried by this standard, it is clear, in the first place, that there was here no dole in the proceeding of the Magistrates and Council. In the next place, as it appears to the Lord Ordinary, neither was there that *crassa negligentia quæ equiparatur dolo*. For how stand the facts? 1. The statute lays down no precise rule as to the nomination of stentmasters; and, 2. In the absence of any such, both parties are agreed that usage has fixed—not that there shall be an annual election to the effect of renewing *de anno in annum*, the entire body or even any stated portion of their number; but, on the contrary, that a stentmaster, once elected, continues so indefinitely, and that it is only when a vacancy happens to occur that it becomes necessary, in the individual case, to take steps for filling up the blank. Now, keeping this in view, observe—3. That, when subsequent to the city's bankruptcy, (and the present question does not carry back further,) the Magistrates and Council of 1833 came to have charge, they found the roll of stentmasters complete. There was no vacancy which called for any active interference on their part, or which even had the smallest tendency to turn their attention, directly or indirectly, to the matter. The existing stentmasters, besides, were in the full and unchallenged exercise of their office;—not a whisper of complaint or objection, either as regards the regularity of their appointment, or their competency to discharge their duties, having been breathed from any quarter. Add to all this, 4. That the system of nomination, such as it was, had itself stood unchallenged and uninterrupted from 1818 downwards—a period of fifteen years; and, 5. That the same system had been operative during all this time, in regard to the stenting of cess, and the assessment of poor's-rates, not less than in regard to the Ministers' annuity.

"The Lord Ordinary cannot conceive a case more thoroughly exclusive of either dole or gross negligence, or rather a case, on the contrary, more thoroughly exclusive of the most perfect *bona fides* on the part of the Magistrates and Council, than is here presented. It appears to him, that even the acquiescence of the Ministers in the system that had been in action for so long a period, is itself a sufficient excuse (if such were wanted) for the Council's not interfering to upset the machinery which had been handed over to themselves as a thing already perfect, and answering all its proper purposes. At all events, if the Ministers deemed a change essential, it was surely their business—where no vacancy had occurred, to call the Council's own attention to the matter—to intimate that such was their wish. If the Council, being so put upon their guard, had refused to comply, that might have raised a very different kind of question. But they were allowed to go on without requisition, or even the most distant hint or suggestion of a wish that they should alter the existing course of procedure. It has been said that the Ministers were themselves in ignorance that there was any thing wrong, as they knew nothing of the Council's proceedings, and had no power to interfere with any thing they did. But were they entitled to be thus ignorant of what so nearly concerned themselves? And was it not their duty, as it was undoubtedly their right, to interpose if they intended to fall back upon the Council with a claim of damages? The present action shows that the means of an efficient control were within their hands. And so standing the case, the Lord Ordinary cannot regard those years of tacit acquiescence on their part as a matter so easily to be got over as has been attempted in the argument.

"The Lord Ordinary, however, is aware, that in 1834 the Magistrates and Council did fill up one vacancy, and again in 1835 other two, which had by that time occurred in the list of stentmasters. But this does not materially affect the case. For, 1. As the stent-roll is made up by separate survey and valuation 'in

No. 121. the mode of performing that duty, could be made against them as representing the community, or to the effect of making the funds of the corpo-

May 28, 1846.
Ministers of
Edinburgh v.
Magistrates.

everie parochie,' it could only be as regards those portions of the roll which applied to the particular parishes wherein these vacancies were filled up, that any speciality of this kind could touch the argument; and if the defenders be right in stating that in these parishes 'there was little arrear of annuity for the years libelled on left unpaid—indeed scarcely any that would in any circumstances have been recovered'—the thing could in any view be but of little consequence. 2. The Lord Ordinary, however, is rather disposed to refuse effect to the speciality altogether, on the broad ground that any error committed by the Council, as regards the vacancies in question, being in conformity with the unchallenged system of appointment, which they found in action when they came into office, was not, in the circumstances, sufficient to lay the ground for personal liability, (so far as that expression can be applied to the case of a corporation,) in the shape of a penal claim for damages.

" 3. The Lord Ordinary has not, in the preceding observations, rested any thing upon the principle recently so well illustrated by the decisions both of the House of Lords and the Court, as to the liability of such bodies as road trustees, police commissioners, &c., though here, too, there is much that has an adverse bearing on the pursuers' argument. For as, on the one hand, the pursuers, upon this principle, could not be subjected personally, or in the annuity fund as their peculiar and proper estate, for the consequences of any illegal proceeding of the Magistrates and Council as their trustees, carried through in face of their statutory powers; so, on the other, neither ought the corporation or general community of the burgh to be subjected in their proper estate or common good, which the same Magistrates and Council are not less bound to administer in a legal and correct manner, and equally powerless to bind for any proceeding in breach or excess of their legal powers as its administrators. In administering the common good, the Magistrates and Council are just as much trustees for the corporation or general community, as in administering the annuity they are trustees for the ministers. And, of course, this trust-estate must in their hands, *pari ratione*, be protected from the consequences of their illegal and unauthorized acts, just as much in the one case as in the other. In truth, if the pursuers be right in representing the proceedings of the Council, as proceedings so deeply tainted by that *crassa negligentia* *quæ æquiparatur dolo*, the estate of the corporation ought no more to be involved in the consequences of this dole on the part of their administrators than the estate of the ministers. *Culpa tenet suos auctores*.

" 4. The Lord Ordinary is satisfied, that under the present libel, the pursuers cannot avail themselves of any special argument for the liability of the defenders, founded on the contract 1815. The action is wholly laid upon a breach of the statute. But, at any rate, the contract was not intended to enlarge, or in any way alter or affect the fundamental ground of liability rested on the statute. It merely repeats the obligation which the statute itself, as construed by the judgment of the Court in 1814, had imposed—viz. to account for the produce of the annuity as it shall be levied.

" 5. Neither has the Lord Ordinary found it necessary, according to the view of the case on which the judgment proceeds, to consider the effect of the decision pronounced in the Bill-Chamber in Winter's case. For all the purposes of the judgment, it may be assumed that that decision would, in its substance, have been repeated upon the expedite letters. Indeed, were the Lord Ordinary to offer an opinion on the subject, that opinion, as he is at present advised, would be, that as regards the mere charge under suspension, the decision must have been so repeated. At the same time, it is perhaps not wholly free from question, whether, when the statute says that of the stentmasters 'two shall be citizens to be chosen and sworn be the Town-Council, and other two shall be nominat, chosen, and sworn be the Colledge of Justice, or such as they shall appoint,' these words, 'such as they

ration liable.¹ 2. Even assuming that the appointment of stentmasters was a duty imposed upon the defenders as representing the community, still that duty being gratuitous, the negligence or omission on which the action was founded were not of such a character as to warrant the present claim for reparation.²

No. 121.
May 28, 1845.
Ministers of
Edinburgh v.
Magistrates.

The Ministers argued, That the administration of the annuity-tax had been imposed upon the Magistrates and Town-Council in their corporate capacity of representatives of the community of the burgh. The duty thus imposed upon them was not gratuitous, but of a highly onerous character—the Corporation having received an important benefit, in the establishment of a numerous body of clergy for the religious instruction of the community; in the relief which the imposition of the tax afforded to the common good of the burgh, which had previously been burdened with the stipend of the city clergy; and in the gift of the patronage of

shall appoint,' do not properly carry back and apply to the Council as well as to the College of Justice—in which case there might be much to say in support of the appointment, which was actually made by the Magistrates in the present case, it being substantially an act of delegated power. Be this, however, as it may, the Lord Ordinary is certainly not prepared to hold, merely because there was in such case as Winter's no legal warrant for the summary charge that was brought under suspension, that therefore the annuity-tax, as imposed by the statute, became, to all intents, and in every shape whatsoever, unleviable. This is a most important question, not merely as regards the annuity, but as it may possibly come to touch both the cess and poor's-rate, and consequently it would deserve the most deliberate consideration, before pronouncing any definite judgment in regard to it. At present, it is fortunately unnecessary to enter further into the subject.

"6. In conclusion, the Lord Ordinary has only further to observe, that had he taken a different view of the law of the case from what he has done, he must have put the whole question before a jury, as in an ordinary claim of damage. He has no idea that the pursuers could in any sense be entitled to decree, as for a liquidated debt, in terms of the stent-roll, which they themselves repudiate, and totally deny to rest on any acts legitimus. At best, they could only have such damage as, adopting Lord Kames' distinction between the cases of debts liquidated and unliquidated, they could reasonably and fairly qualify on the whole matter. But in this view it is not doubted but that a jury would make all proper and necessary allowance for such ordinary deductions as the experience of former levies has, from time immemorial, shown to be unavoidable.

"The defalcations inseparable from the most favourable levy of a tax, which has to be gathered from the whole members of a large community, presents totally different considerations, both legal and equitable, in a question of failure in discharge, from any thing that is, or can be, presented in the case of a messenger's failure to execute as against one single individual a specific legal writ—or of the liability of magistrates for the escape from the burgh jail of an individual debtor, with reference to the one certain specific warrant on which he stood incarcerated."

¹ *Pearson v. Town of Montrose*, June 23, 1669, (Mor. 13098;) *Campbell v. Town of Banff*, Feb. 28, 1744, (Mor. 2505 and 2504; also *Elchies*, voce "Burgh Royal," No. 20;) *Duncan v. Findlater*, Aug. 23, 1839, (1 M.L. & Rob. 911;) *Com. of Police v. Mitchell*, July 28, 1840, (2 Robinson, p. 162;) Stat. 1597, c. 277; *R. and S. of Auchtermuchty*, May 22, 1827, (5 S. & D. 690; 2d Ed. 644.)

² 3 *Ersk.* 1, 21, and 3, 3, 36; *Kay*, Dec. 16, 1801, (*Hume's Descs.* p. 238;) *Grinnon*, Jan. 28, 1802, (*Ibid.* p. 329;) *D. of Hamilton v. Laird of Strichen*, Feb. 1666, (M. p. 13093;) *Stein v. Stirling*, Nov. 15, 1825, (4 S. & D. p. 178.)

No. 121.
May 28, 1845.
Ministers of
Edinburgh v.
Magistrates.

the city churches, and otherwise. The defenders and their predecessors in office having failed in the performance of their statutory duty, and having by their culpable neglect and omission rendered permanently irrecoverable large arrears of the assessment which they were bound under the statute to levy for behoof of the pursuers, they were liable officially, and in their corporate capacity, for the consequences of their culpable conduct and neglect of duty; and the free alienable revenues of the city, and the whole property of the incorporation, in so far as not protected by statute, and in particular the sum of £8000 above mentioned, were liable to be attached in satisfaction of the pursuers' claim.¹

The following opinions were returned by the consulted Judges:—

LORD PRESIDENT.—Looking to the earliest indications that are afforded of the origin and subsequent establishment of the cess or annuity of six per cent on the real rental of the inhabitants of Edinburgh, commencing in the articles proposed in 1625, between the sovereign and the city, which suggested its being levied in aid of the funds for the maintenance of the ministers, (as practised in London,) and the subsequent acts of the Privy Council, and the statute 1649, which, in reference to the pressure on the common good of the town, which had been applied in supporting the ministers, “in remeid thereof” sanctioned the assessment for the annuity; and which, after the Restoration, was followed by the Act 1661, which, after its very important preamble and recital, proceeds on the consideration, “that it is just and necessary that the same should be authorized and settled by an perpetual law in all time coming;” and keeping in view, that at the very time those arrangements were made for the sustentation of the ministers, the number of whom had progressively been increased, with the direct approbation of, if not by the suggestion of the sovereign, the Crown conferred on the Magistrates and Council and community of Edinburgh, the patronage of the whole of the churches—I cannot but be persuaded that the power of assessment, and collection of the impost, was by legislative authority conferred upon the corporation itself, as represented by the Provost, Magistrates, and Town-Council.

¹ *Authorities for Pursuers.*—Stat. 1579, c. 51, (Thomson's Stat. Vol. III. p. 169;) Stat. 1592, (same Vol. p. 582;) Calderwood, Vol. V. pp. 172 and 173; Woodrow, Edinburgh; Maitland's History of Edinburgh, B. III. pp. 273 and 274; Wilson and Hunter v. Hill, July 11, 1833; *Flethers of Edinburgh v. Turnbull*, 1835; *Dwarris on Statutes*, p. 775; *Rex v. Bailow*, (Salk. 609; Vern. 154;) *Rex v. Flockwold Inclosure Coms.* (2 Chitty, p. 251; *Dwarris*, p. 712;) *Ministers v. Magistrates of Edinburgh*, Jan. 19, 1763, (Mor. 7476,) and July 20, 1763, (Mor. 3969,) and Dec. 12, 1764; *Erskine*, App. I. 5, § 23; 1 and 2 Vict. c. 55, § 65, and sched. B.; *Innes v. Magistrates of Edinburgh*, Feb. 1798, (Mor. 13189;) 3 *Ersk.* 3, 14; 2 *Bell's Com.* 548; *Gray*, Dec. 7, 1780, (Mor. 11754;) *Shortreed v. Magistrates of Annan*, June 8, 1790, (Mor. 11760;) *Purdie v. Magistrates of Montrose*, June 29, 1786, (Mor. 11757;) *Gibbs v. Magistrates of Hamilton*, Nov. 13, 1833, (F. C.); *Gray v. Magistrates of Dumfries*, Dec. 7, 1780, (Mor. 11754;) *Anderson and Craig v. Magistrates of Renfrew*, July 6, 1764, (Mor. 11753;) *Kames' Select Decisions*, No. 219, p. 283; *Wilson v. Magistrates of Edinburgh*, July 8, 1788, (Mor. 11757;) *McMillan v. Gray*, March 2, 1830, (F. C.); *Lily v. McDonald*, Dec. 13, 1816, (F. C.); *Affirmed on Appeal*, July 2, 1819, (1 *Bligh*, p. 340;) *Chatto and Co. v. Marshall*, Jan. 17, 1811, (F. C.); *Henly v. Burgh of Lyme Regis*, (5 *Bing.* 91.)

I can see no indication from any public documents to which we are referred, either prior or subsequent to the Act 1661, that the Magistrates and Council, in regard to this great boon provided for the benefit of the city, were looked to or dealt with merely as a board established by Parliament, or as a body of individual commissioners; neither can I hold, considering what was the true purpose of the legislative grant, that the duty of laying on the assessment, and collecting its produce from the whole inhabitant householders of the city, was imposed on any but the corporation or managers for the community, seeing that the Act clearly authorized the College of Justice to decline all interference; while, on their refusal, the Magistrates or Council are to carry the Act into full execution by themselves.

Neither can I concur in holding that the duty imposed upon the Magistrates and Council, as the known and legal representatives of the community, can be deemed as entirely gratuitous, when the whole history and purposes of this legislative grant are attended to. Upon the contrary, it seems to have proceeded manifestly upon onerous considerations—namely, the permanent security of the religious instruction of the community at large—the relief and assistance afforded to the common good of the corporation, which had previously been pressed upon for the maintenance of the clergy—and, lastly, the grant of the patronages of the whole city churches by the Crown. There is likewise complete evidence how the Act 1661 had been carried into execution, from its date downwards—the sole duty of assessing and collecting the impost having been performed by those appointed by the Magistrates and Council on behalf of the community; and it appears from the terms of the contract entered into between the Ministers and Magistrates of Edinburgh in 1815, after the judgment of 1813, that the expense of collecting the annuity (that is a proper salary, I presume, for the collector) had been in use to be deducted, as the sum which they had claimed on that account is contemplated as still claimable as a deduction.

The duty of collecting seems to have been devolved on the same person that collected other of the city's revenues, as a part of the vested rights of the community; and so far the office came also under the city's patronage.

If the duty imposed by the Act 1661, then, was not a private or gratuitous one, which attached merely to the Magistrates or Councillors as individuals, or as Parliamentary commissioners, but was in reality a public onerous duty imposed upon them, as the legal representatives of that community over whose affairs they presided as its constitutional guardians, and who were in this case peculiarly entrusted with the administration of a valuable grant conferred by the legislature in aid of its revenues or common good; it seems very plainly to follow, that if in the performance of that duty injury and loss to the beneficiaries in that grant have arisen, from neglect or omission of what was absolutely necessary to make it available, such injury and loss ought to be repaired from the funds of the community at large, according to those principles of law that are recognised both in our own law and that of England.

I do not, therefore, consider that the present case can be viewed as in any degree affected by what is maintained as the clear rule of law, that in ordinary circumstances the common good of a burgh is not liable for the stipends of its parochial clergy—because the present is a very special case, and to be viewed in relation to the original grants by the Crown after the Reformation, of the Popish funds and revenues in favour of the city of Edinburgh—and the various arrangements and legislative provisions that were subsequently made in aid of those grants, as well

No. 121.

May 28, 1845.

Ministers of
Edinburgh v.
Magistrates.

No. 121. as in relief of the common good, which had de facto come to be applied for the support of the various ministers that had been added to the city's establishment with the approbation of the sovereign.

May 28, 1845.
Ministers of
Edinburgh v.
Magistrates.

As to the effect, again, of the judgment of the Court in 1813—keeping in view the nature of that action and its conclusions, which were directed against “the Magistrates and Council for themselves, and as representing the whole community of the said city,”—it is certainly true that it finds, “that the ministers of Edinburgh have the sole interest in, and exclusive right to, the entire produce and benefit of the annuity libelled of six per cent.” This seems a correct finding, that the whole annuity was set apart by the legislature for the exclusive support of the clergy, and was not liable to be mixed up with the other funds of the city. But it is to be observed, that the judgment at the same time expressly finds, “that the defenders are liable to hold compt and reckoning with the pursuers and their successors for the produce of said annuity since the date of citation to this process and in all time to come, and to pay over the same to them termly and yearly, libelled, and decern; but, of consent of the pursuers, assoilzie the defenders from the claim of, and for the arrears of said annuity, preceding the date of citation, and the admission of any of the pursuers to the benefice.”

Now, looking to the whole circumstances of this litigation, and the attention which the Court, from the opinions that were delivered, evidently bestowed on every word of the Act 1661, as well as all the other documents founded on by the parties, both prior and subsequent to its date, the above express finding cannot be overlooked in regard to what is to be held as the true construction of that statute. The annuity is secured by the legislature for the benefit of the ministers of the city; but the defenders, who are called both to answer for themselves, and as representing the community, are found to be bound to hold compt and reckon with the ministers for the produce of that annuity in all time coming, and to pay over the same to them. After such a finding, pronounced in 1813, and ever since acquiesced in, are the same defenders entitled to maintain, that, though a considerable portion of that annuity has been lost by an act of negligence on their part, which we must now hold was the case, the ministers of Edinburgh are not to be made good that loss made good to them from the funds of the community?

The opinion of Lord Robertson embraces so fully and ably the various grounds of that which I have formed on the case, that I have only to add my entire concurrence with his Lordship.

LORD FULLERTON.—I concur in the opinion of Lord Robertson, and generally in the course of reasoning by which that opinion is supported.

It does not appear to me, that the determination of the question is much aided by a critical examination of the sources from which the various rights and duties of the incorporation, in regard to the matters in dispute, have been at different times derived. The important point is, the combined effect of those various rights and duties in ascertaining the true relation, subsisting for nearly two centuries between the city of Edinburgh in its corporate character, and the ecclesiastical establishment of the city.

Though it appears from the various documents referred to, that at an early period the ordinary resources of the incorporation were inadequate to the maintenance of the ministers, and that various schemes were devised to raise funds in aid or relief of the corporate property, it also appears from those very documents, that the support of the ministers of the burgh was considered, even at that period

as a proper municipal burden, to which the common good might have been applied. No. 121.

The best of all evidence that this involves nothing adverse to the law and practice of Scotland is, that the ministers of burghs, with a very few exceptions, have been and are at this moment so supported. Again, the Magistrates and Council, as representing the town, obtained in 1636 the grant of the patronages of all the livings in the town. Holding, then, the patronages, and having the duty to provide for the clergy in so far as the corporate funds would allow, the town got, by several successive grants, terminating in the Act 1661, the means of defraying the stipends of the clergy by an assessment on the inhabitants. And it is of some importance to observe, that the duty of collecting this assessment, and paying it over to the clergy, was not imposed on the corporate body without their full concurrence. It was indeed a duty voluntarily undertaken by that body, to the exclusion of the ministers themselves, who, but for the interference of the town, might have collected the tax for their own benefit, by persons under their own authority.

May 28, 1845.
Ministers of
Edinburgh v.
Magistrates.

The Act 1649, ratifying the former grants of the annuity, and authorizing the levy of a larger sum for the support of the number of ministers, to be increased from six to twelve, provides that "the said imposition shall be always collected by the deacons of the kirk, to be delivered to the treasurers of the kirk-sessions, and it is not to come into the hands of the Town-Council, nor to be applied to any other use than is above written."

By the Act 1661, that which has since regulated this matter, an alteration was made to the following effect, viz. that the imposition "shall be collected by the deacons of the kirk, or by a collector appointed for that purpose by the Magistrates and Council of the said burgh, at their option, and as they shall think fit and expedient for the time."

Now, it appears that the Magistrates and Council exercised this option; and have ever since taken the duty of levying the imposition on themselves. Indeed, so completely was this taken out of the hands of the ministers, that, until the judgment of this Court in 1813, the Magistrates and Council dealt with the annuity-tax as part of the common good of the burgh, subject only to the payment of what was considered a reasonable stipend. This last misconception of the statute was corrected by the judgment in 1813, finding that "the ministers of Edinburgh had the sole interest in, and exclusive right to the entire produce of the annuity-tax, and that the defenders are liable to hold count and reckoning with the ministers for the produce of the said annuity since the date of citation, and in all time coming."

While the produce of the annuity, then, belonged to the ministers, the obligation of levying it was laid, or to speak more properly, had been voluntarily assumed by the Magistrates and Town-Council, to the exclusion of the parties properly interested; and accordingly, in the various statutes for extending the royalty, in particular the latest, that of 7 Geo. III. c. 27, the Lord Provost, Magistrates, and Council, and their successors in office, are authorized and empowered "to levy, as they have hitherto been in use to levy, the said annuity of six per centum upon the yearly rents of all inhabited houses, shops, booths, cellars, and premises within the said city and royalty thereof."

Such being, then, the construction which the Act 1661 has received in practice,

No. 121.
 May 24, 1845.
 Ministers of
 Edinburgh v.
 Magistrates.

I do not see how the question now depending between the parties can be affected by the peculiar provisions of the statute, conferring a joint power in appointing the stentmasters on the College of Justice. Those provisions have been, in so far as I understand, a dead letter from the very commencement. It is just as useless now to enquire how far they might have affected the obligations of the Town-Council, as it would be to enter into any similar enquiry as to the effect of the clause authorizing the collection to be made by the deacons of the kirk. It is enough to state, that neither of these provisions have been acted upon; and that, by immemorial practice, the Magistrates and Town-Council have exercised the power of levying the tax, through the means of a collector and stentmasters exclusively appointed by their authority.

It has turned out that, in consequence of an error committed in the appointment of stentmasters in the year 1818, and the succeeding years, the levy of the tax has been frustrated. And the question raised in these pleadings truly comes to this, whether the Magistrates and Town-Council, as representing the burgh, are, in accounting with the ministers under the Act 1661, interpreted by the judgment pronounced in 1813, entitled to take credit for that deficiency in the tax, which is imputable to their own error in the nomination of the stentmasters; or are bound to make good that deficiency? For though the action involves, in form, a claim for loss and damage, that damage is nothing but the amount of the arrears of the tax, which have been rendered unavailable to the ministers, by the omission of the defenders to obey the directions of the statute in regard to the mode of collection. It is truly, then, a point in the accounting, and nothing else.

Now, considering this to be the true state of the question, and I am not aware of any impropriety in so representing it, the claims of the ministers appear to me to be irresistible. The ministers of Edinburgh, entitled to certain pecuniary rights, available through the medium of an assessment on the inhabitants, are appointed by the incorporation as patrons. For I do not see that, in this particular, there is any attempt to distinguish between the incorporation and its organs, and to represent the Magistrates and Council as a mere commission for the nomination of ministers. But, again, the corporation—the town in its corporate character—has undertaken the duty of levying the assessment, to the exclusion of the ministers themselves, who, but for the exercise of the option by the town, might have exercised it directly through the medium of the deacons of their different churches. I say the town in its corporate character; for I can see no greater reason to distinguish between the corporation, and its organs the Magistrates and Town-Council for the time being, in this matter, than in that of the patronage. To be sure, it is “the Provost, Magistrates, and Council” who are called on to levy the assessment, just as they are to name the ministers; because, if any thing is to be done, or undertaken to be done by an incorporation, it must be so done or undertaken through the medium of its organs, by whom alone it possesses the means of action. Cases may, indeed, occur in which there is room for a distinction, and in which the individuals who happen to be for the time being the organs of the incorporation may have powers conferred upon them, distinct from the proper corporate rights which they administer. But to support such a view, there must be clear evidence that the distinction was intended—clear evidence from the terms of the grant, and above all, from the nature of the right itself, that they are not

called upon to act as representatives of the incorporation, but as individuals merely selected on the principle of their filling certain public situations. This holds, for instance, in all those nominations of the Magistrates or members of a Town-Council to act in the administration of charitable institutions. They are just *ex officio* appointments, in which the individuals happening to hold those offices for the time are appointed by the founder as individual members of the administrative body of the charitable trust, and in no other character.

No. 121.

May 28, 1845.
Ministers of
Edinburgh v.
Magistrates.

But can this be said of a case like the present, in which the burgh is the patron, and the burgh, named in the ordinary way, under the description of its Magistrates and Council, is called upon, and has undertaken to collect and levy the assessment for the payment of the ministers named by them as patrons, to officiate as the ministers of the burgh? For it rather appears to me that the nature of the duty imposed on or assumed by the Town-Council, in regard to this assessment, is much understated, when it is described as confined to the appointment of stentmasters. The most important part of their duty was the collection of the tax; which was placed at their option, and was assumed, in virtue of that option, by the burgh in its corporate character. For I cannot read the words in that clause of the statute to any other effect. The assessment is to be "collected by the deacons of the kirks," "or by a collector to be appointed for that purpose by the Magistrates and Council of the said burgh, in their option." In whose option? Surely that of the Magistrates and Council of the burgh, in their representative character; and not the option of the individuals who happened at any particular time to fill those situations, and who, but for their official character, could have no conceivable interest to interfere, and certainly had no authority to determine any thing in the matter. In short, I think the case is exactly the same as if the Magistrates and Council had met and determined, as they very naturally might have done, that it was more expedient that the assessment on the inhabitants should be levied by the town, than left to the deacons of the kirk.

But, indeed, all doubt upon this point seems to me to be removed by the terms of the subsequent statutes, and, above all, by the judgment in 1813. The action in which that judgment was pronounced was clearly directed against the burgh in its corporate character, represented, of course, by the Magistrates and Council. In the leading conclusion of the summons they are described "as the Lord Provost, Magistrates, and Town-Council of the said city, for themselves, and as representing the whole community of the said city." The conclusion for the future accounting is directed against "the defenders, their successors in office, or the Lord Provost, Magistrates, and Council of the said city of Edinburgh." And by the judgment, "the defenders" (*i. e.* the Provost and Council, as representing the whole community of the said city) "are found liable to hold count and reckoning with the pursuers for the produce of said annuity since the date of citation, and in all time to come."

And this view of the character in which the defenders appeared is confirmed by the contract which was executed in 1815, for compromising the remaining parts of the cause, and which was entered into by the ministers on the one side, and on the other by the Lord Provost and Magistrates, "for themselves, as present Magistrates of the city of Edinburgh, and for the whole Council and community of that city, defenders in said action." The latter bind themselves, from and after the expiration of certain terms, "to be accountable to the ministers for the whole produce of the funds awarded to them by the Court of Session," &c.

No. 121.

May 28, 1845.
Ministers of
Edinburgh v.
Magistrates.

Now, it does appear to me quite irreconcilable with all sound or reasonable construction, to hold, in the face of these statutes, and that judgment, confirmed as it was by the contract, that the words "the Lord Provost, Magistrates, and Town-Council," were not meant to design the burgh in its corporate character, as represented by its recognized organs, but denoted merely the set of individuals who happened for the time being to hold these situations. So far from there being any evidence, or even ground for presuming such a distinction, every thing—the express terms employed, the relative situation of the parties, and the subject of these various enactments and proceedings—combine in supporting the contrary conclusion.

Holding, then, that it was the burgh, in its corporate character, which, through the medium of its lawful representatives, the Magistrates and Council, originally assumed, in virtue of its option, the levy and collection of the assessment; and which now, by the force of that option, confirmed by the practice of nearly two centuries, by statutes, and by a solemn judgment of the Court, as well as express contract, is bound to account for its whole produce to the ministers; the next point is equally clear, that the whole machinery for enforcing the payment of the tax was under the same guidance, that of the Magistrates and Council; who are directed to appoint the stentmasters, and who did continue to appoint those stentmasters until the year 1818—a fact which is admitted by the defenders themselves. From that period, by some mistake or oversight, the statutory mode of appointing stentmasters was departed from; in other words, there was no legal appointment of stentmasters to warrant the levy of the tax; and in consequence the arrears have become irrecoverable, and the ministers have to that extent been losers.

It seems to me to follow necessarily from these premises, that as the Magistrates and Council, as representing the community, were bound to levy and account, they must also in that character be liable to make good the deficiency. It is to that extent, and no more, that the claim of the pursuers is made. They are only calling on the defenders to make good what has been lost by their failure to do their duty. And though a party, in the situation of the defenders, may not be liable in absolute warrandice—may not be responsible for the ultimate solvency of the rate-payers, or even for that of the collector, if ostensibly solvent when appointed—such party must be liable in warrandice of his own fact and deed—viz. that he shall not defeat the assessment by failing to do that which he is bound to do, and which he has the means of doing.

In such a question as this, it does not appear to me that there is any force in the objection urged by the defenders, that, in regard to the corporation and the common good, the collection of the annuity-tax was gratuitous.

In the first place, I think that if the obligation to collect and account is validly laid on the town by statute, followed up by the judgment of the Court, and by the contract of 1815, that obligation must be performed, under the penalty of the ordinary legal consequences of failure; independently altogether of its origin or onerosity. And the objection appears the more misplaced, when it is considered that in its origin it was the burgh, which in virtue of the option undertook the collections, and thus interposed itself between the ministers and the rate-payers.

2dly, I must be permitted to question the proposition so confidently assumed by the defenders—viz. That the duty undertaken by the incorporation in this matter is to be considered as gratuitous. In so far as the pursuers, the Ministers of Edinburgh, are concerned, it was clearly onerous. The collection and distribution

No. 121.

May 28, 1845.
Ministers of
Edinburgh v.
Magistrates.

of the assessment was, in regard to them, the consideration for which they, when called on by the incorporation as patron, afforded their ministerial services to the community. And I think that this is just one of the cases, in which services rendered to, or advantages acquired by, the individual members of the community, are to be held in law as so rendered to, or acquired by, the corporate body. The body incorporated is the whole community, including all the individuals of whom it may at different times be composed. It is solely for the benefit of the community, so composed, that the incorporation is created, and is entitled to exercise power, and to acquire and hold funds; and there are obviously many services and obligations which can be rendered or performed to the burgh or corporation, only through the medium of the individual members of the community. If the incorporation, for instance, had contracted for a supply of water to the community, or for the completion of any other public work conducive to the comfort and convenience of the inhabitants, and had undertaken the obligation to levy the assessments for defraying the expense, could it have been said, with any show of reason, in a question with the contractors, that this duty was purely gratuitous, because it was the inhabitants, and not the incorporation, who were individually deriving the benefit? I cannot adopt that view. I think, on the contrary, that these form a class of cases, in which services, though rendered to individuals, are, in a question with the incorporation, (constituted for no other purpose but that of benefiting the individuals composing the community,) services rendered to the incorporation; and, consequently, that any obligation come under by the incorporation, in regard to the purchase of those services, is truly to be considered as onerous.

And it is in relation to this view of the matter, that I think the circumstance of the patronage does bear materially on the question. The Magistrates and Council, as representing the community, have called these gentlemen to the discharge of their ministerial duties in the city, under the condition that they were to draw the amount of their assessment from those very Magistrates and Council, who, in the same representative character, are bound to levy it, and to account. Having thus got the benefit of those services, it would be a strange anomaly in the law of obligation, if they were not bound to make good that which has been lost solely by their own neglect. For it is to that effect, and no more, that the present claim is insisted on. It is nothing but a question in accounting; and by the ordinary rules of law applicable to such cases, the loss must fall on the defenders, the party by whom it was occasioned.

There only remains to be considered the other objection, which has been very strongly pressed by the defenders, namely—that this is an attempt on the part of the pursuers to render the incorporation and the common good of the burgh liable for the error, neglect, or omission of the individual members of Council for the time being; an attempt which is said to be at variance with the principles of law, as attested by various decisions. Now the first thing that must strike one in the objection, thus broadly stated, is, that if well founded it would at once extinguish the possibility of an incorporation contracting effectually any obligation whatever *ad factum præstandum*. As observed before, if any thing is to be done by an incorporation, it can be done only through the instrumentality of its legal organs; and if their failure to perform does not affect the incorporation itself, the necessary consequence is, that the obligation must be a dead letter; because, quoad the corporation, there never could be any failure inferring a corporate responsibility. In short, it would just involve the proposition, that no obligation *ad factum præstan-*

No. 121. dum could be an obligation on the incorporation, or be any thing but an obligation upon the individual administrators.

May 28, 1845.
Ministers of
Edinburgh v.
Magistrates.

Now, such a proposition as this appears to me to be entirely unfounded. It is true there often may be questions, how far the acts, or failures to act, on the part of the individual administrators, bind or affect the corporate body. There may be services or duties so purely and absolutely personal, in relation to the individual Magistrates or Council, that the incorporation cannot be affected or rendered liable for their neglect or non-performance. Such was the case in *Campbell v. Town of Banff*, in which an attempt was made to render the burgh liable for the negligence or breach of duty of the former Magistrates, "in having refused to adopt any means to restrain a mob, who had carried off a valuable cargo of meal from the pursuer's ship." There could be little doubt of the soundness of that judgment; as a burgh, though appointing magistrates, certainly does not incur a warrantice, that every individual so appointed shall act in every emergency with the judgment, promptitude, and vigour, which the case may require.

But this judgment lends no support to the general proposition in law, involved in the objection I am now considering; and it is instructive to observe, that that very proposition is directly negated by the explanation given in the report of the case:—"The only case in which a community is liable for the delict of their magistrates, is that of their suffering a prisoner to escape; which is founded upon this reason, that the burgh is by law bound to have sufficient prisons, and consequently is answerable for the keepers thereof." The circumstance of this being described as the only case of the kind, is of little importance. It seems to have been the only case of admitted liability which occurred to the Court; but as the Court assign the ratio for that liability, every case to which the ratio applies must be dealt with in the same way. Now, what is the ratio? It is "that the burgh is by law bound to have sufficient prisons, and consequently is answerable for the keepers thereof?" In other words, that when there is by law a specific duty to perform, laid on the burgh, the burgh will be liable for the failure of performance on the part of its administrators. For it is sufficiently obvious, that in regard to the escape of prisoners, whether that be owing to the insufficiency of the prison, or the negligence of the jailors, the failure is exclusively on the part of those through whom alone the prisons can be repaired, or proper jailors appointed. In short, the principle of the liability thus recognized by the Court, is one which I must consider as of general application to all that class of cases, of which I think the present forms one. When once it is established that a specific obligation *ad factum præstandum* is laid upon a burgh represented by its magistrates and town-council, the failure of performance, which in such a case can be nothing but a failure on the part of the individual administrators, will affect the corporate body; and that body being in law a person capable of contracting obligations, and of holding property, will be liable, on a breach of performance, to all those consequences which are by law attendant on a breach of obligation between private parties.

Accordingly this principle was recognized in the case of *Innes v. Magistrates of Edinburgh*,¹ which was much more unfavourable for the pursuer than the present, as it was truly, in the proper sense of the term, an action of damages. It is said

¹ M. 13189.

No. 121.

May 28, 1845.
Ministers of
Edinburgh v.
Magistrates.

that the point was not argued, which, if true, would only show that it was considered clear. Indeed, the only difficulty there was, whether there lay on the incorporation any such specific obligation as that on which the action was founded. The Court was unanimous in thinking that there was. According to the report, "One of their most important duties (it was observed) is to take care that the streets of the city are kept in such a state as to prevent the slightest danger to passengers. They are liable for the smallest neglect of this duty," &c. It being once held that this was a specific duty incumbent on the magistrates, as representing the community, it never seems to have occurred to any person that the community were to be free from the consequences, because the failure took place through the neglect of the individual administrators of the burgh.

And it is hardly necessary to observe, that the authority of this judgment was not in the slightest degree impaired by the decision of the House of Lords in the case of *Duncan v. Findlater*, and other cases of the same kind. In these last cases, there was no question with a corporate body capable of sustaining obligations and holding funds, and consequently capable of contracting a liability in regard to those funds, for the failure of performance. The questions there were with road-trustees, who constituted no separate constructive person in law, and who neither held nor could hold funds, except those specially appropriated by statute for certain purposes. Consequently, unless the trustees could be made personally liable, which was not attempted, there were neither parties nor funds against whom the claim could be sustained. Accordingly, the Lord Chancellor, in the case of *Duncan v. Findlater*, expressly made the distinction between those cases and that of mine—"The liability of the magistrates was indeed established, but upon grounds which have no application to the present case, as it rested upon the supposed duties of the magistrates of Scotch burghs."

The only other case, and which certainly has more relation to the question in dispute than any of those hitherto considered, is that of *Pearson v. Town of Montrose*, 1669. But, from the report, it would seem to have been one of very special circumstances, and I cannot think that it can be received as an authority against the grounds of liability upon which the present claim rests. It would appear from the statute 1633, c. 1 and 2, that, in the first place, the Provost and Bailies were to be charged to make payment of the tax and stent of the burgh to the collector; and that for their relief letters be direct, charging the Provost, Bailies, and Council in each burgh to appoint stentmasters, &c., and "to charge the burghes, indwellers, and inhabitants within each burgh, to make payment of their part of the said stent to the saids Provost and Bailies, conform to the tax to be given out thereupon."

Now it appears from the report, that the Magistrates of the town of Montrose, meaning, I presume, the Provost and Bailies, wrote a letter to Pearson of Balmudie, the sub-collector, promising count and payment; and he, upon the strength of that, made payment to Ormiston, the general collector. But nothing seems to have followed agreeably to the directions of the statute. The Magistrates, who had thus bound themselves, failed to take the steps authorized by the statute for their own relief, by charging the Provost, Bailies, and Council, that is, the body representative of the burgh, to stent the inhabitants, and by charging the inhabitants to make payment. But in the year 1654, nearly twenty years afterwards, Pearson the collector brought an action directly against the burgh, and the Court held the town and present Magistrates not liable.

No. 121.

May 28, 1845.
Ministers of
Edinburgh v.
Magistrates.

That case differs from the present in many essential particulars. In the first place, it would rather appear that it was only the Magistrates, viz., the Provost and Bailies, who were entitled to collect and to assess for their own relief of that tax, which they were in the first instance bound to pay. Secondly, They neglected to take that step which was indispensable to raise a liability against the burgh, namely, to charge the Provost, Bailies, and Council, that is, the representative body of the burgh, to stent the inhabitants. So that in that case, the observation that the tax was not laid upon the town's common good, was quite relevant; for, while the common good was not directly subjected to the tax, there had been no failure on the part of the burgh, through the medium of its representatives, to comply with the statutory directions, being the only other ground for rendering the burgh, in its corporate character, liable. To assimilate the cases, it would be necessary to suppose that, after the Magistrates had paid the tax, or the collector had undertaken to pay it in the first place, the Provost, Magistrates, and Council, i. e. the burgh, had refused to assess, or had so blundered the mode of assessment as to render it unavailable to the collector, or the party having a claim of relief.

But independently of that altogether, the main reason of that judgment was, that, in that case, the town was not liable for the act of the Magistrates, because the duty was not imposed on them as Magistrates, but as a Parliamentary Commission. I think it very doubtful whether that expression, "the Magistrates," meant any thing more than the Provost and Bailies, as distinguished from the Provost, Bailies, and Council. But, at any rate, that is a ground of decision which does not affect the objection now under consideration, but the former one—namely, that, in regard to the collection of the assessment laid on for the ministers of the burgh, the obligation lay on the Magistrates and Council for the time being, as individuals appointed by statute, and not as representing the community. Now, for the reasons formerly assigned, I cannot adopt that construction of the obligation. I hold in this case the necessary inference, from the terms of the statute, from the judgment of 1815, from the contract following on it, as well as from the relative situation of the parties, and the nature of the obligation itself, to be, that the duty of collecting and assessing the inhabitants lay upon the Magistrates and Council, as representing the community; and that having failed, from their own neglect, in performance of that duty, they are bound, in the same character, to make good to the pursuers the loss which that failure has occasioned.

LORD ROBERTSON.—The present is an action directed against the Magistrates and Town-Council of the city of Edinburgh, as representing the community, and for the purpose of affecting the property of the community, to the extent of recovering payment of the amount sued for. It is rested generally on the allegation, that, by the neglect and omission of the Magistrates to perform a certain statutory duty under the Act of Parliament 5th June 1661, and other Acts of Parliament, the annuity-tax belonging to the pursuers became irrecoverable, and therefore the conclusion is, that they are entitled to reimbursement out of the corporate funds. The leading defences are—1st, That the statutory duties in question do not in any degree affect the Magistrates as representing the community, but are imposed upon them as a separate Parliamentary body of trustees—and, consequently, no alleged breach of duty in violation of that trust can be competently founded on, in an action directed against the Magistrates and Town-Council as representing the community, and so as to affect the corporation funds; 2dly,

It is maintained that, even if the duty in question had been imposed upon the Magistrates, as representing the community, and consequently that the action was directed against the proper defenders, the duty was in itself gratuitous, and the negligence was not of such a description as to afford any ground of action. This second point goes to the relevancy of the action, assuming it competently directed against the incorporation.

No. 121.

May 28, 1845.
Ministers of
Edinburgh v.
Magistrates.

With the view of determining both these questions, it appears to me to be indispensable, in the first place, to fix clearly the true nature of the annuity-tax itself, the character in which the Magistrates were appointed to ensure its collection, and, specially, whether the duty so imposed and undertaken was truly gratuitous, or was not, both in fact and in law, onerous, and an equivalent for valuable advantages derived by the community. While such considerations are essential for the determination of the question, whether the duty was truly imposed on the Magistrates as representing the community, they also enter deeply into the relevancy of the action; the onerousness of the consideration—if there truly be such—imposing a responsibility of a different character from that which might attach to a trust merely gratuitous, and on the faith of the due discharge of which no equivalent was rendered.

It would appear that, prior to 1625, there had been several grants from the Crown in favour of the city of Edinburgh, of church lands and other property belonging to the Popish clergy, which grants were intended, to a certain extent at least, to be applied in support of the ministers. Into any history of these grants it is unnecessary to enter. Their dates are set forth in the summons in the action instituted in 1810, to be afterwards noticed. Whether the common good was or was not liable for the same purpose, it is also clear that to a considerable extent it had been so applied. From an act of the Town-Council, dated 2d March 1625, it appears that certain articles were proposed by King Charles I., and answered by the Magistrates.¹ The first and second of these articles regard the division of the town into parishes, and the appointment of eight ministers. It is clear that this provision was for the benefit of the community. Third, it was proposed that the ministers should “be provided of houses to reside in within their severall parochins, which shall be known to be the houses of the churches, and with maintenance sufficient, which in that town can be no less than two thousand merkis Scottis to everie minister, and ought to be paid in all reason by the people that lieve under their cure. This may be doone either by imposing a certain annuitie upon everie house and tenement within the parochins as is doone here, at Londoun, and in well ordered cities; or by some other convenient means that may be desired, and till this take effect the town must beare the charge of the whole.” The answer to this was, as to the first part, that there were already three ministers provided with houses; and, to the second part, that “the ministers of this burgh are provided each man with a sufficient house to dwell in, maill (maill) free, with a zeirliche stipend of twell hundred merkis Scottis thankfullie paid to them, conforme to the agreement maid with them at their entrie to their charges; and since the common guid is not abill to sustein the burthen alreddie imposed thereupon, and of reasonne aucht not to be thralld to the payment of

¹ See Maitland's History of Edinburgh, p. 274.

No. 121. the ministers stipends; and that the augmentation desired both in mater and maner does crave mature advysement, they most humble entreat his Majestie to pardon theme that they cannot give answer to the same at this present; and to spaire the same till the rest of the articles be first discussed, and the distribution desired in maner contentit in these articles and answers under the same annexed be first satled and brocht to perfectionn." From this it appears, 1st, That there was a yearly stipend of 1200 merks paid by the town; 2d, That the common good was already burdened under express agreement, and that it was not able to bear the burden so undertaken. 3d, It was maintained that it ought not to be thralld to the payment of ministers' stipends; while, 4th, As to the proposed augmentation from 1200 merks to 2000 merks, this was to remain over for further discussion. By the fifth article, the right of patronage was to be confirmd on the Magistrates.

May 28, 1845.
Ministers of
Edinburgh v.
Magistrates.

These articles, which are eight in number, having been answered, various liberties and privileges were requested on the part of the town, and the tenth of the additional articles is thus expressed:—"Since the Proveist, Baillies, and Counsall, as patronnes of the said Kirkis of the said burgh at the entrie and commissioun of ilk minister, agrie with him for his stipend, that it sall not be less for him to exact any other dueties from his parochines, but sall reassume his stipend from the saide Proveist, Baillies, and Counsall, conform to the agriement, and acquiesce therewith." From this it is plain that the Magistrates and Council, representing the community, undertook, on the admission of each minister, to pay his stipend. Now, whether this was or was not a proper application of the common good, it was the situation, in point of fact, in which the Magistrates were placed as representing the community, and the right to draw the stipends out of that common good was invested in the ministers on their induction. The Magistrates and Council, as representing the corporation, never could have prevented the ministers, got them inducted on the faith of receiving the stipend, and then after securing the benefit of their services to the public, refuse payment of the stipend on the ground that this was truly a misapplication of the common good. These proposals and answers were confirmed by act of Council, 28th September 1625, and were afterwards ratified by the King in Council, the stipend continuing at "twelve hundred marks Scottis for each minister as they are presentlie indebted to payt.": And how soone the distribution intended sall be perfytyed by the means they can find, and with all possible diligence, they sall agrie upon such augmentation as may be fitting for a sufficient maintenance to each of them.

On the 18th of March 1634, an Act of the Privy Council was passed to remit from Parliament, authorizing 12,000 merks to be raised yearly from the inhabitants. This was the first imposition of an annuity-tax. But the Act of Parliament, as recited in the said Act of Council, after narrating that those who participate in the benefit of the clergy should contribute to their maintenance, that the inhabitants of Edinburgh had enjoyed this blessing, "and the common good of the town, which has been given to them for maintenance of police, has been that way employed through the inlaick of other sufficient means for maintaining the ministrie of the said burgh, for remeid whereof, and to the end that those who serve at the altar may be entertained aff the altar, and the said common good may rightly be applied to the use whereunto the same has been appointed, it was therefore ordained, that "12,000 merks shall be uplifted yearly at

whole inhabitants and indwellers within the said burgh, (the Lords of his Majesties Counsell and Session being onlie excepted,) and that according to the quantitie and proportion of the mails which they pay, or the houses where they reside may pay.”

No. 121.
—
May 28, 1845.
Ministers of
Edinburgh v.
Magistrates.

Now, prior to this date, there had been no tax levied on the inhabitants. The ministers had been maintained out of the common good for want of other means for that purpose; and to remedy this evil, “for remeid whereof,” the tax was imposed upon the inhabitants. Undoubtedly, in this way, while there was a relief of the corporate funds, and in so far a direct pecuniary benefit to the corporation, on the other hand, the collecting of the assessment was a duty imposed on the Magistrates and Council, and plainly imposed upon them in this Act, as representing the community whose common good had been in so far relieved. The machinery of the act is this:—1st, It requires—“for this effect, (i. e. for the levying of the tax,) “ordain the Provost, Bailies, and Counsell of the said burgh to appoint and make choice of four sworn men out of ilk parish within the said burgh, who, upon their oaths, sall value and estimat the maills of the houses of the said burgh, and sall give in ane roll whereof under their hands,” &c. 2dly, as new houses may be built and others go to ruin, the Act enjoins—“The Provost, Bailies, and Counsell of the said burgh, ilk year, or ilk twa years, as they shall think expedient, to appoint new stenters and valuers for valuing of the said house-maills,—and according to the said valuation, and distribution, and division of the said soume, declares the whole indwellers and inhabitants to be subject to contribute to the entertainment of the said ministrie.” 3d, The inhabitants are to pay according to the roll to be given furth—“to such as sall be appointed by the said Provost, and Bailies, and Counsell, for ingathering of the said soume, under the subscription of their common clerk.” 4th, In case of refusal, the Provost and Bailies are to direct their officers to do diligence. And, finally, the Act ordains the said sums “so ingathered to be applied only for sustentation of the said ministrie.”

It seems clear, under this Act, therefore, that the duty of collecting thus imposed upon the Magistrates and Council was one binding on them in their corporate capacity, and not as a separate and distinct body of Parliamentary Trustees, selected merely on account of their official eminence. The tax was no doubt for the maintenance of the ministry, but it was also for the relief of the common good, and for remedying the evil by which it had been in time past diverted from “the maintenance of policie,” to which purpose it ought primarily to have been applied. But then, as the counterpart of this arrangement, and following up all the negotiations which had taken place betwixt the Crown and the city, the Magistrates and Council, as representing the burgh, (being the only officers who could represent the burgh or administer its affairs,) are directed to name stentmasters to make up a roll, to be authenticated by their common clerk, and the Provost and Bailies are to enjoin their officers, if necessary, to enforce the collection by diligence, and the sums so ingathered are to be applied for the sustenance of the ministry in place of what they formerly received out of the common good, which was thus in so far relieved.

In 1636, there is a charter from the Crown conveying the patronage of the city churches, and expressly ratifying the heads and articles of agreement between the Provost, Bailies, Council, and community—“consules et communitatem”—and

No. 121. the ministers, contained in the Act of Privy Council of the 1st November 1625, in all the heads and clauses thereof, and in particular as to the patronage of the churches; and the same is declared to be as binding as if inserted at length in the charter. The grant also conveys the patronage of all churches to be hereafter built. This charter is thus another strong confirmation of the view that the arrangement of 1625 was truly for behoof of the community, and also is confirmatory of the onerosity of that transaction, by bestowing on the town a valid title to the patronage of all the churches.

May 28, 1845.
Ministers of
Edinburgh v.
Magistrates.

On the 20th October 1648, another Act of the Town-Council was passed,¹ agreeing "that there shall be twelve ministers within this burgh, and that the burden of the stipends of six ministers be laid upon the whole burgh landis in the town, to be payit yearlie and termelie, according to their proportions, by the inhabitants quho as tenants possesseth the several dwellings thereof from tyme to tyme, and that the setting down the proportion and way of uplifting of the same may be agreed on and prosecute be the Toun-Counsell, as it was before begun by them." On the 28th of December of the same year, the Committee of Estates of Parliament ratified this Act of Council, and imposed a tax of "19,000 merks yearly, to be a constant provision to six ministers within the said burgh, the every one of the said six ministers may have yearly 2700 merks for his stipend and 400 merks for his house mail in all time hereafter, and the 400 merks remaining to be allowed for the waste-house maills." This Act declares that the tax shall be collected by the deacons of the kirk-session, and is not to come to the hands of the Town-Council, nor to be applied to any other use than is above written." Under this Act, however, the stentmasters were still to be named by the Town-Council.

On the 2d of March 1649, the Act of Council of 28th October 1648 is ratified and also the Act of the Committee of Estates of 28th December, imposing the 19,000 merks. With this view, an annuity of five per cent is imposed; and this being not sufficient, Parliament was to take into consideration what further tax shall be imposed. And "seeing by the foresaid annuitie and imposition the said toune of Edinburgh will be the more enabled to entertain twelff ministers, it is hereby ordained that they use all diligence for getting their kirks provyded with twelff ministers, and for keeping always that number full for the guid and instruction of the whole inhabitants their of; and when any of the number of the said ministers provyded be the foresaid imposition shall vaik, the stipend or stipends of any of this sex vaikand shall be disposed upon ad pios usus, conform to the Act of Parliament, be the kirk-session of the said toune, with advyce of the committee after mentioned, appointit for decyding of questions and differences." The same voyors are in this case also to be appointed by the Town-Council. On the 19th of June 1649, this Act was ratified in Parliament, and it is clear that in this, as in the former instances, the Magistrates and Town-Council were acting for the community, and in a transaction which went on the one hand to relieve so far the common good from burdens already imposed, and on the other, to secure for the

¹ See Appendix to Memorial for the City of Edinburgh, in the action of 1810, p. 10.

public the services of ministers in the churches, of which the Town-Council, as No. 121.
representing the community, had obtained the patronage.

This matter is rendered, if possible, still clearer, by the agreement of 28th March ^{May 28, 1845.}
1655. It would appear that the ministers had not received their stipends regularly ^{Ministers of}
from Whitsunday 1650, but, after a good deal of negotiation, agreed to accept of ^{Edinburgh v.}
2200 merks yearly, in full of all demand from Whitsunday 1650 to Whitsunday ^{Magistrates.}
1654, and "that they, with consent of the kirk-sessions, would give an assignation
to the good town of all bygone annuities of house-maills within this burgh dew to
the ministers, and uplifted preceding the said term of Whitsunday 1654." The
agreement further bore that a provision of 2500 merks yearly for the future should
be continued to them as long as they thought proper, and that they were to assign
for the future the annuity, so long as they held themselves contented with that
provision. Upon this, on the other hand, the Council "ordaine and appoint their
kirk-thesaurer, present and to come, to compleit the said ten present ministers of
this burgh of so much as is yet retained to y^m, ilk ane of them, of the said soume
of 2200 merks appointed for them, as said is, yeirlie fra Whitsunday 1650 to Whit-
sunday last bypast, as is above mentioned, and sicklike to make good and thankful
payment to the foressaid p^{nt} ten ministers of this burgh and their respective succes-
sors to them in y^r places, ilk ane of them, of the said soume of 2500 merks money
foirsaid yeirlie, and y^t in full contentatioun and satisfaction of all stipends, house-
maills, or any thing else dew to them, or qlk they or any of them may claime." The
concluding provision in the agreement is to this effect—"And because the
foirsaid present agreement, &c., as is above expressed, is only upon the considera-
tion of the present condition of the good toun, and not binding against y^m and
y^r successors for the future, longer than they sall be satisfied yrwith, therefor on
the uy^r pt the Town-Council declare that this present Act sall stand no longer
obligator agains the Town-Council and yr successors than they sall think it fit
and convenient, swa that in either of said articles—or craving any alteration, either
in the number of the ministers of this burgh, or quantitie of yr stipends to a less
or greater proportion, or finding the said articles to be inconvenient or prejudicial
to them, then, and in these caices, or any of them, the said p^ties are to be in yr
awin place as they were in before the dait of this present Act, for any future
yeirs or termes after yr resileing y^rfra."

It is quite true that this was only a temporary arrangement, but still it is very
important, as showing the true character in which the Town-Council transacted
in the whole of these arrangements, and the onerosity of the arrangements them-
selves. It was an assignation to the Town-Council, as representing the commu-
nity, of the arrears of the annuity-tax for a certain valuable consideration, and of
that tax in time to come, as long as the agreement subsisted, and the agreed on
stipend was paid. The Magistrates never could have come voluntarily forward
to have entered into such an agreement, if truly they had no concern, as repre-
senting the community, with the provision of the clergy, but had merely a sepa-
rate Parliamentary duty imposed upon them, under a trust in which the community
had no interest.

Then next follows the Act of 6th June 1661, on which this action mainly rests ;
but for the true and sound construction of which it is quite legitimate, and indeed
indispensable, to keep in view the former acts and arrangements which have been
already referred to. In the recital of this Act it is stated, inter alia, for "the said

No. 121. town having been at vast charges for building of churches and public works upon that and other occasions, the common good and patrimonie thereof is exhausted and overburthened." 2dly, That the inhabitants have been in use to pay at the rate of six per cent "of the maill and rents of all dwelling-houses," &c., being the annuity imposed by the Act 1649. 3dly, That this is an easy and effectual way of providing for the stipends, and that the same should be so authorized and settled by perpetual law in all time coming. The reference to the state of the common good, and to the use of payment of the annuity under the Act 1649, thus plainly connects this statute with the preceding history of the tax and arrangements between the ministers and the burgh. The Act therefore imposes an annuity of six per cent on the rental of the inhabitants, without limitation as to the amount to be levied at the rate so fixed, for the yearly stipend of six of the ministers. For the recovery of the annuity thus imposed, "and to the effect that the said ministers be not frustrat of the payment of their stipends," it is statute—1st, That the payment shall be quarterly; "2d, That the same shall be collected by the deacons of the kirks, or by a collector to be appointed for that purpose by the Magistrates and Council of the said burgh, in their option, and as they shall think fit and expedient for the time;" 3d, The tax is to be imposed "after exact survey by four sworn men in every parochie, who shall survey and value the house-maills aforesaid, whair of two shall be citizens, to be choisen and sworn by the Town-Council, and other two shall be nominat, choisen, and sworn by the Colledge of Justice, or such as they shall appoint;" 4th, The roll, subscribed by the said sworn surveyors, is to be the unalterable rule of collection; 5th, In the event of the Colledge of Justice, which is exempted from the tax, refusing or delaying to name the surveyors or stentmasters, as they have been called, then the Magistrates, after requisition, are to nominate and swear "such of the Colledge of Justice as they shall think fit for surveying and valueing the said house-maills; and if the members of the Colledge of Justice shall either not accept or not concur in the said employment, being required, then, and in either of the said cases, the remanent of these persons choisen and sworn by the Town-Council shall have power to go on in the said employment and act by themselves, without the members of the Colledge of Justice not accepting or concurring, as said is." From this it is plain that, although the Colledge of Justice might choose two surveyors in each parish, if they failed in doing so, the machinery for completing the nomination was completely vested in the Town-Council; 6th, The Act further "ratifies and approves the possession and use of payment of the said annuity and imposition, since the same has been in use to be paid;" 7th, It ordains all persons to make payment to the deacons of the kirk, and collector to be appointed by the Magistrates and Council; and lastly, It enjoins the Magistrates to see the Act put to due execution.

It appears to me to be clear, that while on the one hand the annuity thus imposed on the inhabitants was for the benefit of the ministers, and as a stipend to them, on the other hand, the Magistrates and Town-Council, as representing the community, were required—1st, To appoint sworn surveyors, so that the roll of assessment might be made up; and 2dly, That they had the power of appointing a collector. I do not think that the statutory trust, as it has been called, or obligation imposed upon them, to have the surveys and valuations regularly made, so that the annuity might be collected under the Act, was imposed upon them as a

newly-created body, and apart from their constitution as representing the corporation; but, on the contrary, as the Act contemplated the exhausted state of the common good, referred to the prior Act 1649, which imposed a duty upon the Magistrates and Town-Council as representing the community, and which the agreement of 1655 proves that they understood affected them in that capacity, I think it clear that this Act also imposed the duty upon them as representing the community, and in which the community had a deep interest.

No. 121.

May 28, 1845.
Ministers of
Edinburgh v.
Magistrates.

It is very true, that under this statute of 1661 only one-half of the stentmasters are to be chosen and sworn by the Town-Council, and the other half are to be chosen and sworn by the College of Justice, and from this the argument is deduced that the statute created a separate parliamentary trust. It appears to me, however, that although there certainly was given to the College of Justice a power of nominating stentmasters, which, if they delayed to exercise, was conferred on the Magistrates, as coming in their stead, this was merely ancillary to the main purpose of the statute, and not creative of a trust in the Magistrates and College of Justice, to such an extent as to make the Magistrates trustees in a capacity not representing the community. The Magistrates and Council, as so representing the community, still derived the benefit of the Act, which must be construed in reference to all that had preceded it; and by this Act the power of appointing collectors (as well as one-half of the stentmasters) was conferred upon them independent of the College of Justice, although, no doubt, the deacons of the kirks might also be required to collect, in the option of the Magistrates and Council. Still I think it cannot, in any view, be contended that the Magistrates were not here nominated truly in their corporate capacity, and that they were not receiving the benefit of an onerous arrangement. How far, in the execution of the Act, they might have been liable for any error committed by the College of Justice, is another question. But looking at the statute as following up all that had preceded, and considering the position in which the common good had been placed, and the boon conferred on the city by a provision of a sufficient number of clergy, I do not think that this check, or right of partial nomination of stentmasters conferred upon the College of Justice, alters the substantial onerosity of the transaction, or character of the parties.

I think this construction of the Act 1661 is much strengthened by the subsequent statutes extending the royalty. The three first of these—7 Geo. III. c. 27; 25 Geo. III. c. 28; 26 Geo. III. c. 113—give full power to the Lord Provost, Magistrates, and Council, to appoint stentmasters to levy from the proprietors and possessors of all houses built, or to be built, within the extended royalty, “an equal portion of the cess-annuity, poor’s-money, and watch-money,” in the same manner as previously levied within the bounds of the burgh. It seems very plain that the power to appoint such stentmasters is given by these statutes to the Magistrates and Council, not as a separate parliamentary trust, but in their corporate capacity. It is surely as public officers, representing the community within the burgh, that they are thus empowered to collect the poor’s-money and watch-money—taxes plainly intended for the good of the burgh, and the latter applicable to the special burgh tenure of watching and warding. But if so, is it possible to draw any distinction applicable to the cess-annuity? The power to appoint stentmasters so to make the collection, further implies the duty of making that appointment, because, without its being so made, the public tax could not be collected.

No. 121.

May 28, 1845.
Ministers of
Edinburgh v.
Magistrates.

But, if possible, the matter is rendered still clearer by the provisions of the Act 49 Geo. III. c. 21, which, *inter alia*, was passed—1st, For extending the royalty; 2d, For erecting two new churches, of which, by section 18, the patronage is conferred on the Lord Provost, Magistrates, and Council; and 3d, For regulating this annuity-tax. The 17th section of the statute expressly states in its preamble, that the Lord Provost, Magistrates, and Council, had been in use to levy this tax; and it enacts, “that the said Lord Provost, Magistrates, and Council, and their successors in office, shall be, and they are hereby authorized and empowered not only to levy, as they have hitherto been in use to levy, the said annuity of six per centum upon the yearly rents of all inhabited houses, shops, booths, cellars, and premises within the said city and royalty thereof, whether extended by the said recited Acts, or by this Act, and to apply the same as they have been hitherto in use to apply it, along with the aforesaid other funds or revenues, so far as those other funds or revenues are so applicable, for the payment of the stipends of all the ministers of the present churches of the city and royalty, but also to apply an equal proportion of the said annuity in common with the aforesaid other funds or revenues, in so far as these other funds or revenues are so applicable, for the payment of the stipend or stipends of such minister or ministers as may be appointed to the churches which are required to be built under the authority of this Act, in manner before mentioned.

It seems impossible to contend that the Lord Provost, Magistrates, and Council, mentioned in this section as the parties authorized and empowered—and if authorized and empowered, consequently bound—not merely to appoint stentmasters, but to levy and apply the tax for payment of the stipend of all the ministers, are not authorized and enjoined so to do in their corporate capacity as representing the community, but as parliamentary trustees, holding a separate parliamentary trust, while, in the next section, the patronage of the churches is given to them clearly as representing the community, and in both sections the Magistrates and Council, the only true legal representatives of the community, are described in the same words. Neither can it be contended, that this is a gratuitous duty for which there is no corresponding advantage, because, independent altogether of the valuable services rendered to the community by the ministers as an equivalent for their stipends, and of which services such of the burgesses as may think proper to avail themselves have the benefit, there is the actual patronage bestowed—a right in its own nature valuable, and in ordinary circumstances the subject of sale or adjudication for debt.

On a review of the statutes, therefore, I think it appears clear—1st, That the duty of appointing stentmasters, which was an essential step to the collection of the tax, was one imposed upon, and undertaken by, the Magistrates and Town-Council, not as a separate parliamentary trust unconnected with their character as representing the community of the burgh, but, on the contrary, was so imposed upon and undertaken by them for behoof of the community, and that the obligation imposed by the said statutes was one effectually binding upon the community, whose corporate officers were bound, on behalf of the community, to discharge the statutory duty; 2d, I do not think that the obligation imposed was gratuitous, but, on the contrary, that it was of a highly onerous character, and that this must be taken as matter of fact and law in the determination of the whole case. It is quite true that no money was to be paid to the officers who represent the com-

munity for their trouble, which only shows that it was viewed as matter of public duty, which they were held by the legislature bound to discharge, not for their own benefit, but for the community whom they represented. But the arrangement was of an onerous character in various respects. And,

No. 121.

May 28, 1845.
Ministers of
Edinburgh v.
Magistrates.

(1.) It was matter of public concernment, and for the advantage of the community of the city, including of course the whole burgesses, that they should receive the services of the ministers to be appointed to the several churches. This was a very important matter, and one which it was the duty of the Magistrates, acting for behoof of the city, to do every thing in their power to secure. Accordingly, they did from time to time secure the services of the most efficient ministers, whom they induced to leave other livings, and to resort to the metropolis, on the faith of receiving the stipends secured to them by the statutes; and which the Magistrates, who were appointed to see these statutes carried into effect, were thus bound, in consequence of these appointments, to collect and pay, under a faithful administration of their statutory duties, on which the incumbents, so appointed by them, were entitled to rely.

(2.) Whether the common good was or was not at common law liable for the payment of ministers' stipend, it had, by actual contract and arrangement, been made so liable, legally and effectually, at least to a considerable extent; and in order to relieve the common good from this burden, the annuity-tax was imposed. This was a direct pecuniary advantage to the corporation, and was one of the causes set forth in the statutes on account of which the tax was originally imposed. The condition of granting this relief was the collection of the assessment, and that primarily by the nomination of proper stentmasters, in order that the tax might be collected. If it were not so collected, and yet the common good was relieved, the corporation would have received the benefit without fulfilling the corresponding obligation.

It has been observed, that the obligation undertaken by the Magistrates, by which the common good had become subject to the payment of stipend to the ministers, was not an obligation of a permanent nature by way of endowment of the churches, and extended no further than to the incumbencies of the ministers inducted on the faith of that arrangement. This is, no doubt, quite true; and if it is to be held that the common good is not properly applicable to the maintenance of the clergy, then undoubtedly the relief given was not to so great an extent as if the corporation had been permanently bound. But still this would only lessen the degree of onerosity; and it is very important to observe, that in the course of the whole transactions, the Magistrates, although no doubt maintaining that the proper application of the common good was for the purposes of policy, never proposed to transact upon the footing, that, on the expiry of the incumbencies of the several ministers then inducted, when their obligation to pay the stipend ceased, the vacancies should not be supplied.

It can hardly be said that it was a perversion of the common good, or of any surplus revenue which might arise after all the expenses of maintaining the burgh administration were defrayed, to apply the remainder to the maintenance of the clergy. Such appropriation in time past was sanctioned by the legislature; and if the Magistrates, who were bound to pay as long as the existing incumbents lived, took relief from that obligation, and became under the same transaction administrators of a fund created by Parliament for the maintenance of the future

No. 121.

May 28, 1845.
Ministers of
Edinburgh v.
Magistrates.

clergy, it is plain they were acting in the matter for the benefit of the community, and acting onerously as regarded such clergy who should come to be inducted on the faith of receiving payment of their stipends, and on the faith, also, that the statutory provision would be secured, and the machinery of the statute entrusted to the Magistrates carefully conducted. The Magistrates would not have received from Parliament the relief from their past obligation, as affecting the clergy actually inducted, as a measure by itself. At any rate, they did not receive any such relief, and the whole arrangement in this public transaction must be taken in all its parts as it was actually entered into.

(3.) There was also conferred upon the Magistrates and Council, as representing the burgh, the patronage of the churches. This was a valuable and onerous consideration; and it is very important that, in the charter of 1686, by which the patronages were conferred, there is an express ratification of the Act 1625, which imposed the duty of appointing stentmasters; while, in like manner, by the Act 49 Geo. III. c. 21, which authorized the levying of the assessment, and directed the Magistrates to lay out the money collected in payment of the ministers' stipend, there is conferred upon them the patronage of the churches authorized by that Act to be built.

Such being the result, in my humble view, of the statutes, it is next proper to attend to the manner in which the Court dealt with the rights of the clergy in the action instituted in 1810. That action was clearly directed against the Magistrates and Council, as representing the community; and by the judgment of the Court of 11th June 1813, it was found that the ministers had the exclusive right to the produce of the annuity; and that the Magistrates and Town-Council, as representing the incorporation, were bound to hold compt and reckoning with "the pursuers and their successors for the produce of said annuity since the date of citation to this process, and in all time to come, and to pay over the same to them, termly and yearly, as libelled, and decern." I consider this as a most important judgment in the present cause; and I hold it to fix, 1st, That the statutory duty of collecting the tax, and of course as inherent in this the regular appointment of stentmasters, was incumbent upon the Magistrates and Council as such, and as representing the community; and, 2dly, That the Magistrates and Council were in that capacity bound to pay over the produce of the tax to the ministers, as the parties beneficially interested therein, under the concluded arrangements already so fully explained, and which were all under the consideration of the Court when the judgment was pronounced.

I think the true character and position of the defenders, as representing the community, and the onerous nature of the obligation incumbent upon them in that capacity, is rendered, if possible, still clearer by the terms of the agreement of June 1815. By this agreement—just as had been done by the contract of 1635—the ministers agreed to accept for a time of a specific sum, granting to the Magistrates and Council, as representing the corporation, an assignation of their right to the annuity, with an option to declare the agreement at an end when they thought proper, after the lapse of a certain period. It is quite true, that the present is not an action on the contract of 1815; and if that contract had been at variance with the statutory provisions, or if it had created an obligation different from that which the Acts imposed, it could be of no avail in the present question. But the actual conduct of the parties under the judgment of the Court, may competently be refer-

red to, as showing the distinct understanding of all concerned as to the import and meaning of the arrangements sanctioned and carried into effect by the statutes, and enforced by the judgment of the Court.

No. 121.
May 28, 1845.
Ministers of
Edinburgh v.
Magistrates.

It is in these circumstances that the present action is raised, and it is rested on the culpable negligence or omission of the Magistrates in the appointment of stent-masters. The important allegations are contained in articles 6, 7, 8, and 9, of the condescendence. There can be no question that there was a failure to perform with accuracy the statutory duty, and that, in consequence of this failure, direct loss has been sustained by the pursuers. The question is, Whether the defenders, as representing the community, are bound to repair that loss, and to make such reparation of the common good? Now, in determining that question, I assume it to be made out by the reasoning in the preceding part of this opinion ;

1st, That the statutory duty and obligation incumbent on the Magistrates and Town-Council was imposed upon and undertaken by them as the representatives of the community, and consequently that this obligation was effectual against the community ; and,

2dly, That this duty and obligation were imposed and undertaken for onerous considerations, and consequently that the corporation was bound, for value received, to implement the obligation so undertaken, and duty so imposed, upon their officers, as representing them.

Holding these things to be clear, it is unquestionable, 3d, That by the failure to discharge the duty and fulfil the obligation, loss and damage has been sustained by the pursuers. Now, can there be any doubt that this loss and damage must be repaid by the corporation, the party receiving benefit from the contract, and failing to perform, through its officers, the corresponding duty, and fulfil the equivalent obligation ? I humbly think not.

But if this view be sound, the present demand may be rested simply upon the ground of a claim for the reparation of loss sustained in consequence of a breach of contract. It cannot be denied that a corporation may contract through its officers ; and if in point of fact there was such a contract in the present case, it can hardly be disputed that the common good was thereby bound for consideration onerously given. The corporation cannot be heard to say, in the face of the statutes, and of the judgment of the Court in 1813, that this was an illegal agreement quoad the common good, and that they are entitled to receive for the public benefit the valuable services of the pastors, and have the common good relieved from a burden previously imposed upon it, to enjoy the right of patronage, and at the same time, when the tax imposed for the sustentation of the ministers is lost by their negligence, and failure to fulfil the obligation which the statutory agreement imposed upon them, that they are not bound to make up the loss.

If these views be sound, they seem to supersede in a great measure much of the discussion which has been raised as to the extent of the liability of the funds of a corporation for the negligence of its officers ; because, if there be an actual onerous contract lawfully binding on the corporation, and the terms of that contract have not been fulfilled, whereby loss has been sustained, the corporate funds are surely liable in reparation of the loss. Under such circumstances, the corporation is precisely in the same situation as an individual, and the corporate funds are liable in the same manner as the property of an individual would be. I have no idea that the corporation is in a worse situation. But I cannot see, in a case of breach

No. 121. of contract, and loss sustained by the other contracting party, under an onerous contract, that it can be in any better.

May 28, 1845.
Ministers of
Edinburgh v.
Magistrates.

I am, therefore, unwilling to enter upon the discussions which have been so largely introduced into this question, as to whether an incorporation can be liable for the delict or quasi delict of its officers, because I conceive, where a corporation is effectually bound by contract, and loss is sustained by non-fulfilment, the incorporation is bound to make good the loss; and I think this general principle sufficient for the determination of the whole matter. But I may be permitted to observe, that the cases in which the corporate funds have been held liable for reparation of the loss to the extent of paying the debt, when there has been a failure to keep a prisoner in sure ward—and the case of Innes, in 1798, where the Magistrates, as representing the corporation, were found liable in damages for injury sustained by a person falling into a pit negligently kept open in the public street—are cases which go even further than is necessary to support the plea of the present pursuers. It is true that the keeping of proper jails is a statutory duty imposed upon the burgh, and affecting the common good. The case of the public streets may also fall under the same category. But the moment it is held that the Magistrates have entered into a contract binding upon the corporation, and in rem versum of the incorporation—which I conceive the contract in this case to have been—then the failure to fulfil that contract, so binding upon the incorporation, is just in the same situation with the failure to keep adequate prisons or safe access by the public streets. These two last, indeed, are duties imposed upon the Magistrates under an implied contract in favour of the public, and binding upon the common good. But if there be an express contract binding on the common good, and loss arise from the breach of such onerous contract lawfully entered into, does it not necessarily follow that action must lie for reparation of the loss against the common good?

This view, if sound, also takes the case entirely out of the authority of Duncan v. Findlater, which indeed in no way appears to me to bear upon the present question; and also of the somewhat more analogous case of Pearson of Balma-die. It may be quite sufficient, as applicable to that last authority, to say that there no contract existed with the Magistrates of Montrose as representing the community, and there was of course no party seeking reparation for loss sustained by non-fulfilment of any such contract.

Certain other specialties were strongly relied on, on the part of the defenders. It was said that the error on the part of the stentmasters was a trivial one; that it originally occurred in the year 1818, when it was the interest of the Magistrates to do every thing regularly, as, under the agreement of 1815 then subsisting, they were entitled to any surplus which the annuity might afford beyond the stipends then fixed. But it does not appear to me to be necessary, looking at the case as one of onerous contract, and failure to fulfil that contract, for the pursuers to make out *dole* or *culpa lata*. The Magistrates, in the year 1818, thought fit to depart from the ordinary and accustomed course in the nomination of the stentmasters, and the consequence of this departure was the loss sustained by the ministers, for which reparation is now sought. If the Magistrates and Council had collected regularly, they would of course have been bound to pay over the sums so collected to the ministers. But it seems reasonable to hold, that having the duty and the power of assessing and collecting, they are, in so far as the ministers are concerned,

in the same situation, and quoad them, may be considered as if the funds were actually in their hands, and that the failure to assess and collect is no answer to the demand of the ministers for their stipends.

No. 121.

May 28, 1845.
Ministers of
Edinburgh v.
Magistrates.

Neither can I view the error committed by the Magistrates in 1818 as of so very trivial a description. In place of swearing the stentmasters before the Magistrates and Town-Council, as the statute enjoined, and as had been the universal practice from the passing of the Act, it was thought fit, for what reason is not stated, to change the correct and universal practice, and to have the stentmasters sworn before the Magistrates only as commissioners of supply. Now, if loss was occasioned by this error, and failure to fulfil an obligation undertaken for onerous considerations, how can it be disputed that the corporation, failing through its officers to fulfil the obligation, is bound to repair the loss?

This error, so committed in 1818, was again repeated every successive year down to 1836, no doubt by different individuals elected annually to the offices of Magistrates and Councillors, but by the same Town-Council, that is in law by the same person. The error once committed in 1818, taken in this view as being annually committed by the same person, and occasioning loss to the other onerous contracting party, certainly did not become less. The pursuers are not seeking their redress from the individuals, but from the corporation, the obligation incumbent upon which was not fulfilled year after year through the negligence of its officers. But if it once be held that the duty and obligation are onerously imposed, then a corporation is precisely in the same situation with an individual; and if the same corporation or same individual annually repeats the same blunder, the loss arising from which he was bound to repair on the first year of the error, he surely cannot be liberated by the repetition of that error.

It is said that the estates of the city were sequestrated in the year 1833, and it seems to be argued that this circumstance affects the liability of the corporate funds. It may diminish the amount of payment to be drawn by the pursuers, who, if they have no preference over the other creditors, or fund set apart, can only receive the dividend applicable to their debt during the subsistence of the bankruptcy. But the sequestration did not annihilate the incorporation, which continued a subsisting body, and which body, acting through its Magistrates, continued to act, and failed to fulfil the statutory duty and obligation incumbent upon them under the statute 1661, and repeated from year to year the error which had been commenced in 1818, to the continued loss and damage of the pursuers. The bankruptcy may or may not have the effect of preventing the pursuers from obtaining full reparation of their loss. But as the corporation continued to exist, and continued to fail to perform its obligations, and was in the same situation with a continuous individual wrong-doer, it would be a singular perversion of law and justice to hold that the right of demanding reparation was cut off, merely because the means of reparation—from circumstances over which the party suffering the loss had no control—were diminished. I, therefore, cannot see how the principle of the case is in the least degree affected by the bankruptcy.

It was also stated that, by the Act 1661, the tax might be collected by collectors to be named by the deacons of the kirks or by the Magistrates, and that the College of Justice were entitled to nominate stentmasters; and it was asked, would the incorporation be liable for a loss sustained in consequence of the wrongful act of a collector appointed by the deacons, or an irregularity on the part of the Col-

No. 121. *lege of Justice, in the nomination of a stentmaster? It seems to me to be unnecessary to discuss such questions, because the loss here in question has arisen by the direct failure on the part of the Magistrates to implement the onerous statutory obligation incumbent on them. How far they may be bound for the error of another party named in the Act, or for omitting to see that its terms were strictly complied with, is a hypothetical question not now before the Court, and one which might vary according to circumstances. It seems to me to be sufficient for the determination of the present question, that the failure complained of was one directly on the part of the defenders themselves. The College of Justice was not bound to do any thing, and the Magistrates and Council took the whole matter into their own hands, and incurred the whole responsibility.*

May 28, 1845.
Ministers of
Edinburgh v.
Magistrates.

Upon these grounds I humbly rest my opinion upon the whole of this case; and, without entering upon any question as to the amount of damage, I think that the interlocutor of the Lord Ordinary should be altered, and the relevancy of the action sustained. I think the onerous contract entered into under the sanction of Parliament, (and by express statutes,) between the Magistrates and the ministers, has not been fulfilled—that the ministers have been unable to recover the stipend due to them out of the annuity-tax, for services performed in terms of their contract—that this loss has arisen by the failure of the Magistrates and Council, as representing the community, to perform the duty, and fulfil the obligation of appointing stentmasters, so that the tax might be collected—and therefore, that the ministers are entitled to proceed against the corporate funds, and have properly demanded in this action reparation of the loss sustained by them from the Magistrates and Council representing that community, by the failure of whose officers to discharge the duty and fulfil the obligation imposed upon them as the counter part of the contract, the loss has been sustained.

LORD WOOD.—I concur in the opinion of Lord Robertson.

LORD MACKENZIE.—I am for adhering to the interlocutor of the Lord Ordinary. The reasons on which I wish to rest my opinion are—

I. I am not satisfied that the common good of a burgh is liable generally for damages on account of faults committed by the Magistrates or Council of a burgh in discharge of duties imposed on them as Magistrates or Council directly by statute. Lords Cuninghame and Ivory have, I think, sufficiently shown the reverse to be the law of Scotland. It may be otherwise where the duty is primarily imposed on the burgh itself, and the Magistrates or others act only as the delegates of the burgh in this duty, as in building and maintaining prisons, and some other things.

II. In this case, the duty of naming stentmasters for the annuity was by the statutes expressly imposed on the Magistrates and Council, not on the burgh; and no declaration is expressed therein, that the burgh or common good was to be liable in warrandice of the good conduct of the Magistrates or Council.

III. No such obligation on the burgh itself, or its common good, can be reared up by implication, or reasonably certain construction of the Acts. There was no need of it, or expediency in it. The personal liability of the Magistrates and Council was sufficient, if duly looked to; and the ministers, the true proprietors of the annuity, were the proper parties to watch the Magistrates and Council in performance of this service to themselves. The mass of the burghesses forming

the burgh could not effectively do so. Nay, the duty is by the statutes primarily intended to have been performed partly by the College of Justice, over which the burgesses could have no control whatever, and for which the burgh could not possibly be responsible. But it is said this responsibility on the burgh is to be inferred from the benefits which the Acts constituting the annuity granted to the burgh. In answer, it appears to me,

No. 121.
May 28, 1845.
Ministers of
Edinburgh v.
Magistrates.

(1.) That if this were true in fact, even to the extent alleged, it would not be relevant to support the conclusion. Why might not the King or Parliament grant favours to the burgh without subjecting it to a burden, neither usual nor necessary? Were the ministers not very well treated, if, having previously no legal provision at all, they got the annuity, with a duty imposed on the Magistrates and Council to name stentmasters for it, in the same way as other duties were imposed on these functionaries? To the ministers surely the main favour was granted; and there was little reason for adding to this great favour, by burdening the burgh with a superfluous responsibility, merely because something incomparably less was also granted to it.

(2.) This benefit to the burgh has been much exaggerated. The burgh was not in law liable at all for stipends to ministers of religion. It had in fact agreed to pay, and paid certain small stipends to them out of the common good; but it was not bound in law to continue this. It might have left the support of the ministers wholly to the voluntary payments of the congregations, including not burgesses only, but the College of Justice, as well as strangers. In these circumstances, a legal grant was made to the ministers of a perpetual tax of six per cent on houses in the town; but with exemption of those belonging to the College of Justice, and not affecting strangers unless they possessed houses in the town. It is obvious that such a tax must fall in very large part upon the burgesses themselves, on whom it therefore fixed a very serious and perpetual legal burden. It might enable them more easily to be less liberal to the clergy out of the common good; but it did this, by turning this call on liberality into a legal tax mainly on the burgesses themselves. I do not see that this was so very large a bounty in Parliament as to infer, that it must necessarily have intended to impose on the burgh countervailing burdens which it has not expressed. It is true also, that by these Acts the patronage of the churches was granted to the burgh. But surely that has no necessary connexion with an extra liability in the burgh for magisterial duty. Patronage is almost universally granted in free gift by the Crown, without any return; and if the ministers were to be provided for in the town in any way, the burgh, or rather its magistrates, were the natural patrons. I see nothing, therefore, enormous in the favours granted to the burgh, and still less any thing at all inferring the liability now contended for.

IV. It is said that the burgh is bound to this by contract. Now, I admit a burgh may be bound by contract. But I see no evidence of any contract to this effect. No instrument of contract to this effect is produced between the burgh and ministers, or presbytery, or between the burgh and the Crown, or any other party whatever. I see no trace of it in the statutes, or any of the Acts or transactions relating to the annuity, or to the Ministers of Edinburgh. If it be argued that such contract must be reared up by inference, then I can only say, I think there is still less ground for rearing up a contract to this effect, than for construing an enactment to the same effect.

No. 121.

May 28, 1845.
Ministers of
Edinburgh v.
Magistrates.

V. This action is brought against the present defenders only as representing the burgh, and not on any personal liability of themselves for neglect of their own duty. If, therefore, the common good of the burgh is not liable, the action must fall.

LORD IVORY.—I remain of the opinion originally expressed by me in this case, and am of course for adhering to the interlocutor.

I. The opposite view appears to rest on an essential misapprehension of the true legal relation in which the community at large, or corporation of the burgh, stands, under the statute 1661, towards the annuity-tax, and towards the clergy as the proper beneficiaries of the fund thereby created.

Both parties are agreed that the administration of that fund is to be dealt with as a statutory trust, vested *ad certum effectum* in the Magistrates and Council. But the question is, whether, through the medium of the Magistrates and Council, it is the burgh, in its corporate capacity, which is to be considered as the trustee; or whether the exercise of the trust-function does not, on the contrary, attach exclusively to the Magistrates and Council themselves—designated, no doubt, *eo nomine*, in their character of public officers—yet not as, *quoad hoc*, representing the corporation, or administering the proper corporate estate; but rather as statutory commissioners, deriving their whole authority, and having all their duties and responsibilities regulated and fixed, as regards this especial matter, under the statute.

In considering this question, it is a principle never to be lost sight of, that the Magistrates and Council do not, in any correct sense, either legal or popular, constitute the community or corporation of the burgh. They are the mere office-bearers of that body, just as the Dean of Guild is the office-bearer of the Guildry or Merchant Corporation, and the Deacons the office-bearers of the inferior corporations of crafts or trades. As such office-bearers it is, that they hold and are enabled to administer the common good. But they are not proprietors of the common good. It is in their hands strictly as trustees for the common behoof; and any application by them of this common good to any other than a proper corporate purpose or use, is a breach of duty for which they must answer in their individual persons.

Accordingly, it is settled law that the community and its corporate estate are not liable in reparation to third parties for damage arising from any malversation or neglect of duty by either Magistrates or Council in the exercise of their official functions.¹ The maxim applies, "*Culpa tenet auctores.*" And the culpable act, therefore, being the act of the individual officer, and not of the body or corporation whose officer he is, its consequences do not extend to the corporate estate.

So also, where Magistrates and Council have involved themselves by any wrongful proceeding of their own, in a liability to third parties, they cannot throw over this liability upon the corporation or its common good, even by granting a bond in the corporate name, or executing any corporate act adopting the responsibility as for behoof of the corporation.² And where the attempt is made, the corporation will at once receive protection from the Court against such a perversion of the burgh property.

¹ Magistrates of Banff, 28th February 1744, (D. 2504.)

² Magistrates of Pittenweem, 15th July 1774, (D. 2627.)

Indeed, the rule may be laid down quite generally, that the common estate of a corporation cannot be diverted by its office bearers towards any purpose not distinctly falling within the trusts committed to these office-bearers, as implied in their election qua corporate administrators. And even where a majority of the whole corporators shall join the office-bearers in authorizing such extraneous expenditure, the vote may be quashed at the instance of any individual member. The case of *Finlay*, referred to by Lord Cuninghame, and others of that class, afford examples.

No. 121.

May 28, 1845.
Ministers of
Edinburgh v.
Magistrates.

It was in this situation, then, that the Magistrates and Council of Edinburgh stood, as regards their powers connected with the corporate estate, when the annuity-tax first came to be imposed. And it is important to keep in view, that the very statute of 1661, upon which the whole case of the ministers rests, distinctly recognizes "the common good and patrimony thereof," as an estate peculiarly set apart and belonging to the corporation. The previous statute of 1634 was still more express, treating "the common good of the town" as an estate "givin to them for maintenance of policy;" and indicating, that in so far as it had been employed towards "entertaining the ministry of said burgh," this had arisen only "through the inlaick of other sufficient means," and was, in truth, a misapplication and diversion of it from its own proper use as the corporate estate, and therefore to be put an end to as a positive abuse, and calling "for remeid;" so that, ever after, "the said common good may be rightly applied to the use wherennto the same has been appointed."

These are very important words; and so far are they from relaxing the common law rules, applicable to the peculiar trust which the Magistrates and Council had to administer, in reference to the common good as the proper estate of the corporation, they, on the contrary, adhibit the express sanction of the legislature to what had hitherto been the only correct rule, both in principle and practice, at common law. It was to remedy, as an abuse, the encroachments which had previously been made upon the common good for the maintenance of the clergy, and to protect that common good from the recurrence of similar encroachments in time to come, that the imposition of the annuity-tax itself was justified. And when it is kept in mind, that, neither at this period nor ever since, was the common good, qua such, subject to any legal liability for the maintenance of the clergy, the consideration now adverted to acquires still greater importance; for it was thus a boon conferred upon the ministers, that from this time forward a peculiar fund was to be reared up for themselves alone, out of which their stipends were thenceforth to be secured and settled, under the separate trust to that effect created by the statute.

It is very true that, about the date of the statute, and to provide against the undoubted evil of an unpaid or underpaid ministry, there appear to have been entered into some sort of private agreements between the ministers for the time, and the Magistrates and Council as acting for the community. But these agreements were all of them temporary. Unless in so far as they were adopted and homologated by the community, it may be doubted whether, in the absence of any proper corporate liability, they were strictly legal as imposing a burden on the corporate estate. None of them inured permanently to the benefices, so as to secure a continuance of payment after the agreements had run out. And therefore, that a great benefit accrued to the clergy and their successors as a body, from the

No. 121. new system of payment introduced by the annuity Acts, is not to be called in question.

May 28, 1845.
Ministers of
Edinburgh v.
Magistrates.

This new system, however, such as it was, was altogether the creature of statute. It rested upon no principle drawing back to, or connecting with, the original constitution of the burgh as a body corporate—or the common good devoted to the corporate use—or the powers and duties and responsibilities of the Magistrates and Council as the administrators of that common good.

To be sure, the statute adopted the Magistrates and Council as part (but only part) of the statutory machinery for ministerially carrying into execution the statutory purposes. But in so doing, it chose, not the corporation itself for its minister, but the officers of the corporation. It might have equally chosen any one or more of their number—as, for example, the two eldest Bailies—or the Provost or Dean of Guild—to the exclusion of all the rest; or it might have chosen the office-bearers of any other body whose continued existence was likely to secure the same permanency of endurance. But I read the statute in vain to find any nomination of the burgh itself, in its corporate capacity, for the statutory trustees. And I find no indication whatever that, in nominating the Magistrates and Council, (although by their official designation as the corporate office-bearers,) the legislature intended to cast any liability, direct or indirect, upon the common good or proper estate of the corporation.

On the contrary, (which I hold to be quite conclusive on this head,) the statute in regard to the very matter more immediately in dispute, viz. the appointment of stentmasters, conjoined with the Magistrates and Council, as a substantive and constituent part of the statutory machinery, a body having no connexion whatever with the burgh corporation, viz. “the College of Justice.” It is said that this was meant for the better protection of the interests of the members of that College. Be it so. Still this touches not the only point which is here of importance—that, in the ministerial act of nominating stentmasters, the statute does name the College of Justice as joint trustees for the due execution of the statutory purposes. Neither is it of any moment that the College of Justice have in course of time fallen out of the actual administration. For here again the answer is, that it was not so intended by the legislature. And, in the grand question as to the burgh's liability qua corporation, the only consideration is, did the legislature intend to attach any such liability?

Even, however, had the Magistrates and Council stood alone as the ministerial officers for carrying the statute into execution, it by no means follows that the corporation of the burgh would have been liable for any miscarriage of theirs in the discharge of this duty.

Pearson v. The Town of Montrose, 23d June 1669,¹ is a strong, and indeed, as it seems to me, a precise authority on this head. The question there related to a public taxation (of cess) imposed by the statute 1633, c. 2. The duty of “bringing the burrowes part of the said taxation” had been imposed, just as here, upon the Magistrates and Council; and, more particularly, it was part of the machinery that “the Provost, Bailiffs, and Council within each burgh should convene, and elect certain persons to stent their neighbours.” It so happened, how-

¹ D. 13022.

ever, that the Magistrates and Council had neglected to perform their statutory functions in the inbringing of the tax, and the collector, who had meanwhile, in consequence of some private arrangement with them, "charged himself with the whole taxation" of the burgh, at some interval proceeded to legal measures against the burgh, and the Magistrates and Council of the day, for his reimbursement. The "Lords found the town and present Magistrates not liable, but prejudice to the pursuer to insist against the then Magistrates, their heirs and executors." And the ratio decidendi is (with reference to its bearing upon the present case) most important—"It occurred to the Lords that this taxation not being imposed upon the town's common good, but upon the inhabitants severally for their money, the Magistrates were not countable to the town for the taxation of money, nor were they (the town) liable for their Magistrates, who had not this power of collection by their office, but by the commission of Parliament therefor."

No. 121.
May 28, 1845.
Ministers of
Edinburgh v.
Magistrates.

There are various inferences to be deduced from this authority. 1. That the burgh, in its corporate capacity, is by no means to be confounded with its Magistrates and Council. 2. That a public duty imposed upon the latter is not to be dealt with as if it had been imposed upon the former; and that, consequently, no responsibility attaches to the corporate estate, though the Magistrates and Council should happen to fail in the performance of their statutory functions. 3. And finally, that, as a general principle, the burgh and its corporate estate are in no case to be made answerable for the acts of their Magistrates and Council, unless where the performance of such acts constitutes a proper part of their duties as administrators for the burgh—duties attaching, that is to say, by direct force of their election to office as implying a delegation from the corporation itself to act in such matters in the corporate behalf; and in regard to which, therefore, the act of the Magistrates and Council falls strictly within the category of a proper corporate act, binding only as such, through the delegated authority of the corporation.

Another illustration may be derived from the case of the poor's-rate. For there, too, the Magistrates and Council have, expressly in their capacity as such, a variety of important statutory duties imposed upon them. More particularly, it is made incumbent upon them, just as in the present case, to appoint stentmasters for the due and rateable distribution among the inhabitants of the annual assessment. In point of fact, the very same stentmasters whom they thus nominate under the poor-law statutes are believed to be, de praxi, the stentmasters who take charge in the matter of the annuity. But would it be possible to maintain, that for every slip or miscarriage of the Magistrates and Council, in electing the stentmasters, or performing any other part of their ministerial duty, under the poor-laws, the corporation of the burgh and its common good are to be responsible? On the contrary, the principle of Pearson's case would again apply:—the town is not "liable for their Magistrates, who had not this power of collection by their office, but by the commission of Parliament therefor."

Nor is it, in this view, an observation without weight, that the legislature, in all the statutes for extending the royalty of the city of Edinburgh, has, as to this matter of stenting, uniformly classed the cess and poor's-rate along with the annuity-tax. Thus, in 7th Geo. III. c. 27, it is enacted, "that the said Magistrates and Town-Council of the city of Edinburgh shall have full power to appoint stentmasters to levy," &c., within the annexed grounds, "an equal portion of the

No. 121. cess, annuity, poor's-money, and watch-money, payable by the city of Edinburgh, in the same way and manner as they are now levied within the present royalty."

May 28, 1845.
Ministers of
Edinburgh v.
Magistrates.

The subsequent statutes are in the same terms. Now, surely it would be not a little singular, that for a miscarriage of the Magistrates and Council in the nomination of stentmasters as regards the "cess" and poor's-money, the burgh and its common good should not be liable; and yet that, for a precisely similar miscarriage, by precisely the same Magistrates and Council, as regards the "annuity," the burgh and its common good should be liable. If it be a good answer in the two first cases that the Magistrates and Council have not this duty "by their office, but by the commission of Parliament therefor," the same answer must, in my humble opinion, equally apply to and satisfy the remaining case.

Accordingly, the more closely the statute imposing the annuity-tax is considered, the more strongly does the absolute separation of that tax (with every thing attending it) from the corporation of the burgh and its common good, appear to be made out. 1. Neither by statute nor at common law was there any inherent original liability on the part of the corporation, or out of its common good, to provide the ministers in the stipends which it was the object of the statute to secure. 2. On the contrary, so far as any payment had antecedently been made out of the common good, under occasional temporary arrangements with the ministers for the day, the statutes themselves speak of such payments as a diversion and misapplication of the common good from "the use whereunto the same had been appointed." 3. It was by the force of statute alone, therefore, that the burgh and its common good could legally be subjected in such liability, as regards either the direct payment of stipends, or the more indirect and contingent guarantee of their payment, in case the contemplated primary sources should fail. 4. But the statute imposes neither the direct liability of payment, nor the indirect liability of guarantee, upon the burgh and its corporate estate. On the contrary, it rears up a totally extraneous fund. And the fund which it thus raises up it carefully and anxiously provides for separating, and keeping apart from the common good as the estate of the corporation, in all time to come. 5. Accordingly, the fund, which is thus provided, is not to go into the common purse of the city, or to become a part of the city's means, or to be accounted for to the city treasurer, or in any way whatever to be placed under charge of the Magistrates and Council as the ordinary administrators (*virtute officii*) of the city's common good—but is to be levied by a peculiar machinery of its own, by force of powers specially conferred by the statute, under a Board or Commission, of which the Magistrates and Council (*only ad certum effectum*) are to form a part, and through stentmasters, collectors, and other officers, with whom the burgh as a corporation, and with reference to its corporate estate, has nothing to do. 6. And, finally, it is the ministers, and the ministers alone, who are to be the beneficiaries under the statute. For, as was decided by this Court in 1813, it is they, and they alone, who "have the sole interest in, and exclusive right to, the entire produce and benefit of the annuity."

It is, with deference, impossible, in the face of all this, to hold that, so far as there is a statutory trust here created and imposed upon the Magistrates and Council, it is in any sense to be held as a trust wherein the burgh, in its corporate capacity, can be held as trustee. The real and the only trust functionaries are, just as in the case of the cess or the poor's-money, the officers known by the name

of Magistrates and Town-Council of the burgh for the time. There truly came to be vested in that body, from the date of the statute, two entirely distinct and separate functions of trust. Under the one, they held, by the native virtue of their office as administrators of the burgh, the corporate estate, or common good belonging to the burgh. Under the other, they held, not by virtue of their office, but by the separate powers of the statutory commission conferred upon them, the right of performing certain specific duties in regard to the annuity-tax, which belonged, not to the burgh, but to the clergy as sole beneficiaries. The two trusts which they had thus to execute were several and distinct throughout; and as the officers of each, the whole powers, duties, and responsibilities of the Magistrates and Council were equally so. Questions might arise how far the beneficiaries under one of these trusts could be made answerable for the malversation or neglect of their own trust functionaries; but there is not the vestige of ground for holding that the beneficiaries (or estate belonging to them) under the one trust, could in any case be subjected in liability for the malversation or neglect of those who acted only as the trust functionaries of the other.

If the case had been, that the trust created in the Magistrates and Council had here flowed, not from a statutory source, but from the bounty of a private individual, I do not believe that it could ever have occurred to any one to attempt to make the burgh answerable, in its corporate capacity, for miscarriage or breach of duty on the part of the trustees in such a trust. Suppose, for example, that for the special endowment of a stipend to the ministers of a particular church, (being one of the city churches,) a private party had made over to the Magistrates and Council a valuable property or fund, surely it could never have been maintained that the malversation or neglect of a particular set of Magistrates and Council in the execution of such a trust could be visited upon the burgh. Yet if such would be the result as to the endowment of a single church, the same must equally hold, though all the churches together were to be so endowed. Now, does it make any difference that the endowment comes through an Act of the legislature? The question still is, who are the trustees?—the burgh, or only its magistrates and council? No doubt the legislature might impose both the duty and the burden upon the burgh. But this is not to be held without express words, and certainly is not to be reared up by mere implication. In the present case, I am satisfied that the statute goes no further than to afford facilities for the levying of the necessary funds; and for vesting these funds, when so levied, in certain ex officio trustees for behoof of the ministers. And I certainly see no better ground for holding the burgh liable out of its proper corporate estate for the discharge of this distinct trust, than if the funds had been placed under the superintendence of the Magistrates and Council by a mere private party.

Nor am I in the least moved by the authorities which have been cited as supporting an opposite view; for they all of them, as it seems to me, fall precisely within the principle for which I contend.

For example, as to the case of Lyme-Regis, if I understand it aright, it substantially comes just to this:—The Crown made a grant of certain lands “to the mayor and burgesses of Lyme and their successors,” directing, as a condition of the grant, that they should at their own cost repair the pier and quay, with all banks, &c., within the burgh; and it was held, 1st, That this was a grant to the corporation of the burgh; and 2d, That as the corporation, qua grantees, could

No. 121.

May 28, 1845.

Ministers of
Edinburgh v.
Magistrates.

No. 121.

May 28, 1845.
Ministers of
Edinburgh v.
Magistrates.

not hold the grant without fulfilling its condition, so not having fulfilled it, as damage thence arising, they were answerable in their corporate estate. But is this any resemblance to the present question? If, indeed, the annuity-tax (which was unsuccessfully contended for by the corporation, in the question with the ministers in 1813) had been given to the burgh, and for its corporate use as behoof as part of the proper common good, under condition (as in *Lyme-Regis* of paying certain stipends to the clergy, it is conceded that the clergy would have had their action against the corporation for the fulfilment of this condition, by payment of such stipends. But that is a totally different case from the one before the Court.

In like manner, as to those cases where burghs have been held liable for the escape of imprisoned debtors from their jails, the explanation turns on a somewhat similar principle. The burgh, as a body politic as well as corporate, had (under the recent change in the prison system) attached to it by the law of the land, as an express condition of its existence, the duty of keeping up sufficient jails. In this respect they were public officers, and had an important duty to discharge as keepers of the King's keys, to all the subjects of the realm. It was, in fact, precisely to enable the burgh to perform this duty, that the original grants from the Crown which usually accompanied the charter of erection were bestowed. It followed, as a matter of course, that the burgh, as the proper party to fulfil this obligation, was answerable for the breach of it. Whether—since the new light which has lately been let in, as to the non-liability of trust-estates for the delict of the trust-officer in such cases as *Duncan v. Findlater*, *Mitchell v. the Police of Edinburgh*, &c.—the older decisions are in all points to be justified even upon this ground, may possibly now be made a question. But be that as it may, the cases referred to have, upon their own grounds, no proper application to such a question as the present. And, indeed, Lord Kilkerran expressly states the judgment in the cases as resting on an exception from the general rule; observing that (even when the Magistrates act as the proper representatives of their burgh) “the only case in which a community is liable for the delict of their Magistrates, is that of the suffering a prisoner to escape; which is founded upon this reason, that the burgh is by law bound to have sufficient prisons, and consequently is answerable for the keepers thereof.”¹

To the like effect in principle, though still a weaker authority in the particular case, is the judgment in *Innes*, February 6, 1798.² For there, too, the ground of the decision was, that it was incumbent as a duty upon the burgh itself, and inherent in its very constitution *qua* such, to preserve the public streets in a state of safety as matter of public police. The streets, moreover, were in this sense the public property of the burgh; and the burgh, as proprietor, was liable in the same responsibilities for their condition as an individual proprietor in the case of a private road. It is plain that, in founding upon such a case, the whole question now at issue is assumed. For that question is, not what would have been the liability of the corporation, supposing the duty, of which there has been a breach, to have been a duty imposed upon the burgh itself; but whether the duty was, in truth, at all imposed upon the burgh, or whether, on the contrary, it was not confined to

¹ Magistrates of Banff, Feb. 28, 1744, (D. 2505.)

² D. 13189.

the Magistrates and Council, as a distinct board of statutory trustees for the management of a separate fund belonging to the ministers, and with which the burgh in its corporate capacity had nothing to do.

On the whole, therefore, I am of opinion—1. That the Magistrates and Council for the time being, and not the burgh itself as a corporate body, are the statutory trustees in all that concerns the annuity-tax. 2. That the trust thus constituted in the Magistrates and Council, and wherein the city ministers are alone interested as beneficiaries, is not to be confounded or mixed up with that original and primary trust which was from the outset vested in them, as regards the common good or corporate estate of the burgh, and of which last they are administrators for a different set of beneficiaries—viz. the community at large, or corporation of the burgh. 3. That any breach of duty on their part in the exercise of one of these trusts, is not to be visited upon the estate or beneficiaries of the other. And therefore, 4. That the only ground of action here being “the culpable neglect or omission of the Magistrates and Council to perform the statutory duty committed to them” under the annuity statutes, (the said duty being indeed expressly libelled as a “ministerial duty,”) there are no termini habiles for subjecting the corporate estate to the effect concluded for.

II. But there is a separate ground on which I hold it impossible to reach the corporate estate. For even though the burgh, as a corporation, were to be dealt with as the proper statutory trustee, still, as the common good or corporate estate would in that view be in no worse situation at all events than the proper patrimonial estate of an individual trustee, (where the trust had been conceived in favour of a private person,)—so, under this aspect, the action substantially resolving itself into an action of damages, I should hold the answer to it sufficient—that the trust is wholly gratuitous in its character—and consequently, that the burgh, qua trustee, is liable only *de dolo vel culpa lata*—a species and degree of culpa for which there appears to me no reasonable pretence in the case.

On this head, I have but little to add to the grounds of the opinion formerly stated in the note to my interlocutor; and in which I am only the more confirmed by the further illustration which the subject has received in the opinion of Lord Cuninghame.

In the first place, however, as regards the question, how far the trust is to be regarded as of a gratuitous or onerous description, I can by no means adopt the view which has been so strenuously urged on the part of the ministers—that it is enough to stamp the trust with the latter character, that there has happened, by means of the annuity-tax, to be secured to the clergy a more valuable and settled provision for their stipends, and that thus, indirectly, the inhabitants of the city must be presumed to have been benefited, as having had their religious interests cared for by a better class of ministers. This, surely, is not the sort of onerosity which the law regards, when considering the question whether a particular trust is or is not to be held as of gratuitous execution in the person of the trustee. Any supposed benefit such as that referred to, is purely consequential. But in order to deprive a trustee of the protection which the law extends to him as a gratuitous officer, it must be shown that he, in his own person, derives some direct benefit, in the shape of a distinct consideration, for the discharge of his duties. Therefore, in the present case, where it is a pecuniary fund which is to be administered, the important and conclusive thing is, that not only all participation, whether as

No. 121.
May 28, 1845.
Ministers of
Edinburgh v.
Magistrates.

No. 121. regards the stock or proceeds of this fund, but all chance even of possible participation on the part of the burgh, viewed as the trustee, is absolutely excluded. The burden and the trouble of administration alone lies on their side. The benefit or lacrum is wholly and exclusively with the ministers.

May 28, 1845.
Ministers of
Edinburgh v.
Magistrates.

Besides, it ought not to be forgotten in this view of the case, who it is that pays the annuity. The ministers always assume that the annuity statutes are to be construed and given effect to, as if they had conferred a pecuniary grant upon the community. But it is far otherwise. For, justly considered, the only operation of the statutes is to impose a tax. Now, it may be very right that the individual inhabitants, as parties benefited by the clergy's services, should have such a tax imposed upon them. But it is too much to speak of the party thus burdened, and thus paying, as of a party who had been enriched by a grant derived from some separate and independent source. Even, therefore, as regards the inhabitants, there is no room for representing the trust as of the onerous character contended for by the ministers. And it is presumed that no distinction can in this respect be taken between the inhabitants and the corporation. For, unless it be through the inhabitants, the parties actually attending on religious ordinances, how could it at all be said that the body-corporate derives any benefit whatever from the ministrations of the clergyman?

It seems impossible, therefore, to hold, that on the part of the burgh, qua corporation, (if the corporation is indeed to be held as the statutory trustee,) the execution of the trust is other than wholly gratuitous.

But then it is said there is an implied contract in the case. I cannot read the summons as laying any ground for an action upon contract. And I desiderate evidence as to the existence of any thing entitled to the name. But if the case be to turn on this, it truly resolves, not into a question of law, but into an important question of fact. Now, with deference, it is for a jury, not for the Court, to dispose of such a question.

But suppose there was a contract, who were the parties to it, and what was its nature? Was it a contract between the legislature and the burgh? Was it between the Crown and the burgh? Was it between the ministers and the burgh? I read the statutes in vain to clear these questions. All I see on the face of the statutes is, that the common good or corporate estate of the burgh being unable to meet its own proper duties and burdens, and its application to the maintenance of the clergy being regarded (so far from a natural or legal obligation incumbent upon it) as an absolute perversion and abuse which called for remedy—there was devised, under the sanction of the legislature, a specific measure, the principle of which went to impose a tax upon the inhabitants; that the proceeds of this tax were to be administered for the benefit and support of the clergy; that, to this end, the machinery for the management of the tax was so contrived that any revenue drawn from it should never, under any circumstances, come into contact with the corporate estate; that the corporate estate, on the other hand, was to remain equally independent of and separate from it; and that each was to be administered accordingly for its own proper beneficiaries by the Magistrates and Council. How all this is to be construed into a contract, whereby the burgh is to be made responsible, in its own distinct and separate estate, (the common good,) for the levy and administration of the annuity-tax, which is the property of the ministers—and this just as if the corporation had undertaken expressly to guarantee the annuity against shortcoming or default—I have been altogether unable to discover?

The same answer applies to another argument which has been attempted to be raised, in respect of the Crown's grant of the patronages of the city churches. That grant, no doubt, may or may not have carried along with it certain correlative duties in the exercise of the patronage so conferred. But the annuity statutes are silent upon the whole subject; and equally so is the summons in the present case. How, therefore, any such grant can be held to touch either the question, who is the statutory trustee, or the separate question, what is the diligence prestable by such trustee, and the legal responsibilities flowing therefrom, it is not easy to see. Neither does it appear in any respect to aid the argument of contract. While just as little does it affect the argument of the supposed onerosity of the statutory trust. But if neither in its own direct bearing, nor as touching upon one or other of these heads, can it be brought within the true scope of the present case, there really appears to be, under the present form of action, no possible way in which to apply it.

Holding, therefore, the gratuitous character of the trust to be established, the only remaining consideration is, Has there here been *dole*, or *culpa lata*? I am satisfied that there has not. And in addition to what I formerly stated on this head, I would simply observe in a single word, that considering the fluctuating nature of the body which performed the trust functions—the undoubted fact that there was no wilful mismanagement—the total absence of any personal interest in the course followed—the natural manner in which the mistake (for it was no more) was kept up, each successive set of Magistrates following therein the practice of their predecessors—the absolute silence of all concerned as to the necessity of remedy—and the alacrity, when the blunder was at last discovered, to adopt every precaution necessary for its correction—all combine to make this a case in which to visit retrospectively with punishment what was without objection permitted to exist so long, would seem to be the very acme of injustice. In such a case, (whatever it may be proper to do for avoidance of future error,) I may perhaps be permitted to apply the dicta of two very learned Judges, (cited in a recent publication,¹) that, “To carry back the account to the very commencement of the misapplication, would be the ruin of half the corporations in the kingdom.”—(Per Sir J. Leach, 2 M. & K. 37.) “Besides, that to act on such a principle would be a great discouragement to undertake the office of trustees of charities.”—(Per Lord Eldon, 2 Russ. 54.)

III. I do not here resume certain remarks which I formerly deemed it right to make upon some collateral views of the case, and I allude to them now, only that I may not be supposed to have altered my opinion in regard to them. They still appear to me to be more or less of importance. In particular, looking to that very peculiar enactment in the annuity statute, which directs a separate set of stentmasters, and a separate stent-roll “for every parochie,” I cannot help thinking that the absence of all notice how the case really stands as to the several parishes, furnishes an additional objection to the general relevancy of the summons. Neither am I yet satisfied that the state of matters, as regards the list of stentmasters actually in office at the period of the city's bankruptcy, is altogether without weight; for, in so far as the Magistrates and Council found the list then complete,

¹ Lewin on Trusts, p. 665.

No. 121:
 May 28, 1845.
 Ministers of
 Edinburgh v.
 Magistrates.

and the stentmasters there named in full and unchallenged action, any error that can be imputed to them consists only in an omission to detect the blunder of their predecessors. I doubt whether such an omission (there being no annual election of stentmasters) be sufficient to fix the corporation with an abiding liability even for the future consequences of this blunder, of which the Magistrates and Council of after years could know nothing; and whether, on the contrary, the ministers' claim be not to this extent limited to the estate surrendered on the city's bankruptcy, as alone liable for all the consequences, both past and future, of an irregularity committed before the bankruptcy. There is, at all events, an important difference to be observed between a positive act of commission, such as that chargeable against the Magistrates who fell into the error, and such a mere oversight or omission as is to be imputed against those who only did not detect its previous existence. But I am content to leave these matters on the statement in my former note.

LORD CUNINGHAME.—I concur generally in the opinion and views of the Lord Ordinary, as detailed in the note attached to his interlocutor of 7th November 1843—a reference to which supersedes much of the explanation which might otherwise have been proper, in support of the opinion now to be submitted.

The ministers of Edinburgh commenced the present action in 1838 against the Magistrates and Council of the city, as proprietors or custodiers in trust of the property and funds of the municipal corporation. The summons concludes for the alleged damage sustained by the culpable neglect of their predecessors, the Magistrates and Council who were in office in the several years between Whitsunday 1833 and Whitsunday 1836. The neglect or malversation libelled on, consisted in the Magistrates, during the years foresaid, having continued in office certain stentmasters who had been irregularly appointed, from 1818 downwards, by preceding Magistrates alone, (without concurrence of the Council,) and on the fact that the Magistrates, during the latter years, also elected one or two new stentmasters of their own authority to supply vacancies, instead of dismissing all the former stentmasters, and having new ones named by the Magistrates and Council, in regular form, as required by the Act of 1661 libelled on. Certain of the rate-payers having objected to the assessments imposed by these stentmasters, the summons concludes for the loss said to be sustained by the irregular appointment.

The Lord Ordinary has found that the reverend pursuers have not set forth on record a relevant case to affect the corporate property of the city; and it appears to me that this judgment rests on grounds which are quite insuperable in law.

I. The primary view adopted by the Lord Ordinary in his note cannot be disputed, that the duties imposed on the Magistrates and Council by the Act 1661, with reference to the annuity-tax, have been devolved on them, not at common law, or at origine, under the title upon which the corporate property was acquired by their predecessors, for the use and behoof of the community, but under a nomination made for the first time in the subsequent statute of 1661. The corporators, therefore, must be viewed quoad hoc as Commissioners of Parliament, along with the other public officers, to whom the execution of the Act was confided; and if that is the true state of the case, the municipal property held by the corporation under their original title, could not be held liable for their deeds or omissions as Commissioners.

In this view the principle of the decision of the old case of *Pearson against the Town of Montrose*, in 1669, (Dict. 13098,) applies directly to the present question, as it was found in *Pearson's case*, that the common good is not liable for the neglect of Magistrates in the collection of a tax, in respect they had not the power of collection "by their office," (at common law,) "but by the Commission of Parliament therefor."

No. 121.
May 28, 1843.
Ministers of
Edinburgh v.
Magistrates.

In the present instance it is still more clear than in *Pearson's*, that the corporations are mere Parliamentary Commissioners appointed to execute the Act. In *Pearson's case*, the Magistrates and Council were sole administrators of the tax; but here, the Magistrates and Council had certain duties imposed equally on them, and on the College of Justice, in the nomination of stentmasters, and on the Deacons of the kirk as collectors. It would be unreasonable to hold that the property of either of the corporations were to be liable for the malversation, or even for the culpable neglect of their temporary office-bearers to execute this statutory duty. This would manifestly be, to make the property of one trust liable for the faults of its administrators, when acting in a different capacity and in a different trust—a result without precedent in the law.

While such a doctrine would be contrary to principle in itself, its consequences would be serious and extensive. It is notorious that the Magistrates and Council of Burghs, and the subordinate corporations belonging to them, are very frequently nominated either sole or joint-trustees for the management of hospitals, endowments, bursaries, and many other charitable institutions given to the community, or to the families of the several craftsmen. In the city of Edinburgh, in particular, the Magistrates and Council, and most of the incorporations, have many of these trusts, all held by the wills of the founders, and on separate titles from their office as corporators. If the trustees or legatees in such trusts act corruptly, or wilfully refuse to execute them, they are guilty of illegal conduct, and personally responsible for their wrong; but it has never hitherto been understood that they could, either by direct act or by gross neglect, affect the property of any of the collateral trusts given to them, and still less the common good of their burghs, whose peculiar property they were appointed to administer, under the original title of constitution, for behoof of the community.

If, however, the proposition on which the present action is based were sanctioned, and if it were found that the municipal property was liable for the malversation of the corporators in this trust, it would follow that a claim could be maintained against the common good for every blunder committed by the Magistrates and Council, or their legal advisers, in the execution of every duty, ministerial or official, committed to them by the various statutes and trusts passed by the legislature, or constituted by pious individuals for the public benefit; but no such doctrine has ever been sanctioned. According to the former election law, the whole machinery of electing the representatives for burghs, and the delegates in preparatory stages, was devolved on the Magistrates and Council. These were often violated, sometimes from ignorance, and perhaps more frequently from corruption or mala fides. But whatever responsibility to third parties might be established against individual corporators themselves, for gross and fraudulent breaches of duty, it never was found that the municipal property was attachable for the damage suffered from the wrong of their officers, in the execution of these statutes.

No. 121.

May 28, 1845.
Ministers of
Edinburgh v.
Magistrates.

The common good of corporations is anxiously guarded by rules very strictly enforced, to preserve the property for its original uses and destination. It is sufficient to refer to the case of *Finlay* in 1793, (*Dict.* p. 2008,) in which it was found, that "a corporation cannot employ its funds, or assess its members, for defraying the expense of supporting general plans of reform;" and a series of subsequent cases to the same effect are reported in the same section of the Dictionary, which it is unnecessary to cite. Multo minus, can a corporation, even if so disposed, legally authorize the common funds to be applied in repairing the culpable neglect of their office-bearers, acting as Parliamentary Commissioners in a separate trust?

II. Even if the individuals composing the Magistracy and Council had been named sole trustees for the clergy in the execution of the Act of 1661, there is no relevant case set forth on record to subject the preceding Councillors for the loss and damage now claimed from the corporation.

Assuming (for the sake of argument) that the Magistrates and Council, who were in office from 1833 to 1836, were subject to the liability of private trustees, for the due performance of their duty under the Act; yet, as they were gratuitous trustees, they could only render themselves liable for loss sustained by their beneficiaries, from gross and inexcusable neglect, equivalent to fraud. But no facts amounting to *culpa lata* are established or even averred here. On the contrary, the circumstances were most venial which led to the objection to the collection of the tax averred on record. The Magistrates of 1833 found certain stentmasters in office, who had been so for years prior to the election of those Magistrates, (i. e. since 1818,) without any surmise of complaint from the parties subject to the tax, or from those interested in its collection. These functionaries were continued in office by the Magistrates from 1833 to 1836, and they supplied a few vacancies in the same manner as their predecessors, without any objection being intimated from any quarter for years, that these acts were objectionable. The question then is, If new Councillors, chosen for the first time in 1833, were bound to discover the objection to the mode of electing or naming the stentmasters years before, and whom they found acting when they entered on their office?

The later councillors must have possessed a degree of penetration and astuteness very rarely to be found in ordinary office-bearers, to have suspected and detected the error libelled on; and if so, it is out of the question to impute to them personal blame or culpable neglect of duty, relevant to subject them in damages to any party. The whole principles of law are opposed to the subjection of trustees for mistakes, casual and inadvertent, which are unavoidable in the administration of ordinary affairs, and often attributable to the ignorance or neglect of previous members, or of professional advisers. Even in the highest species of trust (tutary for infants) it is laid down by all our authorities, that "tutors are liable for such diligence as they use in their own affairs, which seems sufficient to tutors testamentary, seeing the office is gratuitous and free, and not sought by them."

The same principle applies more strongly to statutory trustees, and especially to municipal corporators, who are a fluctuating body—changed annually, and who cannot be expected to be versant in legal objections maintainable against the acts of their predecessors or assessors, and acquiesced in by all interested for a series of years prior to their election.

Accordingly, that consideration received effect in the old case of the Duke of Hamilton against the Laird of Strichen,¹ founded on by the defenders. In that instance, a Sheriff, (probably a deputy of the hereditary Sheriff,) who was bound by the Act 1633 to collect a tax under pain of rebellion, was not found liable the amount of the tax, because there was no provision to that effect in the statute; and without such an enactment it was argued successfully, that annual officers could not be so subjected to those interested.

No. 121.
May 28, 1845.
Ministers of
Edinburgh v.
Magistrates.

III. It is important to observe, that few objections, when pointed out, admitted of a more easy and immediate remedy (which it is supposed was applied) than that now founded on as a ground of damage. The objection to the stentmasters here libelled on was never stated till Winter's case occurred in 1837; and it is not alleged on record that the objection was not rectified timeously, after it was known. What more, then, was incumbent on the Magistrates and Council? For aught stated on record, they did every thing proper to correct the mistake when known, and this irrefragably proves their bona fides, as functionaries executing the act. Holding the objection of Winter to the first stent to be well founded, (though it was only a decision of the Bill-Chamber,) the claim against him and similar objectors became insuperable in law, when their premises were stented of new by regular stentmasters. But as no negligence in the collection prior to 1837 is alleged, if the error then urged was instantly remedied, the claim for damages against the Magistrates, as laid on culpa lata, is plainly untenable.

It is stated on record, (Statement 14 for defenders,) and not denied, that the amount of tax paid voluntarily, or without objection, on the erroneous stents between 1833 and 1836, exceeded by £300 on an average the sums levied in 1837 and 1838, by new stentmasters appointed according to the letter of the statutes. According to that statement, no damage was sustained, in point of fact, by the pursuers, in consequence of the error on which alone the present action is founded.

IV. But even if the opposite state of the fact were assumed; and if it were proved that a clear loss had been sustained, by some palpable and gross breach of duty on the part of the corporators of 1833-36, it is apprehended that that would not be sufficient to subject the present defenders, and the corporate property under their charge, for any loss or damage thus sustained by the delict or gross fault of preceding administrators.

It was always, it is believed, a rule of our common law, that the functionaries holding the office of corporators could not alienate any part of the common good for illegal or private purposes; and it might have been deduced from that rule, that they could still less burden the municipal property with debts created by their own gross negligence. But certainly for a time in Scotland an idea prevailed, and received effect by sundry decisions, that Parliamentary trustees, or rather the property and funds under their administration, were liable for injuries sustained by third parties, from the culpable neglect of their servants, necessarily employed in the business of the trust.

But that doctrine is now greatly limited, if not entirely abrogated, by the late

¹ Dict. p. 13093.

No. 121. decision of the House of Lords in the recent and well known case of *Duncan and Findlater* in 1839,¹ in which it was found "that road-trustees on a public road are not liable for any injury which may happen to passengers in consequence of the negligence or improper conduct of labourers or surveyors, or other persons employed by the trustees, or by the officers of trustees, when engaged in any operation performed under the authority of the trustees." And the ground of that decision was fully confirmed in the subsequent case of *Thomson*, clerk to the Commissioners of Police of Edinburgh, against *Mitchell*, in 1840,² in which it was found that the funds of the Police were not liable for the illegal acts of an inferior officer.

May 28, 1845.
Ministers of
Edinburgh v.
Magistrates.

Looking to the views of the law on which these decisions proceeded, it is impossible not to feel that the authority of the earlier case of *Innes* against the Magistrates of Edinburgh in 1798, is considerably shaken. In that instance, an injury was sustained by the pursuer, from a fall into an unfenced excavation along the public street of Edinburgh, when the College was rebuilding. And though the proprietors, the commissioners of the College erecting the new building, were cited, they were not subjected, but the Magistrates were found liable in damages; and, as observed by the Lord Chancellor (Cottenham) in *Findlater's* case, "the Court held the trustees (the proprietors) not liable; the liability of the Magistrates was indeed established; but it rested on the supposed duties of the Magistrates of Scotch burghs," (i. e. to uphold the streets.) If that was the ground of the judgment, the corporation property was only made liable for the breach of a covenant expressly imposed on the corporation, or implied as a condition of the original grant; and so far the case might probably be assimilated with the English precedent of *Lyme-Regis*, founded on by the defenders, and to be immediately adverted to. But it is obvious that the present case is materially different in its circumstances from that of *Innes*, and that the ground of decision in the one question is totally inapplicable to the other. At the same time, as the magistrates of burghs are not under a stronger obligation to maintain the streets, than the trustees of turnpike roads are to preserve free and entire their thoroughfares; and as that consideration was not found sufficient to subject road trusts for a private party's damage, while the court of appeal refrained from expressing any approbation of the decision in *Innes's* case, (which assuaged the proprietors of the ground, performing the operations that occasioned the damage;—) were such a case as that of *Innes* to recur, the grounds of that judgment would probably deserve reconsideration.

The defenders, however, have referred to the case of the *Mayor of Lyme-Regis v. Henly*, to show that, in analogous cases in England, corporations and their property are liable for damage sustained from the ignorance or negligence of their members. The case in question is reported under the following summary, in 3 *Moore and Payne's Rep.* p. 278 :—"Charles the I., by letters-patent, granted to the mayor and burgesses of Lyme and their successors, the borough, pier, and quay of Lyme, with all the liberties and immunities to the same belonging; and directed that the mayor and burgesses, and their successors, should at their own

¹ *M'Lean and Robinson, Rep.* p. 911.

² 1 *Robinson's Rep.* p. 162.

costs repair the quay and pier, and all banks, &c., within the borough :—Held, No. 121.
 that an individual who had sustained an injury from the banks being out of repair, might maintain an action on the case against the corporation, for the recovery of damages in consequence of such non-repair.” But with reference to that case, it deserves to be particularly remarked, that although there was an elaborate reference to English authorities in the case of Findlater in the House of Lords, no notice was taken either by the Lord Chancellor (Cottenham), or by the counsel, of the case of Lyme-Regis, from which it may be inferred that it was held to be inapplicable as a precedent on the general point involved in Findlater's case and other analogous questions. Possibly it turned on the facts, that the repair of the pier was a condition of the grant, and that the trust-funds were unduly benefited by the omission to make the repair ; while there are plainly no grounds for these pleas in the present question. Indeed the estate there subjected, included the emoluments or dues under the grant, which sufficiently distinguishes it from the case now under review.

May 28, 1845.
 Ministers of
 Edinburgh v.
 Magistrates.

Be that as it may, a case recently occurred before the First Division of this Court, relative to the rights and responsibility of harbour trustees, which was determined in precise conformity with the cases of Findlater and the Commissioners of Police just noticed, without being influenced by that of Lyme-Regis. In the case of the New Clyde Shipping Company against the River Clyde Trustees, (16th July 1842,) certain shipowners who frequented the harbour of Broomie-law, and paid very large dues to it annually, complained that they had been compelled by the harbour-master of the trustees, to place one of their vessels in an insecure and improper position, whereby the vessel was strained, and put into a state of leakage, and the cargo sustained much damage. That case depended before me as Ordinary ; and being unable to perceive any distinction in principle between it and the case of the Commissioners of Police and Mitchell, before referred to, I had no hesitation in affirming the judgment of the Sheriff of Lanarkshire, who had assoilzied the trustees. That interlocutor was unanimously adhered to by the First Division. The case is briefly reported in B. and M.'s Reports, Vol. IV. p. 1521 ; but the interlocutor and note are not engrossed in that collection, probably as the question was considered trite, and finally settled by the recent cases ; but they are printed at length in the Jurist, (Vol. XIV. p. 586,) and shall be referred to in the sequel.

Further, the reverend pursuers have set forth, both in their libel and record, that there is at present a surplus fund of £8000 or thereby in bank belonging to the city, which is not protected from legal attachment or alienation by the Act of 3 and 4 William IV., appropriating the revenue of the city to specific purposes ; and this fund is set forth as open to attachment for the pursuers' claim. But upon whatever footing that fund stands, it now belongs to the corporation. Like every surplus of this sort, it is a guarantee against future deficiencies in the revenue of the city, or it may be applied to legitimate purposes within the territory of the burgh, when they arise. At all events, it cannot be awarded to parties who have no claim on the municipal property, merely because it is not at present specially appropriated.

V. A new plea was raised for the first time by the reverend pursuers, in the late argument before the Court, on which it was argued, that the Act 1661, whereby the annuity-tax was granted to the pursuers, was of the nature of an

No. 121. onerous contract between the clergy and the corporation of Edinburgh; that the provision thereby given to the ministers was a great benefit and boon to the community, by procuring the services of able and pious ministers to the city; and that this creates a specialty of overruling weight in the present case, rendering the corporation and their whole property liable for any mistake or error, however slight and excusable, (even for culpa levissima,) committed by the administrators of the corporation, or any of them, in the execution of this statute. It humbly appears to me, on the following grounds, that that plea is not maintainable against the defenders in the present case.

May 28, 1845.
Ministers of
Edinburgh v.
Magistrates.

1. There is no authority in any adjudged case, and no dictum of any judge or author quoted, to show that an obligation or guarantee can be supported without special enactment, or raised up by implication against a corporation, to render their property liable in any case for the omissions, greater or lesser, as the case may be, of their administrators, in the execution of an Act of Parliament. In the old case of the Duke of Hamilton, before quoted, it was found that the public officer himself was not personally liable for a tax for which he was not declared responsible by the statute; and the demand to render corporate property liable, on the ground of presumed onerosity, is at least a novel plea, as yet unsanctioned by any of the established authorities of the law. But it is supposed that both the history and the terms of the Act, and the general principles of law applicable to the question, are equally adverse to this plea.

2. The whole of the proceedings that took place prior to the Act of 1661, altogether exclude the supposition that the legislature intended to provide that the stipends of the ministers, as augmented by the Act, should in any event, or at any future period, be again laid on the common good of the city, which was set forth to be held by the corporation for very different purposes.

The various documents quoted by the reverend pursuers show, that in 1625 and 1634 the Town-Council represented that "the common guid is not abill to sustain the burden (of stipends) imposed thereupone, and of reasonne ought not to be thralld with the burden of the ministers' stipends;" and the Act of the Privy Council of 1634 proceeds on the express narrative, that the maintenance of the clergy should be defrayed by those who had the benefit of their ministrations, and not out of the common good. Accordingly, authority to raise 12,000 merks for sustentation of the ministers, was given by the Privy Council in 1634, on the narrative, that "Our soverand lord and estates of this present Parliament, understanding that, ever since the Reformation, the whole inhabitants of the said burgh of Edinburgh has enjoyed the foresaid benefits and blessings, and the common good of the town, which has been given to them for maintenance of policie, (police,) has been that way employed through the inlaick of other sufficient means for entertaining the ministrie of the said burgh, for remeid whereof, and to the end that those who serve at the altar may be entertained aff the altar, and the said common good may be rightly applied to the use whereunto the same has been appointed, our soverand lord and estates foresaid, statute and ordain that the sum of 12,000 merks shall be uplifted yearlie, af the whole inhabitants and indwellers within the said burgh, (the Lords of his Majestie's Counsell and Session being onlie excepted,) and that according to the quantitie and proportion of the mails which they pay, or the houses where they reside may pay."

The preceding Act having been passed by the Privy Council during the Usur-

pation, the Act of 1661, in substance to the same effect, (but decreeing a larger tax,) was passed on the Restoration. It proceeds on a similar narrative to that of the preceding Act, that "the common good and patrimonie of the city is exhausted and overburdened," and therefore it conferred the grant of six per cent on the householders and tenements in Edinburgh, which is fully explained in the record.

No. 121.

May 28, 1845.
Ministers of
Edinburgh v.
Magistrates.

But although the Act of 1661 gives very minute and detailed directions for its execution in various contingencies, there is no provision whatever, that in any event the corporate property should be subjected to the claim of the ministers. Indeed, it would have been very extraordinary if there had been any such clause. The Act proceeded specially on the fact, that the common good of the city was overburdened and exhausted, and insufficient for its proper and legitimate purposes, and entitled to be relieved from the stipends.

The legal ground of onerosity, therefore, urged by the reverend pursuers, in support of their action, is founded on assumptions not consistent with the facts. The common good of the city was not pledged, antecedent to the Annuity Act, to the permanent support of the future ministers in the parochial benefices of Edinburgh. On the contrary, it was again and again set forth that the corporate property was appropriated to other and preferable uses, and in particular, for the maintenance of the peace and police of the city, for which it is supposed that it is still insufficient. In that view, the ministers of Edinburgh, or at least those appointed subsequent to 1661, had no claim on the common good of the city, which they could substantiate at common law, independent of the annuity-tax.

3. Looking to the state of the corporate property of Edinburgh antecedent to 1661, and to the history and structure of the Annuity Act, it was evidently intended that the ministers should enjoy the provision made for them, in lieu and exchange of every other provision exigible from the city or its inhabitants. The city conceded this provision, and the clergy accepted of it, without any reserved claim on the corporation. It was a far larger provision than the city could afford out of their common good, and it was advantageous for the ministers to take it, subject to the small casualties and hazards of diminution, which are unavoidable in the management and collection of the best secured revenues in the business of mankind. It will be immediately shown that the rules of common law are amply sufficient to protect the ministers, as grantees of the tax, against gross and wilful wrongs on the part of the public functionaries employed to execute the Act; but any loss arising from slight or unintentional errors in the administration of the statute, must fall on those for whose benefit the Act was passed. In such a case, the trite maxim justly and unavoidably applies, "*ejus commodum est, ejus debet esse incommodum.*"

The proposition of the reverend pursuers, however, resolves into this, that although the Act was passed solely for the patrimonial benefit of the ministers, and the execution of it committed (in part) to the individual corporators of the burgh, (along with certain other public functionaries,) yet that the legislature intended that the city of Edinburgh and their property should be guarantees of the due execution of the Act, and liable to the full amount of the tax, for every error, however accidental or unintentional, committed in the administration or working of the Act. In that doctrine I cannot concur.

No. 121.

May 28, 1845.
Ministers of
Edinburgh v.
Magistrates.

No doubt there are certain plain but well-defined cases, in which public officers employed to execute statutes are personally liable by the common law of Scotland, and it is believed of every other system in which the principles of jurisprudence are rightly understood, in damage and reparation to parties injured by the non-execution of the Acts. Such liability unquestionably attaches to statutory officers personally, who corruptly, or wilfully, and tortiously refuse to execute statutes properly, when any error or illegality in their previous proceedings (as in the late cases of Auchterarder and Lethendy) has been pointed out, or has been found and declared by a court of law. When public officers thus wilfully refuse to execute duty imposed on them, they are acting wrongously, and it requires no special enactment—the rules of common law and justice are sufficient to render every party liable for the consequences of what is equivalent to personal obliquity, and fraud. But the contrast between these cases and the present is sufficient to illustrate the untenable ground on which the claim against the defenders in the present instance is maintained.

Even in the case supposed, however, of great injury sustained by third parties from a perverse and wilful refusal by public officers to execute statutes, sufficient to subject the wrongdoers and their estates in full reparation, the corporate property vested in them for other purposes could not be subjected for the illegal and fraudulent conduct of its officers. The rule is alike general and salutary, that the property of corporations, like that of pupils, is under the constant tutelage of the law, and it is thus jealously protected against the fraud and illegal conduct of its administrators.

If that proposition be correct, and if it be admitted that the property of a corporate body is exempted in law from the culpa lata of its members, it must surely follow that it cannot, in any case, be made liable for their culpa levis; more especially for their more slight and unintentional mistakes, into which they were misled, as in the present instance, by the acquiescence of all interested, for a period exceeding the possessory years in our practice.

4. On referring to the precedents in analogous cases, it appears that the plea of onerousness, as a ground for establishing claims against public property not specially rendered competent by statute, has been very generally discouraged and disallowed.

It is obvious that if claims on this ground were readily admitted against corporate property, they would seldom be rejected. There is hardly a bequest or a maturation put under the management of any municipal corporation, for the education of the young, or relief of the sick, or for the comfort and support of the aged or the blind and infirm, which does not minister to the pious and benevolent feelings of the community, and which may not be held to relieve the latter from onerous obligations. But these views of constructive onerousness, as they may be termed, have never hitherto been found sufficient to render the municipal property liable for the error of their administrators in the execution of special trusts and statutes. If they had, they might have been urged with more force in the late case of Mitchell against the Commissioners of Police, than in the present case. It might have been urged that the Magistrates were under an original obligation, and that the municipal property was liable, by its most ancient title, to repair every damage sustained from the violent and illegal conduct of the officers of police, as the Police Acts were passed merely to relieve the corporation of a pro-

per municipal expense, and that the corporate property was bestowed, primarily and preferably, to ensure the safety of the lieges frequenting the burgh, and generally, in the words of the old statutes, for the preservation of the police. But no such plea was attempted in the case referred to.

No. 121.

May 28, 1845.
Ministers of
Edinburgh v.
Magistrates.

In like manner, when the trustees on high-roads are sued for an injury sustained by an unwarrantable obstruction, or unprotected precipice left open on the way, the plea appears most reasonable, independent of statute, that the trustees, by levying tolls at the entrance and along the course of an extensive road, come under an onerous obligation, and implied mutual contract, to give the traveller a safe passage along the road. Indeed, it has been expressly found that trustees cannot keep up toll-bars without putting the roads in proper repair.¹ Yet, notwithstanding this law, it is now settled that third parties have no claim against the trust and road funds for damages sustained from any culpable negligence of the surveyors appointed by the trustees.

On the contrary, the very plea of onerosity was urged, and disregarded by the Court, in the case of the New Clyde Shipping Company and the Clyde Trustees, before referred to. In that case, it was observed in the note of the Lord Ordinary, that "the main specialty relied on by the pursuers seems to be, that their damage is said to have arisen from a failure on the part of the defenders to fulfil the counterpart of the very contract under which the pursuers paid harbour-dues. They stated that they paid £2000 of such dues annually to the defenders; that these were given for safe shelter, and if their property was negligently so placed by the defenders' servants as to suffer great damage, there was an implied stipulation on the part of the defenders to repair the loss. This certainly appears a wrong view of the case, both on legal and equitable principles. But it is doubted if the very same argument was not equally maintainable in Findlater's case. The travellers on a road pay tolls for well-constructed and safe roads; some stage coaches pay as large a sum of tolls as the pursuers pay of harbour dues, and it is now laid down, on authority not to be questioned, that if a coach is overturned when filled with passengers, whose lives are of the greatest value to their families, yet if the injury has arisen from the negligence of subordinate persons whom trustees are authorized to employ, the sufferers must seek redress only from the wrongdoers, and not from the trustees or trust-funds. In such cases where the funds are appropriated by statute to specific purposes, and every other application is prohibited, there is no implied contract which entitles any party to attach them for any damage or failure of duty committed by subordinate servants. The remedy is against the individuals who committed the wrong, and not against the trustees.

These views, or at least the judgment which proceeded upon them, met with unanimous concurrence of the First Division of the Court; and it is apprehended that the authorities referred to go far to obviate the plea of implied obligation in questions of this description, on which it is understood that the plea of pursuers is now chiefly founded. Generally, upon the grounds now explained, it is of opinion that the reverend pursuers have no relevant case against the mu-

¹ Guild v. Scott Dec. 21, 1809, (Fac. Coll.)

No. 121. nicipal corporation of Edinburgh, and therefore that the defenders should be assolizied.

May 28, 1845.
Ministers of
Edinburgh v.
Magistrates.

LORD JEFFREY.—I concur generally in the opinions of Lord Cuninghame, Lord Ivory, and Lord Mackenzie, and in the grounds of these opinions.

I think the principle of not subjecting the common good of a burgh for the neglects or malversations of its Magistrates and Council, when not acting in their proper official capacity, but in regard to matters committed to them by special statute, (or even by the act of an individual,) rests upon such plain grounds of equity and general law, as to require no support from authority, and not to be likely indeed to have been drawn seriously into question. It does appear, however, to have been questioned, and most distinctly affirmed, in the noted case of Pearson, reported by Lord Stair in 1669—a case, as it seems to me, precisely, and in all respects identical with the present—decided in the very best times of our law, and recorded with approbation by the greatest of all our lawyers. I find it also very distinctly recognized in the Banff case of 1744, by the great authority of Lord Kilkerran, and confirmed, as I cannot but think a fortiori, in the recent decisions of the House of Lords in the cases of Findlater and Duncan.

But, as I hold the trust or function of the Magistrates and Council in respect to the appointment of stentmasters, to have been merely honorary and gratuitous, and as there is redundant evidence that the partial neglect which occurred in the performance of it was at no time wilful or contumacious, but, in so far as regards the only times now in question, in the highest possible degree venial and natural, so I take it to be plain that it would have inferred no liability for damages, even if it had occurred in the ordinary official administration of the Magistrates, and in relation to the proper affairs of the burgh.

Upon this point, indeed, I believe I hold a stronger opinion than any of the Judges in whose conclusions I concur; for I think that, in truth and reality, the statute, in so far as the burgh was concerned, neither conferred any benefit, nor imposed any burden; and, at all events, should rather hold it more correct to call that a burden which the pursuers represent as a benefit, and that a benefit which they insist on dealing with as a burden. The benefit, according to them, was the relief of the common good from the burden of the ministers' stipends; but there was plainly no need of a statute to effect that relief, because it is indisputable that it never was legally liable for these stipends, and might at any time (but for special temporary bargains) have relieved itself of them, and left the pastors to the voluntary contributions of their flocks. All that the statute was required for, therefore, and all that it substantially did, was to impose upon the whole inhabitants, and principally on the burgesses or great corporation of the burgh, a much heavier burden on account of these stipends than had ever previously existed. There was no issue for this purpose from the public treasury, nor any bounty bestowed on the city, but, on the contrary, a local tax imposed upon it, and levied, in consequence of its precise locality, exclusively from those who had an interest in the due administration of the common good. The whole benefit, therefore, was plainly to the ministers, and the whole burden on the town—while, with regard to what the pursuers are pleased to call the burden, of occasionally appointing a stentmaster, and seriously represent as an anxious and painful duty, which never could have been submitted to but in consideration of a great corresponding benefit. I have the strongest possible conviction that it was never considered as in the na-

ture of a burden at all, but merely as a privilege and honour, which was, and was expected to be, highly acceptable to those on whom it was conferred, it being, in its own nature, neither more nor less than the grant of a patronage to a new office of some trust and emolument, requiring no outlay or sacrifice whatever, nor any appreciable contribution either of labour or of time, for its most correct and complete exercise. If the patronage or power of nominating the city ministers was, as the pursuers so eagerly contend, an unequivocal benefit and advantage, and nothing else, it is not easy to see how the patronage, or power of nominating the city stentmasters, should rank in an opposite category. There may have been a resulting duty, no doubt, in both cases, importing that the grantees should not refuse to exercise the patronage on all proper occasions; and if there had been a spiteful or contumacious refusal, to the prejudice of third parties, the individual recusants might possibly have been made liable for the consequences. But the grant of the patronage was, notwithstanding, primarily and in its own nature a benefit and not a burden; and it really does seem nothing less than preposterous to hold that a casual omission should be accounted penal, and be dealt with like the withholding of a reddendo that had been onerously bargained for, and purchased for a stipulated price.

No. 121.
May 28, 1845.
Ministers of
Edinburgh v.
Magistrates.

I hold, therefore, that what was really done by the statute was merely to impose a new tax on the city for the benefit of the ministers, and to give the patronage of the stentmasters, who were to assess it, to the Magistrates and Council, and to the College of Justice, as the fittest parties to whom this prerogative could be entrusted, and the most likely to exercise it with propriety, but without the least idea of laying them thereby under any harsh or onerous obligation. The mere fact, indeed, of the conjunction of the College of Justice with the city authorities, is demonstrative to my mind, that the patronage so granted must have been for honour and privilege only, and not at all as a burden.

But if this be its true character, it would plainly be of no consequence although it had been connected in the Act with something else that was also of the nature of a privilege or benefit conferred, as the pursuers say it was, by the relief derived to the common good through the operation of the new annuity-tax, which was truly the only thing with which it was there connected. They contend, however, also, that the Magistrates had obtained from the legislature, or rather from the Crown, the sole patronage of the city churches; and that this being an undoubted gift or benefaction, may be regarded as a counterpart or consideration for the burden imposed on them as to the appointment of stentmasters. I have already said, that if the one patronage was a benefit, it is not easy to conceive that the other should be a burden. But there are other conclusive answers to this ground of pleading: One is, that the things here supposed to be correlative or dependent upon each other, have certainly in themselves no such relation or dependence; and that there is not in any of the statutes a single word tending to bring them into such a relation. There was a plain connexion, no doubt, between the imposition of the new tax and the machinery provided for assessing it; and if the duty of providing the latter had been laid on those who were to profit by the former, there might have been room for maintaining, even without express words, that the obligation was substantially onerous. But the grant of the patronage had obviously no such connexion. The only obligation naturally incident to such a grant is that of exercising it properly. In particular, it never could be presumed to have

No. 121. reference to the imposition of a city tax, or to the manner of assessing it; and unless the one, therefore, was expressly declared to be a condition of, or consideration for, the other, it would seem quite impossible to bring them into such dependence, even if they had happened to stand together in the provisions of a statute.

May 28, 1845.
Ministers of
Edinburgh v.
Magistrates.

But it is a second conclusive answer, that they do nowhere stand so together. In the Act of 1661, upon which the claim of the pursuers is solely and necessarily founded, there is no grant of patronage—and in none of the acts or deeds, in which by which a tax is imposed, is there any such grant—while, on the other hand, none of those by which the patronages are granted, is there any thing about the imposition or assessment of a tax. There is some proposal about obtaining the patronages in the act of the Town-Council of 1625: but there is no actual grant till 1636, when they are granted by royal charter, without any condition whatever, but with a mere reference to the articles of 1625, by which, most certainly no tax or obligation to assess a tax was imposed. The first actual tax, again, was a provision nearly similar to that of 1661 for its assessment, was imposed by Act of Privy Council (on a special remit from Parliament) in 1634; and it is material to observe, that in this Act there neither was, nor could be, any reference to a grant of patronage as justifying the imposition of the supposed burden of appointing stentmasters—the fact being that there was no such grant in existence for two years thereafter, when in 1636 they were granted without any reference whatever to this Act of 1634; while, in like manner, the final Act of 1661 makes no mention of this grant of the patronage as forming any part of the consideration on which its various provisions proceeded; nor is any such thing mentioned in any of the subsequent Acts, in which the right of patronage is extended, or the existence of the tax recognized. From all which I hold it to be clear, that the patronages were given separately, and free of any condition; and in particular that there is not a pretext for holding that any of the statutes either effected or contemplated any connexion between the duty of appointing stentmasters, and the grant of these patronages.

Upon these broad grounds, I have no hesitation in concurring with the Judges who think that the defenders must be assoilzied from this action; and have only to add, that I adopt the view of the authorities so clearly given in the opinions of Lord Cuninghame and Lord Ivory, and the whole of the principles laid down by Lord Mackenzie.

LORD MURRAY.—I am humbly of opinion, that this action cannot be maintained against the Lord Provost, Magistrates, and Town-Council of the city of Edinburgh, to the effect of obtaining the sum demanded out of the revenues and funds belonging to the city.

The action is based upon the alleged culpable neglect of the Magistrates in executing a statute of the Scotch Parliament, passed on the 5th June 1661, directing that certain persons should be appointed to value the houses, two of them to be chosen and sworn by the Town-Council, and two by the College of Justice.

That statute provides that the Magistrates of the burgh shall “see this whole Act and ordinance obeyed and put to due execution, according to the tenor thereof; and to do all things necessary for that effect.”

The alleged omission consists in no election having been made for a great sum-

ber of years by the Council, as provided in the statute ; and that during that period they were nominated by the Magistrates. It is not, however, alleged that this error was persisted in after it was pointed out.

No. 121.

May 28, 1845.
Ministers of
Edinburgh v.
Magistrates.

I. It does not appear to me that a trustee is liable in damages for an error or omission committed by him, unless it proceeds from gross and perverse misconduct on his part, amounting to *culpa lata*, which is placed on the same footing as evil intention. There is no ground for stating that there was such gross misconduct here; on the contrary, there is every reason to believe that the appointments were made, and the duties exercised *bona fide*, without any person, until long after, suspecting that any mistake had been committed. The omission on the part of the Town-Council was making no appointment at all. The error on the part of the Magistrates was making appointments which ought properly to have been made by the Town-Council. The culpa of the Town-Council, therefore, consists merely in the omission to make an appointment; and that omission is somewhat alleviated by the Magistrates, who were appointed to see the Act put into due execution, and do all things necessary to that effect, having done what the Council might have done. The Town-Council have, therefore, to plead, that those whom Parliament directed to keep them right did not perform that duty. The error of the Magistrates, on the other hand, consisted in making the nomination where none was made by the Council. I have some doubts whether, under the clause of the Act, the Magistrates were not entitled to do so; and I do not know whether that point was considered when the case of Winter was discussed in the Bill-Chamber. The statute also directed that two of the valuers should be chosen, sworn, and nominated by the College of Justice, or such as they shall appoint. On the College of Justice refusing to perform this duty, it is then devolved on the Town-Council, and ultimately on the Magistrates. But it has never been maintained that the College of Justice incurred any responsibility by refusing to perform any part of the duty assigned them by statute; and where men, skilful in the law, refuse to perform a statutory duty, it seems rather hard to hold that they are entirely free, and that those on whom it devolved, and who endeavoured to perform it, are liable for the consequences of every error or omission they may commit.

It has been urged in support of the pursuers' argument, that this city has had the great benefit of the labours of pious and able clergymen, selected from all parts of Scotland. This is perfectly true; but the College of Justice has shared the same advantage, without either assisting in the execution of the Act, according to the provision of the statute, or agreeing to pay any part of the assessment either for the clergy or the poor. It appears a somewhat strange result, that those who are willing to contribute both their labour and money should be made penally responsible for an error or omission; and that those who take all the benefit, and disobey the statute altogether, no way assisting in laying on the assessment, and constantly resisting it when imposed, should be free from all question.

II. It appears to me not less clear, that even if there was the most perverse and even corrupt misconduct upon the part of the Town-Council, or of the Magistrates, in making these appointments without due regard to the provisions of the statute, the funds of the city are in no way liable. It was a trust separate and distinct from the administration of the common good, or the other affairs of the city; and, according to all the authorities and decisions, the funds of the city can-

No. 121.

May 28, 1845.
Ministers of
Edinburgh v.
Magistrates.

not be liable. Upon this, the most material part of the case, it is not necessary to add any thing to what has been so fully and ably stated by Lord Cuninghame, in all of whose views and observations I entirely concur.

It appears to me that Lord Cuninghame has shown very clearly, that the case of *Innes v. Magistrates of Edinburgh*¹ can have no weight in the decision of this question. The ground on which the action was brought was different; and it may further be observed, that the question how far the funds of the city were liable does not appear to have been stated, and is not alluded to in the report. It is evident, that when magistrates are to blame, they may not be disposed to urge the plea, that the funds of the city are not liable for the consequences of their misconduct.

This is strongly illustrated by the case of *Pittenweem v. Alexander*,² where a bond, granted by magistrates to defray the expenses of legal proceedings against them, on the head of bribery and corruption, was found not binding as a debt on the borough. The law, according to the opinions of all the Judges in that case, is, that when town-councils act duly in the execution of the duties of their office, their acts are binding on the borough; but when they act wrongfully, the funds of the borough are not liable for what they do amiss.

The case was advised of this date.

LORD MEDWYN.—The present action is founded on the statute 1661, and subsequent statutes, authorizing an annuity to be levied for behoof of the ministers of Edinburgh from the inhabitants, tenants, and occupiers of houses within the town by the Magistrates and Council, who are bound to the performance of a ministerial duty in the election of stentmasters necessary for its collection; and it is stated that an irregularity having been committed in this duty, commencing in 1818, and doubts having been expressed as to the legality of the appointment, no annuity was levied during the period from Whitsunday 1833 to Whitsunday 1836; and the pursuers conclude for the sum of £4908 : 4 : 9, on the ground that these arrears have arisen from irregularities produced by the culpable neglect or omission of the Magistrates and Council to perform the statutory duty committed to them, and that in their corporate capacity they are liable for the consequences, and that the pursuers are entitled to attach the estate and effects of the corporation under a certain limitation for these arrears. Accordingly, the action is not brought against the Magistrates, who are alleged to have committed the irregularity, but against the existing Magistrates in their corporate capacity. The Lord Ordinary has not sustained this action against the corporation. I concur in that conclusion, although I may not incline to adopt all the grounds on which the interlocutor proceeds.

I hold it to be a clear proposition in law, that, independent of statute or contract, the magistrates of a burgh, who are administrators of the common good, given to them for the maintenance of police within the burgh, are not liable for the support of the ministers in a burgh. It was not so before the Reformation; and I know

¹ 6th February 1798, (M. 13189.)

² 15th July 1774, (Hailes, 596; M. 2527.)

of no change which has taken place in this matter since that period, by any statutory regulation. The clergy were always maintained out of church property, including teinds of lands belonging to the proprietors, when not the property of the church. These were the fruits of the piety or superstition of the people, and in this country afforded a most ample fund for such purposes. The church of Edinburgh, then a single parish, belonged before the Reformation to the abbacy of Scone, and was served by a vicar appointed and paid by them. After the Reformation, some church property was given to the burgh for the support of the reformed clergy, in conjunction with other purposes. It appears that, prior to 1633, there were six ministers for the four parishes, of which Edinburgh then consisted; and that, as the church funds had been dilapidated and dissipated at the era of the Reformation, part of which had been given to the Magistrates for support of the various institutions in the city, and which might have been available for the reformed ministers, the common good had been in part applied, or rather, I should say, in a legal sense, misapplied, by being withdrawn from its appropriate object, the maintenance of police, for the support of the ministers. Accordingly, in 1633, the Provost and Bailies give into Parliament an act, which they crave to be passed, as to the ministers' stipends, and Parliament remits it to the Privy Council to consider, with Parliamentary powers. It bears distinctly, "that the common good of the town, which has been given to them for the maintenance of police, has been in that way employed through the inlack of other sufficient means for entertaining the ministrie of the said burgh, for remeid whereof, and to the end that those who serve at the altar may be entertained aff the altar, and the said common good may be rightly applied to the use whereunto the same has been appointed," they require that 1200 merks be levied from the inhabitants, according to the valuation of four chosen men in each parish, for the sustentation of the ministry.

Now, this is the origin of the annuity-tax. It was enacted in the above terms. The Privy Council, in enacting it, do not say it was a legal burden, of which they were relieving the common good. On the contrary, it is plainly implied that it was a misappropriation of it which they were remedying; so that, while they gave the Magistrates the right to levy, and imposed this duty upon them, I do not think it can be properly viewed as constituting them onerous trustees for the ministers. They got a benefit, no doubt, in being relieved of this burden, but it is a very different case from what it would have been, if they had been liable originally in the burden, and had obtained the relief by this fund, from which the burden which still attached to them was to be discharged; nor can I hold that this relief involves at all the responsibility of an onerous trust in favour of the corporation as administrators of the common good. It only recalled the prior misappropriation of the corporate funds, and left them at the disposal of the Magistrates for their original and proper purpose; replacing them in the situation in which they should always have been, but conferring no new benefit upon them, to which they were not by law and the rights of their office entitled.

The subsequent statutes seem to make no difference on the character of this fund, or the duties of its managers. The Council of the city, on 20th October 1648, resolved to have twelve ministers in the city; and on application to the Committee of Estates, on 19th December, they authorized an imposition of 19,000 merks yearly upon the house-malls, for a provision to six of the twelve

No. 121.

May 28, 1845.
Ministers of
Edinburgh v.
Magistrates.

No. 121. ministers, at the rate of five merks per hundred, to be collected by the deacons of the kirk, to be delivered to the treasurer of the kirk,—“and it is not to come into the hands of the Town-Council.” Four stentmasters in each pariah, chosen and sworn by the Town-Council, and one by the College of Justice, are to value the houses for the tax. The amount of collection having fallen short of 19,000 merks, the annuity is raised to six per cent by statute 1649, to be collected by the deacons of the kirks; and the Act concludes with requiring the Magistrates to see this whole Act and ordinance obeyed and performed.

May 28, 1845.
Ministers of
Edinburgh v.
Magistrates.

Only ten ministers it appears were appointed, who, with the Professor of Theology in the College, discharged the ministerial duties in the city.

The Act 1649 having been rescinded at the Restoration, the Act 1661 was passed to supply its place. It affords, I think, no ground for representing the character of the annuity differently from what we have seen the previous enactments did. It does not bear that there was any duty on the Magistrates to pay the stipends out of the common good, and that the annuity was to relieve them of this legal burden; on the contrary, it bears that the teinda, rents, and others belonging to the city, for the use and maintenance of the ministers, are not sufficient for this purpose; and the common good and patrimony thereof is exhausted and overburdened, not, it will be observed, with paying stipends, but with “various charges for building of churches and public works,” so that the inhabitants have for divers years back, been in use to pay for the stipend of six of the ministers by an annuity of six per cent,—therefore the Parliament statutes and ordains that the stipends of six of the ministers shall be paid by this annuity. I think it is of little consequence, that the phraseology of this Act sometimes speaks of the magistrates and council, and sometimes of the town-council. I hold these to be synonymous. It is different, I think, when at the close of the Act it is said, as in the preceding one, that “the magistrates of the said burgh are to see this whole Act and ordinance obeyed and put to due execution.” This applies to them in their judicial character, and letters of horning and all other executorials are to pass upon the Act. But I think it of importance to remark, that though the stentmasters are to be chosen and sworn by the Town-Council, the collection is to be made by the deacons of the kirks, or by a collector appointed by the Magistrates and Council, in their option. I do not see that the more recent statutes make any difference on this matter. There is a change, but not affecting the point at issue; with the extension of the royalty and the increase of churches,¹ the Provost, Magistrates and Council, are to levy the annuity as they have hitherto done, for the stipend of *all* the ministers of the city and royalty, and not, as in the old statutes it was provided, for six of them merely. And the decree of the Court 1813, and contrary following upon it, merely found that the ministers have the sole interest in, and exclusive right to, the annuity; and that the Magistrates and their successors, for all time coming, must hold count and reckoning with them for its produce, implying nothing more, as I understand it, than that the whole produce of the annuity whatever is levied, is to go to the ministers for their stipend, and no part of it any longer to be applied to burgh purposes.

In the course of this analysis of the statutes, under which the right of the minis-

¹ 49 Geo. III. c. 21, § 17.

ten to the produce of this annuity is constituted, I think I have explained sufficiently the grounds on which I am unable to see how the common good, the corporation funds, can be held to have been relieved from any legal burden attaching to them, so as to make the Magistrates and Council, when administering the annuity funds, to act as the corporation for the benefit of their common good; and so that if, through any accident, the annuity should not be recovered, it would still be a deficiency from the common good, which the common good is bound to supply. The claim is not, however, put simply upon the ground of a prior legitimate burden, of which this was to relieve the corporation funds, so that the payment does not depend on the corporation getting the benefit of the relief, or that the party for whose behoof the burden has been imposed will have less claim against the corporation, because the relieving fund is unavailable for its purpose; but it is also rested on the culpable neglect or omission of the Magistrates to perform a statutory duty. This approaches to the argument raised on the ground that Magistrates having a public duty imposed by Parliament upon them for a great public good to the community, must be responsible as a corporation, and not as individuals, and must pay any loss which may arise from neglect or irregularity in the execution of their duty out of the corporate funds, the common good of the city appropriated for the maintenance of policie. This was laid down very broadly, but I heard no authority for this important maxim of law, and really do not know of any. I doubt extremely if the magistrates of a burgh could undertake any trust, so as to make their corporate funds, the common good, responsible for their malversation, or mistake or neglect, in the execution of it. The corporation funds are not their property, to be disposed of by them even for public purposes in the way they think best for the community. They are merely trustees, and bound to apply these funds for the specific purposes for which they are constituted its administrators. In fact, I think it would be illegal in them to endeavour to bind the city funds to be responsible for their management of any trust, so as to make these a fund of relief or guarantee for their mismanagement of any duty not properly magisterial they may choose to undertake, even with a view to the good of the community; and if it would be illegal in them to do so, therefore no such burden could attach to them by simply undertaking the duty. Parliament might no doubt impose the duty upon the Magistrates and Town-Council in their corporate capacity, but it would be necessary, I think, expressly to declare that it was so; and farther to provide that a party suffering loss from any wrong done in the course of their administration, should have a right to be indemnified from the funds of the burgh. We know that they are joint feoffees in trust of Heriot's Hospital. Is it maintainable that the corporation funds of the city would be liable for any mal-administration by them? I cannot conceive it. They have also funds set apart for the support of the University, secured to them by 1621, c. 79. If these were misapplied by the Town-Council, or lost by their culpable negligence, would the Professors have any claim on the common good for the maintenance of policie within the city? I really think not. Yet all these are for a great public object, the education of boys under the first institution, and of young men under the other and still more important institution—inasmuch as, while the one is local and burghal merely, this may be reckoned national. No doubt these are voluntary trusts, accepted by the Magistrates for the good of the community; and although the appointment to see the Act for the annuity carried into effect is the

No. 121.

May 28, 1845.

Ministers of
Edinburgh v.
Magistrates.

No. 121.

May 28, 1845.
Ministers of
Edinburgh v.
Magistrates.

enactment of the legislature, it is so far a voluntary duty undertaken, that the Act is passed on the application of the Town-Council, and it required an Act of Parliament to authorize this tax to be levied; and I think neither the Magistrates would have applied for, nor would the Parliament have yielded to the application, if it was not to have relieved the corporation funds from an illegal burden—that is, a burden sanctioned by no law whatever—instead of making them exposed to such a burden as it is now sought to subject them to. I think it unnecessary to notice the grant of patronage of the churches secured to the corporation by charter 1636. This was not granted as a compensation for the burden of levying the annuity first authorized in 1648, nor was of that nature, adding to the emolument of the corporation, which could impose a burden on the funds of the corporation. Neither can I consider that the advantage to the community of having the services of an additional number of clergymen, though no doubt a great blessing to the inhabitants, was such an advantage to the corporation as distinguished from the inhabitants, as to impose the burden on the corporation funds of any neglect or mistake, or mismanagement by the Town-Council in the steps taken for collecting the special fund for their payment. The advantage was to the inhabitants and was paid for by the annuity imposed upon them. I think it must be a pecuniary addition to the corporation funds for burghal purposes alone which could give a claim to any beneficiary against the corporation and its funds, for loss arising through failure or inability to levy it. No doubt, if it could be shown that the annuity had been misapplied by paying off proper city claims against the community, and thus relieving the common good, I have no doubt there would be good action against the Magistrates, or their successors in office, to make the corporation funds give back what had improperly been placed to their account. But this is on a principle totally distinct from any thing which occurs in the present case. Moreover, the common good will be liable, if there has been any loss from a negligent application of these funds to their peculiar and appropriate purpose. Thus, if a jail is insecure, and a debtor escape, from neglect of the duty of Magistrates to have a sufficient jail, the Magistrates and the corporate funds will be responsible for the debt; and Kilkerran lays it down, that this is the only case in which a community is liable for the delict of its Magistrates; and, accordingly, it was found in that case, *Campbell against Magistrates of Banff*, 28th February 1791, that they were not liable for the transgression of their duty by omission or commission even as Magistrates, for it was clearly their duty to repress a mob, if they were able to do so; while, in the present case, the duty said to be neglected is no part of their proper magisterial functions. The reason of the exception as to liability for their jail and jailor is, that it is part of the duty for which they retain their burghal privileges, and under their rights of watching and warding, to have a secure jail, confirmed by Act 1597, 277; insomuch that, in the case of *Auchtermuchty*, 22d May 1827, the creditors of the incorporation could attach it as available property for their debts. Since the time of *Kilkerran*, no other case has been added of liability of corporation funds for the neglect of Magistrates—*Innes*, 1793. But this, too, falls under the same rule, as the Magistrates are bound, out of the common good, to keep the streets of a burgh safe for the use of the community, and it was thought a necessary consequence of this that the corporation funds should be made responsible from a neglect to make the requisite expenditure out of them for this purpose.

It must never be forgotten that the common good of the corporation of a burgh is applicable only for the benefit of the community—for the maintenance of policy, as it is expressed in the Act of the Privy Council. The Magistrates and Council are not owners of these funds of the corporation. Although they have the administration of these funds, this is a trust only for behoof of the corporation itself; and, moreover, they are specially appropriated to particular public objects for the good of the community of the burgh, and must be applied to these purposes only. The Magistrates must not misapply them to any other; and least of all can such funds be made responsible in reparation of loss or damage arising from the negligence or delict of the administrators when acting in a different capacity, as commissioners for managing the affairs of other parties, and not in managing the proper business of the corporation itself. The individuals who neglect or mismanage the trust may be responsible for their conduct, but because they happen also to be administrators of another public trust, and of appropriate funds, kept totally distinct and separate, I do not see how these funds, and the successors of the individual wrongdoers, can be made responsible for the annuity, when, in the words of the case of Pearson against the Town of Montrose, “the Magistrates had not this power of collection by their office, but by the Commission of Parliament therefor.” And I think the judgment in that case is the proper one here. The Lords found the town and present Magistrates not liable, but prejudice to the pursuers to insist against the then Magistrates, their heirs and successors.

LORD MONCREIFF.—I so entirely concur in the opinions of the Lord Justice-General, Lord Fullerton, and Lord Robertson, and in the explanations therein given of the details of the case, that I shall not think it necessary to go very minutely into those details. But as I consider the case as one of very great importance, in so far as it depends on statute law, and the law of contract, and the simple justice of which is to my mind perfectly self-evident, I still think it my duty to state, as shortly as I can, the general views which I entertain of the merits of it.

The question of justice seems to stand simply thus:—The Magistrates and Town-Council of Edinburgh, expressly in the character of the corporate body representing the community of the burgh, having obtained by certain grants the right of patronage of all the churches in Edinburgh, and having at the same time, in virtue of the statute 1661, and the recognized practice under it, the sole power and the exclusive duty of regularly imposing the tax, called the annuity-tax, for the maintenance of the ministers who might on their presentation be inducted into the ministry, did at certain times invite and induce the gentlemen who maintain this action—all of whom, I believe, previously held other benefices—to renounce those livings, and become ministers of the churches in the city which they have since occupied. They did this, not as a gratuitous boon to these parties, but in consideration of the important services which they expected them to render to the several congregations who might be assembled in those churches, and for the general benefit of the whole community. And, in making the proposal, they necessarily held out to each of them the existence of the Act of Parliament 1661, and the actual operation of it during nearly two centuries, and as more precisely defined and sanctioned by a solemn judgment of this Court in 1813—as affording to them the certain ground for expecting and relying upon a respectable income being accounted for, and paid to them, by the Magistrates and Town-Council, and

No. 121.

May 28, 1845.
Ministers of
Edinburgh v.
Magistrates.

No. 121.

May 28, 1845.
Ministers of
Edinburgh v.
Magistrates.

no other parties. The pursuers, after having in this faith removed with their families from their former livings, and entered upon their duties as ministers of Edinburgh, and discharged them for years for the benefit of the community, are now told, that for certain years during which their services have been given and received, their stipends cannot be paid to them. And for what reason?—not that the Act of Parliament is not effectual for raising the fund devoted to the purpose; not that the duty or the power of enforcing the statute—the power and the duty of imposing the assessment and collecting the money—belonged to any party other than the Magistrates and Town-Council of the city; not that the ministers themselves had any power, far less any duty, to impose or to levy the tax; not that these ministers had done any thing, whereby either the assessment or the collection might be impeded or prevented; but simply because the Magistrates and Town-Council themselves, having the only power and the only duty in the matter, have failed duly to exercise the power and discharge the duty, whereby the funds required to be levied by the statute have not been realized, and cannot now be realized, for the particular years referred to. And the practical question is, whether this loss is to rest with the Magistrates and Town-Council, by whose acts and neglects alone it has been produced?—or whether the ministers, who have actually rendered all the service in consideration of which their stipends were stipulated to be paid, are to be left with their families without the means of living provided for them during those years?

Whatever subtle arguments the defenders may raise, for avoiding the responsibility attaching to them, by the acts and neglects of their predecessors in office as representing the whole community of the burgh, this appears to me to be the plain state of the question in law and justice, as between them and the present pursuers.

And really if it is not so, and if there is any solidity in the grounds of defence, it appears to me that the Act 1661 may at any time be practically set aside. For on the one hand, the ministers themselves are powerless; it is settled that they can neither impose the assessment, nor collect the money. On the other hand, according to the doctrine of the defenders, the corporation are not liable to the ministers, whether their representatives, the Magistrates and Town-Council, are or are not. Then the Magistrates and Town-Council of one year, are not to be liable for the acts and neglects of their predecessors; and even the individuals who do the wrong are said not to be liable, unless *culpa lata* or *posita mala fides* can be proved against them—a thing scarcely within the verge of possibility in any case. Such is the result of the pleas in defence. And the end of it is, that the ministers must lose their stipends, not by any fault of their own, but by the direct acts of the Magistrates and Council, by whom, acting for the corporation, they were invited to enter on the onerous duties of their places, and who alone had the power and duty of realizing the funds provided for their maintenance. Thus the operation of the Act, as in favour of the ministers, or rather of the public object of maintaining a respectable ministry in the city, may at any time be stopped by a latent error committed by the Magistrates and Council acting for the time, without the possibility of remedy, when, as in this case, such error is at last detected by some ingenious member of the Council itself.

On the merits of the case otherwise, it appears to me to be perfectly clear, as a matter of fact, that first the Act of 1649, and afterwards the Act of 1661, were

obtained on the express application of the Magistrates and Town-Council of the city of Edinburgh, distinctly acting in that corporate capacity, and for the benefit of the community of the burgh. No. 121.

May 28, 1845.
Ministers of
Edinburgh v.
Magistrates.

The statutes further prove, that before either of these Acts were passed, the Magistrates and Council, as the corporation, had maintained a certain number of ministers, partly from such ecclesiastical funds as they possessed, and partly from the common good.

I do not enquire whether they were bound to do so or not, though much might be said for the affirmative proposition, as involved in their essential duties, in regard to all the interests of the community. It is enough for me that they had done so in fact; and that in their applications to Parliament, they acknowledged the object to be one of great importance and expected benefit, not to any ministers or clergy, but distinctly to the community of the burgh. They stated, indeed, that the burden oppressed the common good. True; but it was treated as a burden existing and unavoidable, and to relieve them, the corporation, from it, they used the power of taxation.

But was this relief of the common good the real object at bottom? I think not. The real object was, to enable the corporation, applying to Parliament, to maintain for the spiritual good of the community a respectable body of the Reformed clergy in the city—an object which continued ever after.

To accomplish this adequately, great powers were given to the Magistrates and Town-Council, most certainly not for their own benefit, but for the great end of comfort to the community. It is to my mind altogether inconsequential, whether they got any thing pecuniary into the common good, which they had not before, or not. In my view, they got that which by no other means they could have obtained for the common good, if by that be understood not a money-box or fund for general expenditure, but the means of adequately supplying the spiritual wants of the people. They got a clear power of raising, in all time coming, a fund for maintaining an ecclesiastical establishment in Edinburgh, such as the people at that time desired, and for attaining which they were willing to sanction the petition of the Magistrates, as made for them, and to acquiesce in the statute as a great boon.

This is the real onerous cause of the statute. Is it gratuitous in respect of the community? The people of Edinburgh got that benefit at the time, and they have had it ever since. It was obtained on the express application of the Magistrates and Council acting as the corporation for the whole burgesses and inhabitants, and apparently with their unanimous concurrence.

The power of assessment is an extraordinary power. It was granted here as a benefit to the town of Edinburgh, as an arrangement for accomplishing an object of vital importance to the community, and at the same time relieving the common good from a burden hitherto affecting it, because no consideration could now them to neglect it altogether.

This is sometimes spoken of as if the statute had been a grant in favour of the clergy or establishment of ministers. It was not at all so. It was a grant to the corporation for enabling them to maintain a sufficient number of ministers. The presbytery, no general assembly, no bishop, no ministers interfered in the matter. It was altogether the doing of the Magistrates and Town-Council; and, though, in their petition, they mentioned the existing ministers among other

No. 121.

May 28, 1845.
Ministers of
Edinburgh v.
Magistrates.

classes of the community, the benefit was asked for the community at large, not in respect of the common good simply, but for enabling the Magistrates to maintain a sufficient establishment of the most able and learned of the clergy to be found in the kingdom, in so much that the existing number of six ministers having been found inadequate, the object was to obtain the means of maintaining six more, for whom, as not previously existing, no application could possibly be made.

In order to encourage this arrangement, and the grant as made to the corporation, and according to the strictest principle, the Magistrates and Council, as the corporation, got the patronage of all the churches.

This is treated too lightly. I regard it as of deep importance. They got the patronage first by the articles of agreement between them and the Crown, and it was afterwards confirmed by the same statutes, which, as I read them, conferred on them, as a corporation, the benefit of means for supporting the ministers to be inducted under it, by the power of imposing a public tax. They got these patronages decidedly as the corporation, and they are held by no other title; as the practical effect is, that, upon every vacancy, this corporation, having the power of appointment, and also the sole power of levying the tax, invite ministers from a distance to become ministers of the city, on the faith and solemn pledge given in behalf of the whole community, that, when the services are rendered, the statute shall be duly executed by the Magistrates and Council, who alone have the power of putting it in execution.

The statute 1661 appears to me to be very clear in its terms, and I see no occasion for going farther back, though that Act itself shows that the tax had been previously established in use. All that is said about the possibility of the College of Justice taking a share in the management, or of the Deacons of the kirk being appointed to collect, appears to me to be of no manner of consequence. Practically, the whole power was assumed by the Magistrates and Council, in perfect consistency with the terms of the statute. They got the whole power, and from 1661, they have used it ever since. They have named the stentmaster, they have named the collector—and so very clearly did they assume, as the corporation, both the power and the responsibility, that for a long course of years they gathered all the annuity-tax as their own, mixing it with their other funds; and ultimately maintained, that they were only liable for competent stipends to the ministers.

This course of practice went on from 1661 till 1811, a hundred and fifty years, during all which time the idea of no liability by the corporation never was imagined; on the contrary, the tax was levied as a common tax belonging to the corporation, and all was put into the common fund, subject to the claims of the ministers for adequate stipends.

Now, though this turned out to be wrong practice, and it was found that the ministers had a claim against the corporation for the whole free produce of the tax, this cannot, in my apprehension, make any difference as to the affecting acknowledgment of the principle in the present argument. There never was any doubt entertained as to the responsibility of the corporation, both for the due imposition of the assessment, and the due collection of the money. No doubt was entertained on that subject in 1813; and it is distinctly so explained in the contract which was then entered into between the Magistrates and Council and the

existing ministers. For, if it had been held otherwise, the management would have been put into the hands of the ministers themselves. But this was impossible under the statute, and would have been a very mischievous arrangement, if it had been possible or necessary.

No. 121.
May 28, 1845.
Ministers of
Edinburgh v.
Magistrates.

But, in fact, the whole matter of assessment and collection remained exactly as it had been before. The statutes were passed for the benefit of the community, permanently, in their most precious interests. And who should take care of those interests but the Magistrates and Council, on whom the whole duty is expressly laid? I apprehend that they must be considered as thoroughly and entirely representing the community in this matter, and thereby binding all the tangible funds which they may possess for making good the stipends payable by the annuity-tax.

For, in truth, the view I take of the legal question is somewhat different from that which has been urged. My opinion is, that these defenders having, not as individual Magistrates and Councillors for the time, but solely as the representatives of the corporation of the city permanently, the sole powers and the sole duty of imposing and levying this tax, granted by Parliament as a boon to the city, must, in any question with the ministers brought into it on the faith of those powers and that duty, be considered as having in all cases levied the duties which they had the power and means of levying; and that it is altogether an irrelevant answer to the ministers, demanding their stipends from those in whose hands the fund appropriated to the purpose by Act of Parliament ought to be, to say, that the officers of the corporation have neglected their duty—that is, that the corporation has failed to discharge its duty, not to the clergy merely, whose services have been given and taken, but to the whole community, for whose benefit the power was conferred, and the obligation duly to exercise it was undertaken.

Taking this broad view of the case, I regard the allusions to such cases as that of Innes, or the escape of prisoners, on the one hand, or the case of the road trustees, or any similar case, on the other, as of very little importance. The first class of cases apply a fortiori, when rightly explained. But the pursuers stand upon statutes, decrees of Court, and an implied contract. They are not engaged in a penal suit in any sense. It is just a process of accounting, in which the pursuers say that the defenders, as representing the corporation, either have, or ought to have, in their possession funds appropriated by statute to their use.

The case of the road trustees appears to be so totally different in principle, that it is unnecessary to advert to it more particularly.

If there could be any question of personal liability involved in this matter, in any view of the case, it could only be between the community and their representatives, the acting Magistrates and Council at the time when the error was committed. I do not say, either that such a claim of relief would be competent, or that it would not. I only think it clear that the ministers, who are in no way answerable for such acts and neglects of the corporate body, ought not to be thrown on any such penal and impracticable action.

The words about loss and damage in the summons relate, I conceive, to the fact of the money being withheld, and the excuse made for not paying it. But that excuse is not the cause of action—which consists simply in the refusal to pay

No. 121. to the ministers the stipends legally due to them, from funds which the defenders have, or ought to have, in their hands.

May 28, 1845.
Ministers of
Edinburgh v.
Magistrates.

Finally, it is not said that the defenders have not disposable funds. And it is very clear that they have such funds.

Some illustration might, perhaps, be obtained from the case of assessments for the poor, which by the statutes are to be imposed and levied within burgh by the Magistrates.* It will hardly be said that, in respect of that duty, they are under no responsibility as the corporation representing the community, or that the poor within the burgh would have no claim against them as such, if they chose not to lay on the stent, or not to levy the money.

But, in truth, the case of the annuity-tax appears to me to be the clearest case of all, against the attempt to deny such responsibility.

LORD COCKBURN.—I am of opinion that the interlocutor under review, in so far as it assolizes, ought to be adhered to.

I. In so far as the matter depends on the general principles of burgh law apart from any statutes, judgments, or contracts applicable to this particular question—I do not understand that even the pursuers pretend to have a maintainable case. Nothing is better established than that the Magistrates of a royal burgh are not the burgh; that they do not, in all matters, even represent it; and that where they do represent it, they have no absolute power of binding it. The Magistrates and Town-Councillors are the principal officers by whom the business of the burgh is performed; but the burgh and its officers are not identical. Nothing can show this more plainly than the fact, that the burgh, with all its corporate funds and privileges, may exist, although its Town-Council be extinguished. A failure to renew the Magistracy does not dissolve the burgh. Although the Magistrates may have great power over the burgh property, still they are chiefly custodiers for the corporation, and they cannot divert it from its proper ends; and least of all can they do so by making it stand between them and their own official errors or delinquencies. No burgh could long survive in a state of insolvency if they could.

And this protection is only the more necessary, that Magistrates, from their position, are often, very naturally, chosen to perform many duties, and, in particular, to administer many trusts, which are assigned to them because they hold that office. But this multiplication of the trusts which they may happen to administer, creates in law no confusion or amalgamation of trusts. There are probably no Magistrates or Town-Councils who have not, as such, various duties to perform, of the nature of trusts; which, even when laid upon them by public statute, and for behoof of the burgh, are quite distinct from their peculiar municipal duties as officers of the corporation. The management of streets, schools, hospitals, harbours, &c., have all been devolved on Magistrates, because they were the natural persons to select. But though these trusts may have been conferred

* Proclamation, 29th August 1693:—"And we, with advice foresaid, require and command the Magistrates of our Burghs Royal to meet and stent themselves, conform to such order and custom, used and wonted, in laying on stents, annuities, or other public burdens, in the respective Burghs, as may be most effectual to reach all the inhabitants."

upon them solely in consequence of the municipal dignity, and though this may have been sanctioned by statute, and though the right management of these things may be eminently useful to the burgh, nobody ever fancied that the burgh property was liable for all the errors of these Magisterial trustees. The produce of these trusts need not accrue to the burghesses, or to the burgh; which, not being directly benefited, are not liable for the loss.

No. 121.

May 28, 1845.
Ministers of
Edinburgh v.
Magistrates.

No trust funds are applicable except for the purposes of the particular trust. This is the principle implied in the recent judgments of the House of Lords, by which funds in the hands of road trustees and commissioners of police were not allowed to be applied in payment of damages incurred by these officers; because the payment of damages was not the object for which these funds were raised. Now, the property of the corporation of a royal burgh subsists only for the proper corporate purposes. These generally exhaust it; but when there happens to be any unappropriated surplus, its object is to accumulate for behoof of the corporation. And it is most material, in reference to the present question, to observe, that royal burghs are not liable, by common law, for the maintenance of ministers. Payment of clergymens' stipend is no legal burden on burgh funds. The incompetency of Magistrates subjecting the burgh funds for these stipends is implied in this single fact. They might just as well attempt to apply them in salaries to physicians of the body, because there was a dearth of medical skill, which made the purchase of it beneficial to the burghesses.

But merely because the managers of their tax happen to be the Town-Council, and there is thus an association of the idea of this tax with the idea of Magistracy, the pursuers seem to have a notion that the estate of the burgh forms a sort of general reservoir, out of which any party who loses by the negligence of the Council, no matter in what capacity it was acting when it caused the loss, is entitled to draw his relief. This, however, is a mistake; and it is one that accounts for much of their error in this argument.

To render the corporation responsible, a liability must be laid upon the burgh itself. This may be done in various ways; and the existence of the obligation, where it has not been imposed directly and in plain terms, may be deduced from circumstances. But, unquestionably, it can never be held to be implied, at common law, merely from three particulars, viz. that it arises out of an error on the part of the Magistrates or Town-Council; that the error was committed by them in the course of performing a statutory duty; and in a business useful for the town.

Nothing can illustrate this more strikingly than the case of Balmadie. It may be doubted whether this case is, even yet, cleared up. I do not see how the Magistrates escaped being made liable *ex contractu*; for the report bears that they had come under a written engagement to pay. But, on the point decided, the judgment is express, in its principles, against the present pursuers. It is, that the tax was imposed on the inhabitants, and that its produce did not belong to the burgh; that "the Magistrates were not countable to the town;" and that, therefore, the people "were not liable for their Magistrates, who had not this collection by their office, but by the Commission of Parliament." The Court "found the town and the present Magistrates not liable; but prejudice to the pursuer to insist against the then Magistrates, their heirs and executors." This reasoning is conclusive against the pursuers now before us.

No. 121.

May 28, 1845.
Ministers of
Edinburgh v.
Magistrates.

II. They maintain, however, that the liability of the present defenders is fixed by the various statutes, decisions, contracts, and proceedings which expound the history and legal character of this annuity-tax. There can be no doubt of the relevancy of this statement; but it appears to me to be utterly groundless. I am satisfied that the responsibility of the funds of the burgh for the due administration, by the Magistrates, of the assessment for the clergy, was not only not in the contemplation of any party concerned in the introduction or arrangement of the annuity, but is inconsistent with the whole course of what was done and meant.

The municipal property of this city, though not liable for stipends to ministers, had been misapplied to this purpose; and one main object of all the arrangements was, to correct this misapplication, by creating a different fund for the maintenance of the clergy. This is plainly set forth in the Act of the Privy Council of 18th March 1634, sanctioned by Parliament—an Act which forms the basis, and discloses the true principles, of all the future arrangements: "Our Sovereign Lord and Estates, &c., understanding that, ever since the Reformation, the whole inhabitants of Edinburgh has enjoyed the foresaid benefits and blessings, and the common good of the town, which has been given to them for maintenance of police has been that way employed, through inlack of other sufficient means, for entertaining the ministrie of the said burgh; for remeid whereof, and to the end that those who serve at the altar may be entertained aff the altar, and the said common good may be rightlie applied to the use whereunto the same has been appointed our Sovereign Lord, &c., statute and ordain." And so they introduce the tax but plainly on the principle that the burgh property was not liable. The duty of levying is laid on the Town-Council, not because they were the guardians of the common good, which was not meant to be affected, but solely because they had the power and machinery for collecting.

The statute of 19th June 1649, proceeds on an implied recital of the same fact and of "the vast charges they (the town) have been at in building of their kirk and other public works—in advancing great sommes of money for the use of the publick, towards the maintainance of the cause, and the promoting the Reformation, and the great loss they have sustained from their great troubles and distractions." To have made the common good contingently responsible for the annuity now raised from twelve to nineteen thousand merks annually, would have been an odd way of repairing this loss.

The Town-Council was not trusted either with the valuation of the property to be taxed, or with the collection of the assessment. The valuation was to be by surveyors, chosen partly by the Town-Council, and partly by the College of Justice. And these last were then accustomed to act; for this statute is partly founded on "an exact survey of the elders and deacons of the session, with the advice of the Dean of Facultie and others, members of the College of Justice." And as to the collection, "it is hereby ordainit that the said imposition shall be always collected be the deacons of the kirk, to be deliverit to the treasurer of the kirk-sessions, and it is not to come in the hands of the Town-Counsell, nor to be applied to any other use than is above written." It is scarcely possible that any idea of the burgh's liability could arise under these provisions; for the burgh, at such, had nothing to do with the matter. It might have been foreseen that the Town-Council, or the College of Justice, might fail to appoint surveyors; yet the

consequence of this is left to common law ; or at least it is not laid by this statute either on the funds of the burgh or of the College. No. 121.

The statute of 6th June 1661 matured the system, as it subsists at this hour. May 28, 1845.
 If the pursuers have no case under this Act, they have no case at all. Ministers of
Edinburgh v.
Magistrates.

It proceeds on the narrative, that the funds previously belonging to the city for the use of the clergy, "are far short and not proportionable for such ane number of ministers," and that "the common good and patrimonie thereof is exhausted and overburthened." Nothing, therefore, is laid upon that patrimony ; but the annuity is raised to six per cent, and is laid on "the inhabitants of the said burgh, who has the comfort and benefite of the preaching of the gospell," &c. The valuations, as before, are not trusted exclusively to the Town-Council, and the collection may be solely by "the deacons of the kirks." This last circumstance is conclusive against the idea, that the produce of the assessment formed any part of the corporation property. If there had been any idea that the burgh was responsible, the general execution of the Act would have been laid on the Magistrates and Council, the only official representatives of the burgh. But it is laid upon the Magistrates alone—plainly as Parliamentary commissioners.

The accidents that the College of Justice has ceased to appoint stentmasters, and the church to collect, are immaterial. The fact that these parties had power to have acted, shows that it was not meant to be purely a burgh affair. Now, suppose that certain representatives of the College of Justice had not merely been omitted, but had been ordered, to concur in the appointment of surveyors ; but not, like the Magistrates here, done so under an error which made an assessment lost—Would the College, or its funds, if it had any, be liable for the consequences of this error ? I conceive that they would not ; and if it be so, it is not curious how a similar error by the Magistrates can bind the funds of the city.

I can discover no enactment, and no expression in these original authorities for an annuity, to warrant even a suspicion that the case that has occurred was anticipated. If it had been anticipated, checks would have been provided ; one of which would probably have been the personal liability of the incorrect trustees ; but the whole scope of all the statutes seems to me to show that the conversion of the property of the burgh into a security fund for the conduct of the Magistrates or Council, would never have been proposed, or would have been rejected.

If this be a sound view of the original statutes, the burgh does not appear to have been made responsible by any of the modern Acts of Parliament. These make no change whatever, applicable to this question. They merely adopt the ancient system, and apply it to new churches and to extended royalties. They were never meant to provide for the perfectly unexpected occurrence which has produced this action ; or to introduce the new and alarming principle, that the burgh property might be swallowed up, at any moment, by an error on the part of the Magistrates or Council, as collectors of an assessment for the city clergy. Notwithstanding an occasional expression here and there, the matter at present in dispute stands now, in so far as it depends on Acts of Parliament, exactly as it could have stood, had it arisen in 1662.

It has been argued that the liability of the burgh, though certainly not enacted in express words, must now be inferred constructively. The grounds of this construction are, that the corporation was not only relieved of the burden of main-

No. 121. taining the ministers, but acquired something, and that the benefit was secured of good clergymen.

May 28, 1845.
Ministers of
Edinburgh v.
Magistrates.

But the corporation was not relieved of the burden of maintaining ministers, because, though its funds had been occasionally perverted for the use of the clergy, there was in law no such burden to be relieved of. What is said to have been acquired, was merely certain patronages, teinds, and vacant stipends. I am not aware that the town obtained any new teinds. Patronages are only held by Town-Councils as trusts to be exercised gratuitously, and are not additions to the patrimony of the burgh. Vacant stipends can only be applied to pious uses; and, by one of these old statutes, this could only be done "by the kirk-session of the said toune." The benefit of good ministers is undoubted; but, 1st, it is no benefit to any burgh in its corporate character, but only to the people, who accordingly were assessed. 2d, Were not the clergy adequately paid for the good they did, without involving the burgh property? They got a grant of a tax of six per cent on most of the real property within the city. Useful as their services may be, they appear to me to have had no bad part of the bargain. There are many other things absolutely indispensable for towns—such as protection from violence, trade, relief for poverty, &c. Town-Councils are very generally made the instruments by Parliament for levying funds for these objects. The Magistrates and Council of Edinburgh are still the collectors, through their stentmasters, of the poor's-money; and, till recently, they had the same statutory duty to perform in collecting "watch-money," and in managing the port of Edinburgh, the streets, and many other things. If the burgh be responsible under this action, its funds are equally responsible for the most innocent mistake committed by the Magistrates in all these matters—that is, are never safe for a moment.

It has been said that neither are the pursuers safe if the defenders' plea be sound, because the defenders, by committing a blunder, may defeat the assessment whenever they please. The same thing may be said of every trust. Trustees may always injure trusts by voluntary errors. But there are two safeguards for the pursuers; 1st, the individual liability of those who err; 2d, that, if not excluded by contract, the pursuers may take the collection into their own hands whenever they please.

I do not think that either the judgment of the Court in 1813, or the contract of the parties in 1815, are of the slightest value in this discussion. The point now at issue formed no part of the litigation, or of the agreement.

The point now before us did not, and could not, arise in that action. The summons contained a conclusion, that if at any time the funds, provided for the maintenance of the clergy, should "prove inadequate," they were entitled to recoune on "the common property of the community." But no judgment was pronounced on this; and though there had, this does not imply a decision on the present question. The only real object of the action was, to ascertain whether the defenders were bound to account to the ministers for the whole actual produce of the assessment, or had a right to allow what might be deemed adequate stipends, and to keep the surplus. Nothing beyond this was discussed or settled. I was counsel for the ministers throughout, and am confident that the present case, viz., of the liability of the burgh property for loss arising through error by the Town-Council or Magistrates, was never contemplated. It had no connexion whatever with the matter then in hand.

The contract neither does, nor professes to do, any thing, except to follow out what was decided. The parties agree not to disturb the judgment, and the Magistrates engage to pay a fixed sum, as the estimated produce of the tax, till 1825, and to take whatever surplus there might be for the community. But there is no declaration, that if the collection should ever happen to be impaired by a mistake, the property of the burgh was responsible. It is true that the agreement binds the successors of the existing Council, but this does not enlarge the nature of the obligation; and it is also true that the party on one side is described as the present Magistrates of the city of Edinburgh, "and for the whole Council and community of that city." But, 1st, these Magistrates lay nothing upon the community except an obligation to account for a certain sum till 1825. 2d, If they had transferred the consequence of a blunder of their own from themselves to the community, and if this had been illegal, which is the point now in dispute, this art of the contract could not be enforced against the present guardians of the municipal estate.

No. 121.

May 28, 1845.
Ministers of
Edinburgh v.
Magistrates.

The cases of Innes, and those about the escape of civil prisoners, have been founded on by the pursuers, but they are strongly against them; because, in all of them, the duty, for the violation of which the corporation was found responsible, was a duty incumbent on the corporation. It was the burgh that was bound to have fenced the streets, and to have secured imprisoned debtors. These cases are only applicable by assuming the matter in dispute.

The same observation disposes of the only three English cases that we have seen referred to. In every one of them an obligation had been undertaken by the corporation, and had been violated by them for their own emolument. In *Ludlow*, the corporation being the guardians of a charity, had culpably sold it to themselves, and were found responsible for this "breach of trust." In *Dublin*, the magistrates, as trustees of a water-duty, had misapplied the money sued for to the purposes of the corporation. In *Lyme-Regis*, the corporation had obtained its charter on condition of maintaining the harbour, and wished to retain its privilege, while it saved its funds by letting the harbour get into disrepair.

I am, therefore, of opinion, that the burgh property of Edinburgh is not liable for the error of the defenders' predecessors, who, I think, were acting when they fell into it, solely as Parliamentary Commissioners.

III. But if I were wrong in this, and if they are to be held as entitled to represent the burgh *quoad hoc*, then the question arises, Whether their error was sufficient to involve the burgh?

As to this I am of opinion, that if the burgh be liable at all, it is liable for any error on the part of its representatives, however innocent, by which loss has arisen, to the extent of repairing that loss. It seems to me to be no answer to the party suffering to say that the error was excusable. It may be excusable morally, as a defence against any penal demand, but in the matter of mere reparation this is irrelevant.

But this is not the ground on which the summons is rested. It proceeds solely and emphatically on culpable misconduct or neglect. If, as I suppose, the pursuers must be restricted to this, I am very clear that, whatever other action they may raise, this one cannot stand. I never knew, and indeed it is impossible for me to conceive, conduct more entirely free of every taint of blame. It was the purest and most innocent possible mistake.

No. 121. The LORD JUSTICE-CLERK concurred in the opinion delivered by Lord Moncreiff.

May 29, 1845.

M'Laurin v.

M'Gregor.

THE COURT pronounced this interlocutor :—" Having resumed consideration of the cause, with the opinions of the consulted Judges, and having again consulted their Lordships as to the terms of the interlocutor now to be pronounced :—In terms of the opinions of the majority of the whole Judges, recal the interlocutor, in so far as it sustains the seventh defence: Quoad ultra adhere to the interlocutor, and refuse the desire of the reclaiming note."

ROBERT JOHNSTON, Jun., W.S.—GRAHAM and ANDERSON, W.S.—Agents.

No. 122.

RONALD M'LAURIN, Pursuer.—*Tennent*.

THE REV. GREGOR M'GREGOR, Defender.—*Monro*.

Process—Reclaiming Note—Statute 6 Geo. IV. c. 120, § 5.—Objection to the competency of a reclaiming note, on the ground that a party had not intimated his intention to reclaim to the Lord Ordinary, repelled.

May 29, 1845.

1st DIVISION.

Lord Wood.

W.

THIS was an action of furthcoming at the instant of Ronald M'Laurin against the Rev. Gregor M'Gregor, as common debtor, and certain other parties, as arrestees. M'Gregor gave in defences, stating that the pursuer was barred from following forth his action, inasmuch as he had entered into an agreement with the other creditors to pursue common measures along with them. M'Laurin objected that the common debtor had no title to maintain such a defence, which was only competent to the creditors, with whom this agreement was alleged to have been made.

The Lord Ordinary ordered the dependence of the action to be intimated to the creditors, and they having failed to appear, without making up a record, pronounced the following interlocutor :—" In respect of the intimation to the creditors made in obedience to the interlocutor of the 28th of February last, and that none of the creditors have appeared, repels the defences for the common debtor, and decerns *ad interim*, and appoints the arrestees to lodge a condescendence of the funds in their hands by the second box-day in the ensuing vacation."

M'Gregor reclaimed, when the pursuer objected to the competency of his reclaiming note, on the ground that he had not intimated his intention of reclaiming to the Lord Ordinary, upon his pronouncing the interlocutor. The interlocutor was one repelling dilatory defences, while it was made imperative by the 5th section of the Judicature Act, that a party intending to reclaim against such a judgment, should intimate his purpose of doing so to the Lord Ordinary, in order that he might pronounce a judgment as to the expenses of the preliminary discussion.

LORD PRESIDENT.—These do not seem to be dilatory defences. The Lord No. 122.
Ordinary does not call them so.

LORD JEFFREY.—I do not think the Judicature Act is to be construed according May 29, 1845.
to the strict interpretation put on it by the pursuer. It does not seem to me to Brown v.
have been passed *eo intuitu*; it seems merely to be intended to allow the success- Robertson.
ful party to obtain a finding for expenses.

THE COURT repelled the objection.

BAXTER and M'DOUGALL, W.S.—PATTEN and M'DOUGALL, W.S.—Agents.

JAMES BROWN and OTHERS, (Ogilvie's Trustees,) and the KIRK- No. 123.
SESSION OF DUNDEE, Petitioners.—*Rutherford—Moir.*
JAMES ROBERTSON, Respondent.—*Inglis.*

Trust—Factor—Competition.—Circumstances in which a factor upon a trust-
tate was appointed on the joint application of two claimants of the residue of the
tate, during the dependence of a process raised for the reduction of the titles of
a heir-at-law, who was in possession of the heritage of the trustee, and main-
tained that the trust had lapsed, and was ineffectual.

THE petitioners respectively claimed the whole residue of the trust- May 29, 1845.
tate of a party deceased, under his trust-settlements, and raised sepa- 1ST DIVISION.
rate actions against the respondent, the heir-at-law of the truster, who W.
d made up titles to him, and entered into possession of all his heritable
operty. The heir-at-law, in defence, maintained, that the trusts had
apsed, and that the trust-deeds were, for different reasons, ineffectual as
lements of the truster's estate, or at least of his heritage. The ac-
ons against him were conjoined; and, during their dependence, the pe-
tioners presented a joint petition to the Court, praying for the appoint-
nt of a judicial factor, to act in room of the trustees named in the
lements, for the purpose of managing and carrying the purposes of
trust into execution.

Their petition proceeded on the statement, that they had one interest
t the trusts should not lapse, in order that, in the event of either of
ir claims to the residue being sustained, it might be conveyed over to
successful claimant, and the legacies bequeathed in the trust-deeds,
d to any of the legatees who might be found to have right to them.
Answers were given in by the respondent, in which he opposed the
lication, on the ground that the pleas he maintained in the actions at
petitioners' instance, and more particularly the plea that the trust
lapsed, might be materially prejudiced by the appointment of a ju-
dicial factor; and that such an appointment would be equivalent to a

No. 123. sequestration of the trust-estate, which was incompetent, after he, who was one of the competitors, had obtained possession of it.¹

May 30, 1845.
Currie v.
M'Nair.

The petitioners craved leave to amend the prayer of their petition, so as to conclude simply for the appointment of a party "as factor on the trust-estate and effects" of the deceased trustor.

THE COURT granted the prayer of the petition as amended, reserving "to both parties all pleas competent to them in the action now in dependence."

JOHN MURDOCH, S.S.C.—LOCKHART, HUNTER, & WHITEHEAD, W.S.—Agents.

No. 124. MARGARET CURRIE, Pursuer.—*Rutherford—Penney*.
ISABELLA M'NAIR OF GLEN, and PETER GLEN, Defenders.—*Whig*

Process—Statute 1 & 2 Vict. c. 118, § 4—Act of Sederunt, 24th Decr 1838, § 2.—A party who had raised a reduction of certain bills, and marked a First Division process, afterwards suspended a charge upon one of the bills, neglected to mark the Division to which the suspension was to belong; respondent, in the suspension, marked it as belonging to the Second Division; reclaimed against an interlocutor of the Lord Ordinary passing the note, to the Division of the Court, who adhered; the actions of reduction and suspension were afterwards conjoined by the Lord Ordinary, and declared to belong to the Second Division of the Court; but the Court altered, and declared that the joined processes belonged to the First Division.

May 30, 1845. MARGARET CURRIE raised an action against Mrs Glen and her band for the reduction of three bills of exchange, and the summons marked by the pursuer's agent as belonging to the First Division of the Court. On the 17th December 1844, the Lord Ordinary appointed defenders to satisfy the production, and, on the 21st of the same month, held the production as satisfied, and ordered defences to be lodged.

1st Division.
Ld. Robertson.
N.

One of the bills in the mean time having become payable, the defenders charged the pursuer for payment, and she suspended the charge, and, on the 21st of December, the note of suspension was passed, without caution or consignment.

Against this finding the charger reclaimed; and, as the suspender's agent had neglected to mark the Division to which the note of suspension belonged, their agent marked it as belonging to the Second,

¹ Ersk. II. 12, § 55, 56; *Somerville v. Rutherford*, 19th May 1815, (F.C. Berry v. Anderson, 17th November 1822, (2 S. 97;) *Rowatson*, 15th December 1830, (9 S. 188.)

carried the process to that Division of the Court. The Second Division No. 124. adhered to the Lord Ordinary's interlocutor.

When the suspension returned to the Lord Ordinary, he pronounced an interlocutor in the original action of reduction, conjoining it with the suspension, and declaring the conjoined actions to belong to the Second Division of the Court.

May 30, 1845.
Currie v.
M'Nair.

The pursuer reclaimed, and pleaded ;—

That, as the reduction was the action that had been first raised, it was the leading process, and that as it had been marked as a First Division case, which marking, under the 1 and 2 Vict. c. 118, § 4, and relative Act of Sederunt, was final as to it, when the suspension was conjoined with it, the conjoined process must belong to the First Division ; and that the fact of the defender's having brought the Lord Ordinary's finding in the suspension under the review of the Second Division, had no effect upon the question.

The defenders pleaded ;—

That, as the pursuer's agent had failed to mark the note of suspension as belonging to the First Division, the Lord Ordinary had a power to declare the conjoined actions to belong to the Second Division, and that he had exercised his discretion properly in doing so, as the suspension had already been under the review of that Division.

The Court held, that the reduction being the leading process, and the marking on the summons being final and conclusive as to the Division to which it was to belong, any action which required to be conjoined with it must necessarily belong to that Division of the Court which had already, in the exercise of the power conferred by statute, been selected by the pursuer.

THE following interlocutor was accordingly pronounced :—“ In respect the reduction is the leading process, and was first in Court, alter the interlocutor of the Lord Ordinary ; declare the conjoined actions to belong to this Division of the Court.”

JAMES STUART, S.S.C.—A. FERGUSON, S.S.C.—Agents.

No. 125. EDWARD RAILTON, Pursuer.—*Rutherford—Buchanan—Maitland—Moncreiff.*

May 30, 1845.
Railton v.
Mathews.

MATHEWS and LEONARD, Defenders.—*G. G. Bell—Penney.*

Process—Jury-Trial—Cautioner.—Verdict returned under an issue whether party had been induced to subscribe a bond of caution by undue concealment or deception,—set aside as not warranted by the evidence, and a new trial granted.

May 30, 1845. SEQUEL of case reported ante, Vol. VI. p. 536, which see.

2D DIVISION.
Ld. Moncreiff.
Jury Cause.

This was an action of reduction, at the instance of Edward Railton, of a bond of caution granted by him to Messrs Mathews and Leonard of Bristol, for George Hickes, who was commission-agent for the sale of their goods in Glasgow. The ground of reduction libelled was, that the bond had been obtained by fraudulent concealment on the part of the Bristol firm, of material circumstances known to them affecting the credit and trustworthiness of Hickes.

The decision of the Court upon the bill of exceptions, formerly reported, having been appealed to the House of Lords, was reversed on 14th June 1844,¹ and the exception was allowed, and a new trial granted.

A second trial took place at Edinburgh, before Lord Moncreiff, where a verdict was returned in favour of Railton, the pursuer.

Mathews and Leonard then moved the Court to have the verdict set aside, as contrary to evidence, and a new trial granted.

The case was advised of this date.

LORD MEDWYN.—I admit as fully as any person can do, what I may term a rule of Court, that no verdict is to be disturbed founded on evidence, if it is possible to take a view of the evidence sufficient to support the opinion of the jury, even although that should not be the soundest or most natural view, or as the Judge did or would take; but, on the other hand, I am bound to hold that it is the duty of the Court to review a verdict, if it be manifestly contrary to evidence, in consequence of the jury having taken a false view of it, and more especially if they had not a mere issue in fact to try, but one where the fact was to be applied to the law as laid down by the Judge; and if, in doing so, they have misconceived the charge, or supposed that the facts came up to the requisitions of the charge when they clearly did not, then the Court is bound to afford the complaining party an opportunity of obtaining justice, by submitting the case to the jury.

¹ 3 S. Bell, 56.

sion of another jury. Observe, I say, to obtain justice—for it is only in the case when the Court are satisfied that justice has been frustrated, that a new trial should be granted. Now, being very decidedly of opinion that the jury have not applied the facts of the case according to their true import, as established in evidence, to the law which must have been laid down by the Judge, for it was prescribed to him by paramount authority, and, as it has not been objected to, I am bound to hold it was so laid down; and as, looking at the evidence, an opposite conclusion, I think, should have been arrived at by the jury, if they had not erred in the application of the facts to the law, I feel bound to allow a new trial in this case.

No. 125.
May 30, 1845.
Railton v.
Mathews.

The law of this case, as laid down by the House of Lords, is this: According to one learned Lord, it is, that “there may be a case of improper concealment, or non-communication of facts which ought to be communicated, which would affect the situation of the parties, even if it was not wilful or intentional, and with a view to the advantage the parties were to receive.” And according to the other learned Lord, who disposed of the Bill of Exceptions, the meaning of the issue is declared to be—“Whether Railton was induced to subscribe the bond, by the defenders having omitted to divulge facts within their knowledge, which they were bound in point of law to divulge;”—bound in law to divulge. That is, *such* as the surety, the friend of the agent—he who is applied to solely by the agent, and who, out of friendship to him alone, agrees to become his cautioner, in order to secure the employment to him—and without any application to him from the principal, or desire that he should come forward, by being informed of, would have refused to become bound for his friend as not trustworthy; for it is only such material facts, which affect the character of the risk to this extent, that the principal can be required by law to communicate, when no application is made by the proposed cautioner for information as to the prior dealings of the agent. The principal, who cannot be supposed to have any doubt or suspicion of the man he is employing as his agent, is further confirmed in his confidence by his friend coming forward as his cautioner without any enquiry at him; and thus he is never called upon to investigate minutely the conduct of the agency, nor to suppose that a doubt may be cast upon the agent's prior proceedings by the enquiry made regarding them.

It was well remarked, that it is difficult for the Court, sitting calmly in review on this case—upon the whole circumstances of irregularity or inaccuracy, producing instructions, remonstrance, or remarks, even to tending to destroy confidence—some explained and thought of no more at the time, nor entitled to be thought of, now that they are explained, and others shown to be, in the circumstances, inconvenient or impossible, and therefore not insisted in, and thus also no longer to be taken into view—to take a just view of the circumstances, so as to place themselves exactly in the situation of the defenders as to knowledge of what would affect their mind, and thus ascertain what was material to be communicated. Still less, with all submission must I say it, was it in the power of the jury, with all the facts stated to them at one time in a mass by the counsel, and placed before them in one view, to discriminate accurately among them, and consider their effect upon the minds of the defenders, as they occurred not at one time and together, but during a course of time from January 1834 to October 1835.

The misconduct of the agent, that from which loss has arisen, consists in this, that he sometimes discounted bills of the customers of the house, and, instead of remitting the proceeds immediately, he retained the amount and applied it to his

No. 125.

May 30, 1845.
Hailton v.
Mathews.

own use, sometimes giving a false date to the discount, when he noticed the discount—so that, for example, at the date of the bond, there was a balance due on the agency accounts of £8067, of which there was of debts due by purchasers, £5185, and cash in his own hands, £2882, while all that the states, sent by him monthly, showed to be in his hands, was £583. If you allow, as Mr Moncreiff does, £500 to pay the commission then due, this was a very reasonable sum for the agent to retain, who besides, as the accounts show, had various expenses always to disburse. It appears, that monthly accounts of sales, and monthly accounts current of sums received and paid, were sent by Hickes to Bristol; and these were sufficient to show the sum due by the agency, although they would not tell what part was cash in his hands, and what part was in bills due by customers. This, which was the important particular, for it was here where Hickes' speculation lay, could only be discovered, the fact as well as the amount, from the Glasgow books, and with a good deal of investigation, by going to the banks to ascertain the periods of discounts, which were often different from what appeared in the monthly states, even when the discount was mentioned there.

Now, it cannot be pretended that the defenders had any means of ascertaining that Hickes retained more in his hands than his states showed—that is, the sums contained in the third column of the state made up by Mr Moncreiff, and printed at p. 8. They never were in Glasgow subsequent to April 1834, and I know of no circumstance which could have raised any suspicion in their mind that Hickes was acting dishonestly, and was not trustworthy, and that all the states which he sent were false from the very outset of his agency, and made up, and too successfully, with a view to cover his deficiency.

I confess I should have liked if the jury had returned a special verdict, or, if the parties had concurred in a joint case, to have seen what points they really thought proved to have been within the knowledge of the defenders, or presumed to have been so, which the defenders were bound in law to communicate, unapprehended, as material; for I confess I am unable to comprehend on what the jury have returned this verdict, finding that the pursuer was induced to subscribe the bond by undue concealment on the part of the defenders. He was appointed agent in February 1834, and was to find security for £3000. It cannot be supposed there was any thing to give the defenders an idea that he was not trustworthy at this time. Even before security was granted, he was authorized to collect above £2000 of outstanding claims of the former agency.

Now let us attend to the various matters which, it has been said, should have raised suspicion in the minds of the defenders, and should have been communicated unasked to the proposed cautioner, and which are now urged as sufficient to vacate the bond of caution.

The correspondence shows that no precise rules were laid down for conducting the agency; that was left on the former practice, and the usage in such cases. He transmitted monthly statements of sales, and also account-sales, with sufficient regularity. The dates of rendering are given in the first column of Mr Moncreiff's state, always within the following month, and very regularly during the six last months, the latest being the 5th of the month. The defenders acquiesced in getting monthly states, and these gave all the information that weekly sales would have given.

Then they occasionally call upon Hickes to make farther remittances. It is

said that some months he made no remittance ; but this was always made up the next month, by a larger remittance than his apparent balance for that month would have allowed. Thus he makes no remittance in May 1834 ; this is made up in June, when he remits £700, although the balance shown at 31st May, on the transactions of the month, was only £323 ; and the same applies to all the other instances of this (at the very utmost) irregularity being immediately corrected on being pointed out.

No. 125.

May 30, 1845.
Railton v.
Mathews.

Again, they wished him to sell only at four months' credit. They knew he did not do so. And he seems to have given sufficient reasons for this in May 1834 ; other houses in the same line were giving six and twelve months. This statement is not disputed. I never see the term of credit adverted to till 24th September 1835, when they write, " You must really keep up your payments better, and attend to the terms of credit ;" but it is not said that this means four months. The defenders could not fail to know that he had done so, and they had acquiesced in this ; and what loss, falling within the bond of caution, arose from this exclusion of credit ? It obviously increased the sales, and this was for the advantage of his employers ; but as he was not responsible as on a *del credere* commission, and only for his recoveries, and on these only received commission, he had no interest, but the opposite, to extend the credit, if that was to increase the irrecoverable debts in his hands.

The states showed that there was an increasing balance in the agent's hands ; but was it such as to induce suspicion that he had retained cash and misapplied it ? The business had increased under his management. The same months which, in 1834, produced £3137 of sales, produced in 1835, £4626. This necessarily increased the balance.

Besides, an agency such as this could not be carried on without the occurrence of bad debts. Mr Moncreiff says the balance of £8067 includes the bad debts of both agencies, although he has not furnished a state of them. It is further said, that, in June 1835, a list is sent of parties requiring prompt attention, defaulters to the extent of £1603. Hickes, in his answer, 3d August, says, " I have attended to the instructions in your letter of the 24th June as far as it is practicable ;" and it does not appear that there was any reason to doubt this, or, in truth, any negligence here. It appears, by Mr Moncreiff's evidence, that £712 was recovered prior to 30th September, but £891 was not then accounted for, and was outstanding. It is not alleged that these were recovered and not accounted for by Hickes. With the full investigation of the states, and examination of the books, if this had been true, it must have been discovered, and could have been proved. But the pursuer has not attempted to do so, nor is it proved that there was any negligence even. It was his interest to recover as much as he could. Very probably some may have been recovered subsequent to 30th September ; and, even if the whole remained unrecovered, it was no large sum on sales exceeding £14,000, in addition to the sales under the former agency, of which we do not know the amount, but where we also hear of bad debts.

As to Cattern's bill, can it be supposed that, when the amount carried in June stated this small bill discounted, they looked back, or were bound to look back, to prior states, where, if they had any suspicion, they might have found in the state of bills in March, that the bill was said to be payable at a prior date.

It is further said, that the books of the defenders were not balanced for twenty-

No. 125.

May 30, 1845.

Ruilton v.

Mathews.

one months. But this was not peculiar to this agency account; it was omitted because the books of the copartnery were not balanced during that time, even although there were changes in the partnership. But if they had been, all it would have shown would have been an increasing balance no doubt outstanding, but would not have shown that the cash balances in hand were larger than he represented in his monthly accounts, which is the real matter in his conduct which would have indicated untrustworthiness. The increasing balance might have called for an explanation, and Hickes would probably have told them, and, to a certain extent, with truth, of increased sales, of continually increasing bad debts, and of the necessity of extended credits. Unless suspicion was raised on other grounds, this would have been satisfactory.

There is a letter in May 1835, which it is possible may have misled the jury; it is addressed by Mathews to Hickes, and speaks of his conduct, tending to destroy confidence. If the subject was not duly attended to, it might be supposed that it alluded to the balances in his hands, and thus might give room for a supposition which was thrown out at the bar, that suspicion did exist; but the means of ascertaining, if well founded or not, were refrained from, because at this time the bond had not yet been obtained, and, till that was got, it would not be prudent to investigate the accounts of Hickes. But the letter had no reference to these balances, even if an examination could have led to the detection of his frauds, but solely to the delay as to the bond. Twelve months had elapsed since this was promised, and still it was not executed. It was this delay that tended to destroy confidence—a strong expression used to urge him to get it executed, which accordingly had the effect. The bond is given—any diminution of confidence is at an end—confidence is fully restored, so much so, that the agency continues for two years longer, till May 1837, when it is put an end to the moment it was suspected there was any thing wrong in his conduct, which first dawned upon the defenders by the return of a dishonoured bill upon them: when one of the partners came down to Glasgow, where alone the state of the agency could be ascertained, in consequence of the false states he had always furnished. Had any suspicion existed prior to the date of the bond, would they have been so long of verifying their suspicions after it was granted, and permitted him to go on deeper and deeper in their debt? The supposition is impossible; and the step was taken on the very first occasion on which a doubt arose in their mind as to his untrustworthiness.

These, I think, are all the circumstances which have been founded on in this case; and from all of them, even taking them combined, and as pressing upon the mind at the same moment, I cannot but conclude with Mr Moncreiff, that “looking only at the monthly states and the Bristol books, it does not appear to me that there was any thing necessarily calculated to excite suspicion of unfair dealing.”

It is true Mr Borthwick says, “looking to the amount outstanding, I should have suspected something wrong.” But he explains this, and takes two elements into view in arriving at this opinion, not legitimately in the case, as affecting the mind of the defenders. “The sum was too large on the rule of four months’ credit.” This they knew could not be observed, “and considering what I know of the respectability of the houses dealt with in Glasgow,” was information which they could not possibly have.

Under these circumstances, I cannot wonder at the desire of the defenders to have an opportunity of submitting their conduct to the decision of another jury, under any penalty which may be attached to it as to payment of expenses, in order to wipe off the imputation which has been cast upon their character as British merchants for fair dealing, as if they had indorsed, by undue concealment, a contract to come forward for their agent, whom they knew, or strongly suspected, to be dishonest; and I cannot bring myself to think we ought to refuse them this chance of redeeming their character. A new trial is no doubt not to be granted lightly; hence it is often granted only under the penalty of paying the expense of the one excepted to—severe enough, surely, upon the party who shows that the verdict is contrary to evidence; and if the expenses of the other party are paid, if his plea is just he does not suffer, as he will be entitled to the same verdict again. If it is not just, his claim should have no favour. Contrast the pursuer's case with the defenders. Nothing excited suspicion of their agent in their mind; they believed him trustworthy; the accounts he sent showed nothing of his speculations. From the first it was arranged that he was to find security; he is dilatory in doing so, and so little suspicion attached to him, that he is allowed to go on for more than twelve months without its being peremptorily insisted in; and then it is not from any suspicion, but solely on the establishment of a new firm, that this stipulation is enforced. He applies to his friend Mr Railton—he who had been his agent in settling his affairs with his partner Rowley—perhaps I am not entitled to refer to the proceedings in the former case, which showed this, and his continued intimacy with Railton—but this I may assume, that none but a very warm friend indeed would undertake a cautionary obligation for the good conduct of another to the extent of £4000, in the management of a business where the control of his principal was excluded by the distance of their residence, and the trust which required to be reposed in the agent. Then this friend agrees to become cautioner; he makes no enquiry of the principals as to their satisfaction with the mode of his doing business, and the correctness of his accounts; but it cannot be supposed that this friend did not make enquiry of the agent himself. He would no doubt get assurances from him that every thing was correct; he might show him the copies of his monthly states and accounts current; he would thus deceive him, just as he misled and deceived his employers; but it seems very hard to lay the penalty of his fraud upon them, and relieve the other.

I am aware, that in granting or refusing a new trial, the opinion of the Judge who tried the cause is always a weighty consideration; and as we have the advantage of having his Lordship one of our number, if he shall say that the verdict is the one he expected, or the one he would have advised, if he had been to offer an opinion, as perhaps he might have done, by stating what, in point of law, the principal was bound to divulge—which is given as the law of this case by one of the learned Lords who disposed of the former bill of exceptions in the House of Lords—I would at once admit that I had taken a wrong view of the evidence. At the same time I may notice, that considering the nature of the testimony—not a number of conflicting witnesses, where it may be of importance to see in what manner each has given his evidence, that their effect may be properly weighed, but where two intelligent and unbiassed professional gentlemen give the authenthical results of their examination of mercantile books, in perfect consistency with each other, a Judge reviewing at leisure this evidence does not seem to be in a position at all

No. 125. less capable of arriving at the truth, than the Judge who is to form his opinion at a single sitting, in the course of an investigation into complicated mercantile transactions, extending over a considerable period. My deliberate study of this case has resulted in a very clear opinion, that great injustice will be done to the defenders if a new trial be not granted here.

May 30, 1845.
Rallton v.
Mathews.

I will only add this. It was pressed upon us from the bar, that to allow a new trial would be to have three trials in this case, to the great disparagement of the system of trial by jury. But I hold that, in truth, there has only been one trial, according to the law which has been prescribed to us for this case; the first trial failed not from any erroneous view of the facts of the case. But even if it were so, where we were satisfied that the verdict is against evidence, and that great injustice had been done by the verdict, I think such a consideration should not weigh with the Court; no doubt making it a matter of greater difficulty to allow a third trial than a second; but even such a result would, I must hold, be less injurious to the credit of jury-trial, when justice is finally attained, than if the unsuccessful party is made to sit down under an unjust verdict to his great loss, with the feelings consequent on such a result, rather than disturb the verdict, while even the successful party cannot but be secretly exulting, that his case has been submitted to a jury rather than to a court of law, or an intelligent arbiter.

LORD MONCREIFF.—I must confess that I have had considerable difficulty in coming to a decided opinion in this case, arising chiefly from the peculiar position in which the cause stood in the last trial.

The verdict of a former jury, in favour of the defenders, having been set aside, in consequence of a bill of exceptions to the charge of the presiding Judge in matter of law, though disallowed by a majority of this Court, having been sustained by the House of Lords, I stated the law to the jury, in the words of Lord Chancellor Eldon, in the case of *Smith against the Bank of Scotland*, and of *Lords Cottenham and Campbell* in the present case.

Under this direction, to which no exception was stated by either party, the verdict returned substantially finds that the pursuer was induced to sign the bond in question by undue concealment on the part of the defenders. The defenders now move to have that verdict set aside, and a new trial granted, on the ground that it is contrary to evidence, or without sufficient evidence to warrant it.

The right to move for new trial on such a ground, which had been long settled in England as matter of necessity, is made clear in Scotland by our statutes, and is indeed a very important and sacred right, resting on principles which have been justly deemed essential to the very existence of trial by jury in civil cases; for, if there were lodged in every jury an absolute power to deal with the property, or the honour and character of the individual parties before them, by an arbitrary discretion against evidence, or upon no sufficient evidence, without any power of control, the trial of such cases by jury, instead of being, as I believe it to be, a great benefit and blessing to the country, would be in great danger of becoming an instrument of the most grievous injustice. But, on the other hand, all authorities have held it to be one of the most delicate duties which a Court has to discharge, to deal with such motions for new trial on matters of fact and evidence; for we all must be sensible, that repeated trials of the same cause are a very great evil, and that to set aside a verdict fairly returned, where no matter of law has been properly raised, on light grounds, or merely because the Court may think

that the verdict might, in better consistency with the evidence, have been different, would tend to supersede the jury altogether, and involve the parties litigants in endless expense and vexation.

No. 125.
May 30, 1845.
Raiton v.
Mathews.

Nevertheless, when such a case is presented to us on reasonable and probable grounds, we cannot refuse to come firmly to so important a duty. The ends of substantial justice must be secured, and we must deal with such motions according to the best lights we can obtain, and the best judgment we can form, on the facts of the particular case ; but it is always to be remembered, that, in granting a new trial, where it appears to be called for, we do not ourselves decide the merits of the cause, but only hold that, in the circumstances, the trial had not been satisfactory, and that it is fit that it should be submitted to another jury.

In the present case, there was only evidence led upon one side ; but then the verdict is in favour of the party who led that evidence, the pursuer ; and this has been a special difficulty in my mind. The defenders adduced no evidence, though the case evidently admitted of material evidence on their part, if they could have brought it. They took their chance of the result on the pursuer's evidence ; and though they were no doubt entitled to the benefit of all facts in their favour appearing in the written or other evidence adduced by the pursuer, the state of this case essentially is, that it is on the insufficiency of the pursuer's evidence to prove affirmatively of the issue, and not on the verdict being contrary to any evidence before the jury by the defenders, that the motion for new trial must rest. The verdict so taken is no doubt perfectly legitimate ; but we must be satisfied that it is solidly founded in truth and justice before we order a new trial, to impose a heavy burden of expense on the pursuer, and give the defenders an opportunity of attempting to make a new case, by evidence which they might have led in the first trial, and did not choose to do.

I have felt this to be a delicate and difficult matter ; nevertheless, I am bound to deal with the case as it stands, and, after much thought and consideration, I have come to be of opinion with your Lordship and Lord Medwyn, that the justice of the case requires that a new trial should be granted. I was of opinion in the first trial, that the pursuer had entirely failed to prove his case ; and, though I did not say so to the jury in express words, (which perhaps I ought to have done,) I have felt that, in the observations which I made to them, no one could be at any loss to discover the opinion which I entertained. I certainly expected the verdict to be different from that returned. I was dissatisfied with that verdict at the time, and, after hearing all that could be said in support of it, I am still of opinion that it was not warranted by the evidence.

In these circumstances, and finding that two of your Lordships are strongly impressed with the same opinion, I feel it to be my duty to concur with you in granting the new trial asked, on payment of costs ; though I must feel great regret in doing so, that I have the misfortune to differ from another of my brethren.

As there must be another trial, I do not think it expedient to enter into the details of the evidence. And this is the less necessary, because my views respecting it were pretty fully made known to the parties at the trial.

But what are the leading facts, by which the pursuer thinks he proves that he was induced to sign the bond by undue concealment ? The defenders had no

No. 125. previous knowledge of him; they had no communication with him; and he made no enquiry or demand of information of them. He was the friend of Hickes, the agent—bound to know his character and condition—and on that footing he became surety for his honesty and fidelity. But he says that, before the bond was signed, certain circumstances existed, or had occurred, which, if known, would have prevented him from signing it, and which the defenders were bound to communicate.

May 30, 1845.
Rallton v.
Mathews.

He says, 1. that Rowley, the former partner of Hickes, had, while in competition with him for the agency, accused Hickes of an incorrect proceeding regarding the negotiation of a certain bill. The fact that such a proceeding had taken place was not competently proved in this trial, Rowley not having been called to prove it; though it was proved that the defenders were aware that Rowley said so. But there is an invincible presumption that the circumstance had been explained by Hickes to their satisfaction, and made no impression on them; otherwise it is absurd to suppose that they would ever have employed him as their agent at all.

He says, 2. that no balances were struck in the books of the defenders during the whole currency of the agency. This may be incorrect or unsafe practice of the defenders in their own trade. But it applies to all their business, and not to this agency particularly; and, to my mind, it can never be regarded as either itself a fact within their knowledge which they were bound in law to communicate to a proposed surety for the honesty of an agent, before accepting such a bond from him—or as proving that other facts material were in their knowledge which they were bound to communicate. It rather proves the reverse; and the attempt to found so much on it, in reality goes to an entirely different point from undue concealment, viz. want of sufficient vigilance, which is not a point involved in this issue.

He says, 3. that the balances on the agent's own accounts had been constantly increasing, till at last, immediately before the bond was signed, they amounted to a very large sum. But this must be taken along with the other statement, 4.—that he had acted in opposition to their positive and repeated injunctions, in allowing a larger credit than four months to the customers. For it appears that, according to the accounts rendered to them, the increased amount of the balances consisted mainly of funds outstanding in the hands of customers, and that the balance in cash in his own hands, according to the accounts, was not at all excessive.

But though it is true that the defender spoke in strong terms of the limitation of the credit to four months, and frequently remonstrated on the subject, Hickes had answered to their remonstrances, that the practice of other agents and houses in Glasgow rendered it impossible for him to keep his place for the defence of the market, unless he allowed a larger credit than four months.

And unless it had been proved that his statement was not true, and that he had information that he was deceiving them in this point, I own I do not see why there was in the circumstance which should render it undue concealment to induce the pursuer to sign the bond, that they did not think it necessary to communicate it to him, with whom they had no communication, he living in Glasgow, and being intimately acquainted with the nature of Hickes's trade.

Besides, it is not in evidence that any loss was occasioned by the extended

credit allowed; and all that occurred regarding it was perfectly open and undisguised. No. 125.

5. A very plausible argument is raised on a letter of 26th May, and on the agency of the defenders for the bond, and a complaint that the delay tended to destroy confidence. May 30, 1845.
Railton v.
Mathews.

I own I cannot attach great importance to this circumstance. The defenders had required a bond of surety at the beginning of the agency. Hickes had promised to give it, but had delayed to fulfil his promise. Was it wonderful that they should have complained of this? But was it, especially, a fact which they were bound to communicate to the pursuer? He could hardly be ignorant that Hickes had engaged to give the bond—for it must have been told to him as Hickes's reason for asking him to be one of his sureties; and he certainly knew that it had not been granted, as the bond itself showed. How, then, could it be undue concealment to induce him to sign the bond, that the defenders did not tell him that Hickes had unduly delayed to procure and deliver the bond? He saw quite well that it had not been granted till he signed it.

6. In connexion with this, however, the pursuer founds on a letter of 24th June, near a month after, in which accounts are mentioned as outstanding, and requiring attention, amounting to £1603. This, though it shows some difficulty, and perhaps incautiousness in Hickes's management, is probably not a very unnatural circumstance to occur in any agency, and it is a very natural suggestion by the employers. But it does not at all appear that it occasioned any alarm to the defenders; and as Hickes was not personally answerable for the debts due by customers, getting the bond of caution could not alter the state of that matter. It is evidence, that £712 of the sum referred to had been recovered before 30th September. Though the rest was then outstanding, it is not proved that it was all recovered at a later period, or that any part of it was in danger, or that any loss ultimately arose on it. The real cause of loss falling on the surety, was in the secret fraud practised by Hickes in the mode of discounting the bills, which was only detected when the accountant obtained access to the books of the bank, and compared the entries with those in the books kept by Hickes himself; and the practice of framing his accounts falsely, and making his returns incorrectly, which were just among the things against which Railton engaged to protect the defenders.

7. An argument is founded on certain entries relative to a certain bill, called Catern's bill. An entry in March bore that it was payable 16th May; and then an entry in June stated it as discounted on the 4th June. It is not proved that the defenders knew about it. It is, indeed, clear they did not. All that can be said is, that if they had been under the least suspicion of any false dealing, and had been looking very sharp into the books and accounts, they might have discovered it. If they had observed it, having otherwise no suspicion, they would naturally have supposed that it might be some mistake in the entries, as one of the accountants says; or the utmost effect would have been, to lead them to ask for an explanation. But are we to take it to have been an undue concealment, to induce the pursuer to sign the bond, if they did not search for, discover, and tell every little circumstance which had occurred in the whole course of the agency? When the bond came at last to be granted in October 1836, no notice had been

No. 125. taken, five months-after this occurrence, of it. Nothing was asked of them by Railton, and no representation was made by them to him.

May 30, 1845.
Railton v.
Mathews.

Looking at each of the circumstances founded on separately, or putting them all together, even with all the colouring which counsel could throw on them, I am really quite unable to see where there is any thing like a case proved to satisfy the terms of this issue, construing it, as we are bound to do, according to the rule given to us by the House of Lords. And when I look at the general complexion of the case, I see still less ground for it. I see nothing proved to have been in the knowledge of the defenders, and unknown to the pursuer, which, I can see, they were either bound in law, or called upon as a matter of fair dealing, to communicate to the pursuer. I think that no case of undue concealment has been proved.

It is very possible that the pursuer may be able to make a better or stronger case; but at present I think that the verdict is not warranted by the evidence.

It has been stated, and much dwelt upon, that the defenders, in their action to implement, at one time maintained that the bond was sufficient to cover previous transactions. It is quite clear that it was not, and it has been so decided. That statement probably arose from mistake in those employed by them. But the object of the argument founded on the circumstance, is to account for the otherwise inexplicable fact, that the defenders, after getting the bond, continued to employ in their employment as their agent, and entrusted him with their property and funds to a large extent during twelve months. They did not, as in the case of the Bank of Scotland, take a bond calculated and intended to cover arrears of the agent known to exist, and immediately after turn round, make the agent bankrupt and come on the new sureties for the loss. On the contrary, they went on entrusting the agent during twelve months after having got the bond; and it was only upon his bankruptcy at the end of that time, that his unfaithfulness was discovered, and the defenders had occasion to claim on their bond against the same.

LORD COCKBURN.—I regret I cannot come to the conclusion adopted by the majority of the Lordships. But the regret I express is the less, as Lord Moncreiff has told me that he, the Judge who tried the case, has come to the conclusion he has now expressed only with considerable difficulty. If I had been left to my own judgment, I would have refused a new trial.

LORD JUSTICE-CLERK.—I concur entirely with Lord Moncreiff. The difficulty which occurred to me arose from what did not entitle the defenders' counsel to so much favour—viz. that from the way in which the question has been argued and stated to us, we find that the defenders had it in their power, by calling evidence, to have cleared away a great deal of doubt. They did not lead evidence to meet the points maintained by the pursuer, but rested satisfied with the evidence led by the pursuer. On that account I have felt the utmost reluctance to grant a new trial, because, assuming that the explanations made by the defenders were true, they might have strengthened them by evidence. They certainly on that account have the less reason to complain, that the jury were misled by that which was stated to be a colouring given to the facts. But we are bound to look to what is the true nature of the question here; and, in doing so, I am unable to say that this is a verdict maintainable on the evidence. I quite concur, then, with the Court in thinking that this is a verdict that we cannot support, and that the question should be submitted to another jury; but certainly under the usual and fair conditions.

the defenders paying the expenses of the former trial. Had there been no doubts or difficulties to contend with in the case of the defenders, the matter would have been different, and quite conclusive. If the defenders chose to starve their case by not leading evidence, and by not putting in the answers to certain letters, the Court, I think, can do nothing more than grant a new trial, on the condition of the expenses of the former trial being paid.

No. 125.

May 30, 1845.
Duke of
Montrose v.
Edmonstone.

THE COURT accordingly granted a new trial on the defenders paying the expenses of the last trial.

JOHN CULLEN, W.S.—SIMON CAMPBELL, S.S.C.—Agents.

DUKE OF MONTROSE, Pursuer.—*Sol.-Gen. Anderson—Inglis.*

No. 126.

SIR ARCHIBALD EDMONSTONE and OTHERS, Defenders.—*Rutherford—Penney—Moir—R. Glasgow.*

Obligation—Road—Trust—Clause.—The tolls of a road having been found insufficient to pay the interest of the debt upon it, and certain of the road trustees who were liable for the debt being less interested in the road than the others, it was agreed that “a loss of about £130 per annum” should be made up by these other trustees paying their several proportions thereof according to their respective valuations;—Held, 1. That this agreement did not import an obligation to pay an average loss of £130 per annum in a series of years, but only an obligation to pay the loss not exceeding that sum, in each year as it occurred. 2. That the obligants not being liable *singuli in solidum*, were not liable for the loss occasioned by the insolvency of one of their number. 3. That one of the obligants having sold his property, was not thereby relieved of his obligation.

SEQUEL of case reported 11th March 1842, (ante, Vol. IV. p. 1152,) May 30, 1845.
which see.

It having been found by the former judgment of the Court, that the obligations and interests of parties fell to be regulated by the agreement contained in the minutes of 24th November and 22d December 1801, according to the legal meaning and import thereof, the case was remitted to the Lord Ordinary.

2d DIVISION.
Lord Wood.
R.

His Lordship remitted to Mr Donald Lindsay, accountant, to report on the liabilities of parties under these minutes. Of date 20th March 1844, his Lordship pronounced this interlocutor:—“Having resumed consideration of the cause, with the accountant’s report, &c., and whole process, finds that, by the interlocutor of the Court of 11th March 1842, it is found that the obligations and interests of the parties to the record in this action must be regulated by the agreement contained in the minutes of the 24th Nov. and 22d Dec. 1801, mentioned in the said record, according to the legal meaning and import thereof: Therefore finds that it is now a final point in the cause, that the said agreement of 1801 was

No. 126. and is a binding agreement, and has not been brought to a close, recalled, or derelinquished, or given place to any other or different arrangement, and that it is to be enforced as a subsisting agreement, according to the legal meaning and import thereof: Finds, that according to the legal import and meaning of the said agreement of 1801, no part of the sum of £130 sterling, payable under that agreement, is applicable to the extinction of the capital of the debt contracted on account of the road in question at and prior to the 24th November 1801, and remaining due at that date; that the parties to this record are bound to contribute annually to the funds of the said road the said sum of £130 sterling, in the respective proportions or sums set down in the note of valuation and contribution prepared by the clerk to the road as payable by each, and founded on in the record, in so far as the same may have been, or may in future be necessary, to make up a loss to that amount, arising in the year from Whitsunday 1801 to Whitsunday 1802, and subsequent years, in consequence of the receipts from the toll-bars falling short of the charges and expenditure, and of the interest of the said debt due at 24th November 1801; and that although the loss or deficiency in any one year may not amount to the said sum of £130 sterling, yet if, in a subsequent or prior year or years, it shall, from the foresaid causes, amount to a larger sum than £130 sterling, the surplus not required for any particular year or years is applicable to providing for the loss or deficiency exceeding £130 sterling, in the subsequent or prior year or years; and that the said parties were and are chargeable in the proportions foresaid with the said sum of £130 sterling annually, in so far as requisite for said purpose, their total liabilities in any given number of years being always limited to £130 sterling for each of said years, with interest on their respective proportions of said sum, from the term of Whitsunday yearly, and credit being allowed in calculating the sums now due by each party for the sums already either paid by him directly in name of contributions under said agreement, or otherwise advanced for defraying the charges on said road: and, with reference to the special plea of the defender, Mr Campbell of Stonefield, that his responsibility under the agreement 1801 terminated in 1835, in respect of his having then sold his property of Levenside, and ceased to have any interest in the district and its roads, finds that the said plea is not well-founded, and that he is still bound by said agreement: Further, finds that, in so far as any portion of the contributions payable under the agreement 1801, for any one year, may not be recoverable from the party liable for that portion, and a proportional part of the loss on that year produced by the receipts of the toll-bars falling short of the charges and expenditure, and of the interest of the debt prior to 1801, which would otherwise have been paid, shall be thereby left unprovided for, then the portion of the loss not recoverable as aforesaid under the said agreement 1801, with the interest thereon, falls to be stated in account against the road, and to be provided for out of the first

May 30, 1845.
Duke of
Montrose v.
Edmonstone.

surplus arising in any future year of the proceeds of the toll-bars over the amount of the charges for management and expenditure in that year, leaving any loss which, in the said last-mentioned year, may be brought out in the account of the year as so stated, in consequence of the balance of said surplus not being sufficient to pay the interest on the foresaid debt, due at 24th November 1801, to be provided for under the agreement 1801, and agreeable to the second supplement to the accountant's report: Finds that the persons following are liable in payment of the sums after specified respectively, on account of the contributions payable under the agreement of 1801, and that as on the 15th of May 1842, with the legal interest thereof from that date till paid, viz. the said John Campbell of Stonefield the sum of £1452 : 2 : 7; Sir Archibald Edmonstone the sum of £583 : 8 : 3; Mrs Marianne Alston or Kippen, and William Kippen, her husband, for his interest, for themselves, and Donald Cuthbertson and Allan Cuthbertson, as trustees of the deceased John Alston of Westertoun, the sum of £306 : 16 : 10; Miss Anne M'Gounie the sum of £221 : 7 : 10; and Sir James Colquhoun the sum of £22, 12s. 8d.; and with respect to the debt contracted prior to 24th November 1801, Finds that the liabilities of parties for the said debt, whether to the creditors in the bonds granted for said debt, or in relief inter se, is to be regulated by the said bonds respectively—that is, the parties subscribing to each of the existing bonds for said debt are liable for the amount of each bond, with relief inter se only; but without relief as against any other parties, whether in respect of their having subscribed some of the other bonds granted for said debt, or having attended and approved of the resolutions of the meetings of the trustees of 10th June 1794, and 25th October 1799; reserving always all claims competent against the proceeds of the toll-bars, and likewise reserving to the parties who may either directly or in relief pay any part of the said debt, the effect of the said agreement 1801, as a means of securing them in payment of the interests which have arisen or may arise on said debt, in so far as the same is provided for by said agreement, according to its legal meaning and import, as embodied in the preceding findings; repels all the objections to the accountant's report, in so far as the same are not sustained by, or are inconsistent with the said findings; and appoints the cause to be enrolled, for the purpose of adjusting the terms of such decerniture or decernitures as may be required for giving effect to the foregoing findings, and such other decernitures as are necessary, in order to exhaust the cause."

William Kippen and others, trustees of the late Mr Alston of Westertoun, reclaimed against this interlocutor.

Mr Campbell of Stonefield also reclaimed, praying to have it found, "that upon his contributing to the road funds, in terms of the minutes of 1801, his share of the annual deficiencies arising therein betwixt Whitsunday 1801 and Whitsunday 1835, (when he sold his estate of

No. 126.
May 30, 1845.
Duke of
Montrose v.
Edmonstone.

No. 126. Levenside,) together with simple interest on each year's contribution until paid, he should be relieved from all further payment under the said minutes; and further, that in the event of any party liable in contribution under the said minutes failing to pay his portion thereof, no part of the loss so sustained shall be borne, either directly or indirectly, by him."

May 30, 1845.
Duke of
Montrose v.
Edmonstone.

The case was advised July 9, 1844.

LORD JUSTICE-CLERK.—The interlocutor of 11th March 1842 found—(His Lordship read the former judgment.)

We are now to decide upon the points which so arise. Nothing which has occurred can in the least degree affect the determination of the legal rights of parties. The remit originally was before answer, and the whole matter is as open as when the above interlocutor was pronounced, except in so far as any points have been abandoned by any of the parties.

In the next place, the materials for ascertaining the legal meaning and import of the agreement can be found only in the two minutes in question; and beyond these I hold it to be quite incompetent for any of the parties to attempt to find grounds for deciding the points which arise regarding it. I make this observation the more, because I think a great part of the argument in support of the view taken by the Lord Ordinary as to the legal meaning and import of the agreement, derives its plausibility wholly from speculations as to the objects and purposes of the agreement, which the terms of the minutes do not warrant.

The Court have gone surely far enough to give effect to what was thought to be an arrangement really concluded between the parties, when it sustained the agreement, although the principal minute was not signed by any one—not even by the preses—when one of the defenders was in pupilarity—and when the footing on which the only payments (two, I think) made by him after majority were viewed and interpreted, was not decided by the declaration of him and others in 1815, but by the terms of an account kept by the collector, which there is no proof that he ever saw or knew any thing of.

But now, at least, the Court cannot go further. The legal meaning and import of the agreement is just the legal meaning and import of the two minutes in question. No attempt was ever made to put this agreement into any regular form or shape, to ascertain by any proper obligation what the parties respectively bound themselves to—nay, the letters, in which some gave, it is said, their consent, have not been preserved, which, as the evidence of the understanding of the absent parties, and of the contract to which they intended to become parties, ought to have been engrossed in the sederunt-book that was kept.

We cannot speculate on what one set of parties, the trustees, who had signed road bonds beyond the extent of their real interest, hoped that they might receive, or what, at the date, some might have been induced to give; and then, having formed a plausible theory of what a set of gentlemen might be thought to have in view as matter of generosity, or rather having formed a notion of what it was equitable and fair for them to do, to construe the meagre terms of the two minutes in question according to such preconceived speculations as to the motives or moral obligations of the road trustees.

We must look wholly to the minutes as the measure and proof of the nature and extent of the legal obligations thereby created and undertaken. No. 126.

Certainly, it struck me very much that the argument of the respondents really threw aside the exact terms of the minutes almost entirely, and was just as applicable to any one set of minutes as another, for it avoided all consideration of the meaning and import of the terms employed. May 30, 1845. Duke of Montrose v. Edmonstone.

We have been told, that relief from the obligations undertaken—total relief—was the object in view, and to be the rule for interpreting the obligation. Now, when the minute is closely looked into, it is admitted that *total* relief, in any sensible construction of the minutes, was not intended or undertaken—that the parties who had signed the obligation for the debts remained liable for the whole principal debts, whether it might turn out a burdensome obligation or not from the failure of the road. 2dly, It comes to be admitted that even total relief from the interest was not intended. 3d, That the obligation only related to a probable loss arising from the returns of the road being inadequate to pay both the interest and the repairs, and that there was no obligation undertaken to *see the interest paid*. 4th, That the sum annually to be raised, on the widest view of the alleged obligation of relief, is *fixed* in its total amount; and, moreover, the sum annually exigible from each of the parties undertaking liability is specially limited and restricted to specific sums, as their proportions of that annual payment, however inadequate to give relief.

So far, therefore, from being an obligation of a character to be construed as to its legal import and extent by any general consideration, it seems to be one, from the very statement of it, of a most limited and special character, and that we must look to the actual terms employed, and nothing else.

Again, it was urged that the loss which might arise to those bound for the debts was of a fluctuating character—greater or less in particular years; and this was urged upon us, to my surprise, for construing liberally against the obligants the import of the obligation undertaken, which it was admitted, on any view, could never exceed a fixed sum. The fact, that the loss was fluctuating, and yet, consequently, no obligation undertaken, on any view, to meet that varying loss, but only for a fixed sum, seems to me only the more to prove how limited, and special, and restricted was the liability to be undertaken.

The legal interest on the debt was a fixed sum. Yet no sort of guarantee or liability was undertaken to relieve the bond obligants of that annual burden except to a certain extent; and an annual loss to a considerable extent confessedly might, if the road had proved an utter or great failure, have necessarily fallen on them.

Then it was said,—“but by design and unfair management, after years of prosperity, large repairs might come to be made, and then the extent of the liability might be regulated and affected by design, unless you adopted the construction that parties were to pay a fixed sum on an accounting, I suppose, for forty years, year for another, so as to exclude the supposed partial and unfair operations on the roads.”

This general argument is utterly inadmissible. 1. No such case is alleged on record. 2. It was urged, oddly enough, by the Duke of Montrose, who took the management of the roads almost entirely on himself, and against whom the case was not unnaturally at first urged, that he was responsible for this agreement

No. 126.
 May 30, 1845.
 Duke of
 Montrose v.
 Edmonstone.

not being acted upon as a binding agreement. 3. The case supposed is exactly what happens in the usual and ordinary administration of all roads—the returns fluctuate much—the necessity of repairs occurs from time to time very unequally, not only from casualties, but because roads, after being long in a fair state, are found to be worn out, and require large outlays in particular years, adding much to the item of repairs. Yet, plain and obvious as was this state of the fact, as a necessary condition applicable to roads, and the returns from them from year to year, yet no provision whatever is made for this probable case, viz. that the repairs in particular years might swallow up and greatly exceed all the returns, so as to form an additional burden on the roads. It is not provided against those undertaking liability, by any express terms, or by any special clause whatever, that in that case the obligation shall take effect, as a sinking-fund, to reduce that excess of new debt for repairs until paid off, although not required for the loss of any particular subsequent years. Nay, no words are referred to which can be said to provide machinery for or to contemplate this case; and, but for the accident that we are now in what is called and made an accounting—but the extent of which is just the question in dispute—I am persuaded such an idea could never have occurred to any one.

Lastly, in answer to the above argument, it is to be remembered the obligants for the debt were themselves trustees, entitled to act as much as the others, and having the power to attend to the administration of the funds, and to complain if any unfair design had been entertained. But the notion of unfair design being pleaded in this case is wholly inconsistent with all the pleadings, and the actual relation and actings of parties.

In every light, then, all general argument fails, and is inapplicable.

The only general observation which can be made is that urged by Mr Graham Bell—that no debt or obligation was undertaken by the trustees on the west of the Leven on the faith of these minutes, or the liability thereby incurred; that the liability so assumed was voluntary by the others, and contained in a loose minute, and ought not to be construed against them upon any general notions of equity—no legal equity being applicable to the case—nor according to more loose notions of equitable adjustment after the lapse of years, but according to a fair view of what the parties intended to undertake at the time, and what could be legally enforced against them *de anno in annum*, if the import of the obligation had come into controversy at the first, and not after the lapse of nearly forty years.

What are the terms of the minutes and note of valuation?—(Read.)

First, I find nothing in these terms which imports any undertaking, except *when* a loss occurs, and then to the *extent only of such a loss*. It is a deficiency for meeting an annual burden, which is to be made good—a deficiency expected to be, *per annum*, about the amount stated. If no deficiency, I do not see one single expression which imports an undertaking to pay, or a right to any one to demand payment. If the deficiency is short of the sum, then the undertaking seems to me limited to the deficiency, whatever that may be, as plainly as words can restrict and define liability. According to another expression, it is a loss of about £130 *per annum* which arises, which loss is to be made good, so far as the repairs diminish the produce of the tolls, and render them insufficient to pay the interest. If there is no loss *per annum*, either for one or more years, then as there is no loss

so there is no liability. I cannot find words to import liability, if there is no loss. No. 126.
 It seems to me that loss must occur to bring the resolution into operation at all.
 If the revenue became permanently such as to exclude the possibility of any loss, May 30, 1845.
 so also would the liability be excluded. If for three, five, ten, or fifteen years, or Duke of
 every second year, there is no loss, then I cannot see how liability can arise. Montrose v.
 Edmonstone.

A ruling principle, for the construction of the agreement, seems to me to be found in this matter of fact, viz., that the liability was only to meet a varying annual burden, not to pay off any debt at all, and, like all other undertakings intended to meet a certain deficiency in funds to pay interest up to a certain sum, can only attach or apply, in my judgment, to the particular years where there is a deficiency in the funds for meeting that annual burden. I think an express stipulation or provision would be required to extend the liability to any accumulated amount of interest carried on from year to year.

Let us see now what the Lord Ordinary has found. It is quite essential not to attempt to make an adjustment of accounts between the parties, without ascertaining how the same views will work the agreement out in other and far simpler cases. The decision to be pronounced now must regulate the construction of the agreement in future as well as in this case, and the application of it equally to other states of the facts.

1. The Ordinary finds that the parties are bound to contribute annually £130, in the proportions fixed by the note of valuation, so far as the same may have been, or may in future be, necessary to make up a loss to that amount on the period in question, and on the same principle on any other future period.

2. And here his exact words are material—"That although the loss or deficiency in any one year may not amount to the said sum of £130 sterling, yet, if in a subsequent or prior year or years it shall, from the foresaid causes," (that is, the deficiency of the returns,) "amount to a larger sum than £130 sterling, the surplus," (treating it as a sum due to the extent of £130 every year, whatever is the loss of that year,) "not required for any particular year or years, is applicable to providing for the loss or deficiency exceeding £130 sterling in the subsequent or prior years."

3. That the parties were and are chargeable (observe the terms *were and are chargeable*) with the said sum of £130 sterling annually, in so far as requisite for that purpose; and he adds, with interest from the time when the proportion of each was due.

Let us see how these principles can be worked out apart from the assumption that there must be a general accounting, which just begs the whole question.

Prior years to the occurrence of the excess of loss are put on the same footing with future years—that is to say, if in the tenth year, after nine of ample returns, there should be a great repair, that is to be a debt to be met and paid by going back on the liability for the nine preceding years equally as for subsequent deficient years; and this must be decided, for, if otherwise, you must strike out of the period, under the interlocutor, a great many free years. Then, again, if you slump the loss or debt of prior and subsequent years to make them cover an intervening series of free years, that also proceeds on the principle of the interlocutor, that the liability in prior free and subsequent free years, is equally then to be given effect to; and, in short, that the sum is due for every year, without reference to the loss of that year.

The interlocutor was given out in draft to be acted upon by the accountant.

No. 126. His report is framed upon it, and the principles laid down by it are all necessary for the results as well as details of the report.

May 30, 1845.
Duke of
Montrose v.
Edmonstone.

Then suppose the first years are free from loss—say the first five—are the parties free also? No loss has occurred—no deficiency: is payment due? And if so, how much, and when and how to be exacted? Mr Moir most prudently took the complex view that the Ordinary does;—"This is an accounting," (although why that is to be assumed, one does not understand, for the whole question depends on that point,) "and, in an accounting, the loss of all years, and the funds of all years, must be massed." Mr Inglis disclaimed distinctly the notion that the sums could be collected and levied for free years in these free years; but the Solicitor-General found himself too much pressed on that admission by Mr Penney's close reasoning, and therefore he at once contended that the full sum was to be levied every year, whatever was the loss, or whether any loss or not,—referred to the payments by one or two in the first year, in proof of that view of the matter,—and then said, that if at the end of a long period such as this accounting, there was more than required, repayment might be made or relief given. These views are totally different.

After full consideration, this latter view, to me utterly irreconcilable with the terms of the obligation, seems to be the only consistent or intelligible view of the plea of the parties. They must come, as the Solicitor-General was driven with obvious reluctance, to this plea.

Now I take the first four or five years, or the first. What words are there on which any one could enforce at the time payment, if no loss had occurred? Could the proprietors west of Leven (assuming that they have any title at all to enforce the agreement) put forward and enforce a demand for payment, *when the interest on the bonds had been fully paid off by the returns of the tolls*, and when there was no loss? Relief to them is said to be the object for which the minutes are to be construed. Be it so; still surely they must show that they have been called on to pay the interest; they must show loss. If not, what title have they? Or what ground in law is there to hold that the sum must be paid, when the interest has been fully paid off, and there has been no loss? In whom can there be a title in such a case, or on what fact can the liability emerge?

But then it was argued here,—“true, there has been no loss in these years; but you are to relieve us wholly and for ever of interest to the extent of £13. The tolls may fall off in some subsequent and future years, perhaps remote, and hence you must pay up now in order to provide a fund in hand in case of loss. We are entitled to that.”

Now *that is truly done*, in result, in this accounting, when you go back on former years.

I can find no title or ground for any such demand. The claim seems to be repugnant to the terms of the minutes, in that plain meaning of which alone they seem susceptible. Had any plan of a permanent fund been in view to provide for future loss, and for raising a sort of contingent fund to meet such prospective loss, I think the minutes would have contained provision for such plan. I hold that express provision was necessary, in order to constitute so singular an obligation.

Then, if there is no claim to collect and demand payment in these free years, how can you go back on these years for loss subsequently occurring? That is to me inexplicable. I do not see how the liability attached at all until loss occurred. When loss did occur it was to be enforced, but surely not by liability during prior

No. 126.

May 30, 1845.
Duke of
Montrose v
Edmonstone.

bygone years. Suppose a great repair in the sixth year, causing loss far exceeding the £130, and the certainty of similar repairs creating equal loss for several years to come, could the bond obligants show title, under these minutes, to state such loss against prior years, when the returns had fully met the annual burden, and paid off all the interest, so that their only claim at all is for future interest? How can there be a debt against past years for sums of interest, only emerging by accidental deficiency in after years? On what principle of law could such a demand be founded? Terms in the minutes, pointing to such a result, there are none.

Liability of the bond obligants for the interest of the debt during the prior years is at an end. The only burden that can fall on them is the interest of the sixth year, and of future years. The past years are gone, free from all burden; they show no burden as to them. Hence, surely, if any thing is plain, it is that the only loss which can give rise to a claim, is for emerging interests on the bonds, and, therefore, there can be no liability of relief drawing back to the free years, in which the account is closed by the fact that there has been no loss.

Then suppose, in the sixth, and three next years, the £130 is necessary, but sufficient to pay the interest, the effect of the interlocutor is also that the surplus interest is to be stated as a debt against the road for future years; and so this surplus is called a loss under the terms of the minute, to meet which the parties must pay in future years, although the returns in the subsequent years are equal to repairs and interest. This appears to me to be equally inadmissible, and really on the same ground. Nothing seems to me to be plainer than that the bond obligants were left to bear the interest, if it exceeded what the returns of the road for the £130 for the year would cover. The very object and meaning of a reduction to £130, is pro tanto defeated, if, after the remainder of the interest is paid, debtors paying it are entitled, under these minutes, to say—But as we are creditors of the road for it, so it is to fall under the head of repairs for the next year, (the sense in which these minutes use the word repairs, contrary to its proper usual signification,) and, therefore, you must repay it the next year, although the returns of that year there is no deficiency to meet the annual interest and the annual repairs. They remain creditors of the road, but I have no conception that an additional debt by them can, under this minute, be taken as repairs, and so legally to be repaid by levying what otherwise would not be exigible under agreement. The term used is repairs. (Read the minute again.) Now, how is surplus interest to be brought in, if not under the head of repairs? But that seems to me a most violent meaning to put on the word. Future debts form the obligant's claim against the road, but cannot, I think, be taken into account, to bring out liability for £130, when that would not be due on the proper amount of the returns of that year, on the one hand, and the annual interest and repairs on the other.

Then, again, take a certain number of years, in which occasionally the loss falls short of the £130, and occasionally exceeds it—varying, as might be expected, a year to year; what warrant is there in the terms of the minute to interlace club together all these years, and so make up a general account? Be it that a great number of years no payments have been made, because not required these years, is that accident to alter and affect the extent of liability under the agreement? Must not the principles of judgment be the same? And is it not as easy to ascertain, as indeed the accountant has done, the years when there

No. 126. was loss, and what the loss was on the different years, and enforce payment of the particular sums necessary for the loss of each year according to the loss? I am at a loss to see any principle whatever for such an accounting as the interlocutor directs, unless the full sum of £130 was to be *levied* each year, as the Solicitor-General contended, whether there was loss or not, in order to provide a fund for the interest, without regard to the loss of particular years. But that is distinctly not the *principle* of the interlocutor.

May 30, 1845.
Duke of
Montrose v.
Edmonstone.

Although that rule is at variance with the terms of the minutes, yet I do not see how any construction supporting the interlocutor can stop short of that result. The Lord Ordinary says the liability is for £130, only so far as necessary; but necessary how? Why, on a state of accounts beginning in 1802, and ending in 1842; but the state may vary greatly in 1843, 1844, and so forth. I think each year must form the commencement of a separate period of forty, on the view taken in the interlocutor. For instance, suppose the full sum of £130 is not exacted or necessary, as it is not on this period of forty years, but that in the next eight there is great loss; then, why is the full sum not to be exacted for forty years back from 1850? What is to protect the years from 1810 to 1850 on the principle of this interlocutor, so far as the full sum of £130 has not been necessary in this account? On the contrary, these years must equally remain liable for the difference not now to be paid, nor necessary as yet. There can be no partial and final closing of the chequer in 1842, except for that exact period of forty years, beginning in 1802; and on the very same grounds on which on that period you ascertain what is necessary, and go back on prior years, even as far as 1800, so in 1850 there must be the same right to say, here is great loss for the preceding eight years, which the £130 for these years will not cover; and hence you must now call up what has not been paid of the £130, so far as necessary, in the forty years before 1850, and so on, indefinitely in each period of forty years, beginning annually. If, to be sure, you levy and collect the full sum of £130 each year, although there is no loss at all, and form a contingent fund, then that construction will work. But I cannot see how the rule of the interlocutor will operate, except by a continual and conditional liability over each period of forty years, which may emerge at the very close of it—a result which seems to me to be quite inadmissible in so simple a resolution.

Then, on the theory of combining years in an accounting of the sort directed by the interlocutor, what is to be done in regard to heirs and executors? How is it to work? It might be most difficult to find out the parties. Could it be contemplated, that if a person died without any loss arising during his lifetime, his descendants, as his executors, might be liable for this sum annually, with interest, although the necessity for any payment had never emerged. Then suppose succession by heirs of entail not bound by the debts of their ancestor? What is to be the principle? Does this obligation stop by death of the grantor, or would it transmit and follow in perpetuum all the representatives of the grantor? Or to apply the rule to the special case of Campbell of Stonefield. Suppose a very common case, an heir of entail leaves no funds whatever, his younger children provided for only by bonds of provision, or dies without any children, and the next heir is not full at all—what is to become of the proportion effeiring to that estate which necessarily drops out?—first in a general accounting, and secondly for future years. On the principle of the interlocutor, I do not see how the result could be avoided.

that even large proportions, such as Stonefield's or the Duke of Montrose's, might have been thrown on the other proprietors, to the extent of exacting the full amount of the proportions of the others, not in respect of real loss, but of the proportions of others not having been paid, by stating the latter as a debt against the road. These points will all arise on Gartmore's death, whom his son will not represent at all. Supposing Gartmore had died in 1826, instead of becoming insolvent, how would the matter have been worked out? In 1850 you may have to consider the effect of his death, in going back for forty years from that time, and what is to happen, seeing that the obligation then will stop altogether as to the Gartmore property.

No. 126.
—
May 30, 1845.
Duke of
Montrose v.
Edmonstone.

Many other difficulties in the working of the principle of accounting, directed by the interlocutor, might easily be stated.

As to the second point, the liability for Gartmore, I am clearly of opinion that the rules applicable to cautionary obligations cannot be made applicable to this case. I think the liability was simply this:—We resolve to pay among us the interest up to £130, which may not be provided in each year, on the following rule—that is, in the proportion by each of the members concurring, effecting to the respective valuations of such concurrents:—From A B you will get so much, then from C D so much, and so forth. A B fails, but the result just appears to me to be the same as if A B had been solvent, so far as the others are concerned. For the sum to be allocated against him, the bond obligants must go against him and recover what they can—a dividend if he can only pay that, or recover nothing if he can pay nothing—and then they have not got relief for that part of the interest expected. That seems to me to be the only result.

I cannot see how, under the terms of this minute, the others have any concern with that. When Mr Inglis contended that the result must be the same as if Gartmore was no party at all, I thought he was going to maintain the more plausible plea, that as the parties were to make good £130, the result of one dropping it was at once to alter and enlarge the proportions of the others. For this result there would be more to be said than for the view adopted by the interlocutor, of making the sum not recovered from Gartmore against the road as a *debt* for future years, and so ultimately making the others pay it. But Mr Inglis admitted the proportions could not be altered. That being conceded, then, it seems to follow that only these proportions can be exacted of the sum of £130, according to the actual loss. Indeed, in the view I take of this second point, it is included under the general point of the incompetency of combining a number of years in an accounting, and slumping the loss and the liabilities of all these years.

The third question as to Stonefield's liability after the sale of the estate, seems to me to enter much into the general character and nature of the obligation. The minute proposes for adoption, a *resolution*, that the loss should be made up by the whole trustees who *have property in the parishes through which the road passes*. This is agreed to. Now it is material to consider if this resolution is one which the bond obligants have a legal title to enforce between these parties as a proper personal obligation, irrespective of the only consideration which made any distinction between one road trustee and another. I am not satisfied of this; nor do I see the principle on which they can contend that Stonefield remains liable when he sold his property. They had no right to demand the relief by this agreement, or any relief from the other trustees personally. They are not in a worse situation if

No. 126. the liability of Stonefield should cease, than if the agreement among the others had not been entered into; on the contrary, they have got, or will get, his payment to the extent of his liability for thirty-three years, or those years to which the liability applies. But I cannot at present connect this resolution among the trustees into a regular personal debt, to endure in all time coming. I think such a view is contrary to any reasonable construction to be put on a resolution so loosely expressed. This point, however, is of subordinate importance to the general question.

May 30, 1845.
Duke of
Montrose v.
Edmonstone.

LORD MEDWYN.—I concur in the interlocutor. The Lord Ordinary has adopted the view of the agreement 1801, which occurred to me when we decided that the interests of the parties to it, and of those for whose benefit it was entered into, were to be regulated by it. Those who subscribed the bonds prior to it, if interested in the road, were to be freed from any subsequent loss by this arrangement, which also provided for payment of the interest of the prior debt out of the returns from the road. We are to recollect that it does not stand on a regular contract, but on the minutes of the road-trustees; and they are to be construed so as to give effect to the obvious intention of the parties at the time. The only hesitation I could have in adopting, to the full extent, the manner in which the view has been carried out by the interlocutor, is in that part which regards a deficiency in any year greater than £130 would cover. I think it not very clear whether the interlocutor proposes to take more any one year than this sum, which has been taken in previous years. I am not sure, that if this be the meaning of the interlocutor, I would go that length; but I would not quarrel with it, if it only means this—that if there be any surplus of former years unexpended, and a large outlay in any one year subsequently, the consequence, in fact, of a large expenditure on previous years, fixed upon a calculation of loss on an average of years, which subsequently also would be variable from year to year, the prior debt plus may be taken along with as much of the £130 of that year as may be necessary. For, looking at the nature of the agreement, and the payments made by the parties at first, I do not think that the payments were to be annually of an exact sum required for each year's expenditure. After the large expenditure laid out on the road in 1800 and 1801, it must have been seen that there would be comparatively little repair required for some years; but upon an average of former years, the loss of future years was calculated at £130 annually, and the sum was to be raised by annual payments, as being easiest for those who would pay it; and if the traffic on the roads, and of course the toll-dues, had not risen, I presume the average would have continued pretty much at this sum. As it did improve, I think the parties would, on seeing this was to be permanent and progressive, have met and regulated the future payments, by reducing the sum to £110, or such other sum as should be estimated on the average of prior years, although the whole sum might not be required for expenditure the next year, but would be necessary on the average of repairs one year with another. On the view of the interlocutor I concur in it.

I am very clear that the decision as to Mr Campbell of Stonefield is well founded. If he wished to relieve himself of this burden, he should have made an obligation on the purchaser, who would have reckoned it among the burdens attached to the property, and in estimating the price would have deducted it from the rental. Stonefield has not suffered this deduction. He has, therefore,

capital effecting to it in his pocket, and can have no equitable claim even to get rid of the burden. He will benefit by the increasing improvement on the toll-duties, which he could not have done if he had imposed the burden on the purchaser.

No. 126.
May 30, 1845.
Duke of
Montrose v.
Edmonstone.

As to the loss by Graham of Gartmore, I think the Lord Ordinary has provided for it according to the true spirit of the agreement. The parties to it undertook to relieve Mr Denniston and the three others, whose properties were not benefited by this road, of all subsequent loss, binding themselves to do so, not exceeding £130, and each according to his valuation. If any portion of this sum is not recovered, it is loss, and adds to the debt on the road, of which these parties are to be relieved, at all events, by the parties to the agreement. These must relieve the others up to the amount of their obligation, if necessary; but not to exceed it. The case of parties binding themselves to pay a sum, with separate and restricted liabilities, is an extremely apt illustration, and fully warrants this portion of the interlocutor.

LORD MONCREIFF.—I have found myself in a situation rather of extraordinary embarrassment in judging of this case as it now stands, owing to peculiar circumstances. When the cause was formerly advised, on very full papers, and a full argument in reviewing a very detailed judgment of Lord Jeffrey, I delivered a very long opinion, explaining the reasons why I could not concur in the principle of that judgment, by which the liability for the debts in question was found to rest on the bonds individually subscribed by certain of the parties; explaining also the legal grounds on which I thought that there was an original mutual undertaking by the parties for all the debt constituted by the bonds implying relief among one another, in whatever way those bonds might happen to be signed; and, finally, explaining my reasons for thinking that a fair equitable rule of proportional liability was definitively settled by the minutes of the trustees of 24th November 1801 and 22d December 1801, taken in connexion with the facts proved or admitted on record, with reference to those minutes and the acts of the parties proceeding on them. But when I look at the report of that advising, I find, in the first place, that the reporters have not thought it necessary to give any account of the detailed reasons why I differed from Lord Jeffrey—and they are not to be found in the report of the other opinions delivered—a defect which may hereafter become exceedingly inconvenient if it cannot be supplied; and, in the second place, that while the report bears that I did not agree in either of the opinions which were previously given, there is no distinct statement of what my opinion really was, except only in general terms that I thought the agreement of 1801 binding; and even some of the statements given have been taken as relating to the agreement of 1801, which in fact related to the original undertaking in 1794. The embarrassment which this lays me under is occasioned by the accident, that though I have found the greater part of my notes among the papers, the last part of them, which related specially to the matter now in discussion, the subsisting obligation, and the effect of the agreement of November and December 1801, have in some way been lost or mislaid.

But it may be proper to mention, that if the parties shall find it to be material in what may follow in this case, the part of the notes preserved may still be of use for explaining my views of the case generally, the reasons of my difference from Lord Jeffrey, and, in some manner, my grounds for holding the minutes of

No. 126. 1801 admissible, in connexion with the facts on record, to establish a binding agreement, though I cannot recal the precise conclusion to which I came, except as it is indicated by the interlocutor.

May 30, 1845.
Duke of
Montrose v.
Edmonstone.

The interlocutor, however, finding that there was a valid agreement by the minutes of 1801, is final in this Court. The question now is, Whether the Lord Ordinary has put a right construction on that agreement? Three points are maintained against the interlocutor:

1. For Alston's trustees it is urged, that the Lord Ordinary has misconstrued the agreement, in so far as he has found, "that though the loss or deficiency in any one year may not amount to the sum of £130, yet if, in a subsequent or prior year or years, it shall amount to a larger sum than £130, the surplus, not required for any particular year or years, is applicable to providing for the loss or deficiency exceeding £130, in the subsequent or prior year or years;" and that he ought to have found that the obligation is only for £130 for each year separately; and that, in so far as there may be no deficiency in any one year to that amount, or no deficiency at all in any one year, the surplus cannot be claimed to make up deficiencies in other years.

2. It is maintained that the proportion payable by Graham of Gartmore, which cannot be recovered in consequence of his bankruptcy, ought to be deducted, and cannot be thrown upon the other defenders. And,

3. Mr Campbell of Stonefield concurring in the plea of Alston's trustees, maintains separately, that he cannot be answerable to any extent, on account of loss or deficiency in any year posterior to 1835, when he sold his whole estate in the district.

1. The first of these points is attended with difficulty. But as I read the interlocutor, it seems to exclude any claim on account of deficiencies in years preceding 1801. So I understand it; and though there was, I believe, some difference of opinion on that point formerly, there is no case now brought before us by Edmonstone and others, maintaining that it should have such retrospective effect.

There are still, however, three views which may be taken of the effect of it. One is that adopted by the Lord Ordinary, that the obligation is for £130, corresponding to each year, whether there be an actual deficiency to that amount or not in any particular year, the surplus being always applicable to excess of deficiency either in prior or future years. Another is, that the obligation is strictly limited to the deficiency in each year separately. But a third case, as I understand it, is, that an excess of deficiency in one year beyond £130, may be made up by levying the £130 in the next or subsequent years, though not all required for the year or years, but not by levying the proportions which may have been unapplied as unnecessary in former years.

I am, on the whole, of opinion, that the first is the right construction.

The object and the main principle of the agreement, are very distinctly expressed in the first minute:—That there being an annual loss of about £130, "it would be a hardship to make the trustees on the west side of the water of Leven, and those eastward of Milton Burn, liable in payment of any part of the loss, as their names were introduced into the Act, and they attended meetings merely for the purpose of making a quorum, and having no material interest in that road—resolve, that it is the opinion of the meeting, that this loss should be made up by the whole trustees (with the above exceptions) who have property in the parishes through which

the road passes, whether they acted or not, by paying their several proportions thereof, according to their respective valuations; and that a committee be appointed to correspond on this subject with the trustees who are not present."

No. 126.
May 30, 1845.
Duke of
Montrose v.
Edmonstone.

On this distinct ground, that the trustees excepted, though they had signed bonds, had really no material interest in the road, the proposal is, that the loss should be borne by all the other trustees according to their valuations in the parishes, *i. e.* by all the trustees, under the exception of those referred to; and the apportionment is afterwards made out and acted on precisely on this principle, excluding the excepted trustees. Very clearly, therefore, the intention was, that, at least from 1801 downwards, the excepted trustees should be relieved in such manner as could be effected by an obligation for £130 per annum, undertaken by all the rest. No doubt, the arrangement also answered another and more general purpose, that of settling the responsibilities of the other trustees who had an interest in the road on a more equitable principle than the mere subscription of the bonds would infer—that is, by the probable extent of that interest in each, estimated reasonably by the valuation of their several lands in the parishes. But the immediate and declared object was to relieve the excepted trustees altogether of their liabilities, either by the bonds or by the other actings.

The produce of tolls in each year was evidently a matter of uncertainty. But it surely could not be the meaning of such an agreement, necessarily made known to the excepted trustees, whether proved to have been formally applied for by them or not, that, though the whole £130 might not be required in particular years, whenever an excess of deficiency arose in a particular year, the excepted trustees were not to be relieved, but still required to pay the excess of deficiency under the obligations of the bonds, without any relief, either against the surplus produce of the tolls in future years, as long as no more than £130 was required for the interests of these years, or more directly against the other trustees on their obligation for £130 in each year, whether before or after the year of excessive deficiency. The resolution was, that the binding trustees were not to be liable for more than £130 in any one year; but subject to that arrangement as to the mode of accomplishing the object, the agreement and resolution were substantive, that the excepted heritors should not be liable in payment of any part of the loss; and therefore it appears to me, that, as long as the engaging trustees are not called on for more than £130, corresponding to any and every year posterior to 1801, they cannot complain of the demand for that sum, in so far as it may be necessary for relieving the excepted trustees from the payment of any part of the loss. Any construction less than this would defeat the declared object of the agreement. And it is, indeed, apparent to me, that when it was set forth in the first minute that a loss of about £130 per annum arises, &c., and that the loss should be borne entirely by the other trustees, and when the apportionment was then made on this principle, without reference to the actual loss in any particular year, the meaning must have been, that those proportions should be due as upon an average of years, whenever it should appear that they were required, in order to give full relief to the excepted trustees.

A question has been agitated, whether the full £130 could be levied when that sum was not required for that year, or for prior years subsequent to 1801. I think the answer to this question very simple. It is very clear that that difficulty did not occur in 1801, when all paid their full proportions, though there was not

No. 126.
 May 30, 1845.
 Duke of
 Montrose v.
 Edmonstone.

a deficiency of £130. But the answer seems to me to be this: If there was not a deficiency of £130 in the particular year, and while it might be uncertain whether there ever would be such a deficiency in future years, as to make it necessary to fall back on the £130 of that year, or the surplus part of that year, I should think that any trustee might object to paying his proportion of that sum, upon the contingency of a future unknown necessity. But this could not make any difference on the nature of the obligation itself, as calculated to effect the object of totally relieving the excepted trustees of all the interests posterior to its date.

I am, therefore, inclined to adhere to the interlocutor on this point. The other view, which would confine the demand to the surplus of future years for the relief of an excess in one year, would come to the same thing in the end. But it would expose the excepted trustees to the necessity of paying in the first instance. And, on the whole, I think the Lord Ordinary's view the more correct and consistent construction.

I have a doubt however, as to the charge of interest, where no demand was made, or, more especially, when it could not be made. But I am not sure what would be the effect of disallowing it.

2. With regard to the effect of Gartmore's bonds, I have great doubt. When the argument closed, I was inclined to go along with the plea, that, though the parties are not cautioners for one another, they may be in the position of cautioners, with the obligation of each limited. But, on reflection, I doubt whether this is sound. They may, indeed, be somewhat as cautioners, with a limitation as to each. But what is the limitation? Each is not liable for the whole £130. The obligation of each is distinctly limited and defined to be only for his own proportion of the £130, according to his valuation. Beyond that he is not liable. And therefore, to make him liable for a share of Gartmore's proportion also, would be to subject him beyond the limits of his obligation. The illustration thus rather brings out the point against the respondents; and, at present, I am inclined to think that the interlocutor ought to be altered in that point. It may not, indeed, make much difference in the end, if the agreement is continued in the way I think it should be. But still the judgment should be correct.

3. With regard to the plea of Mr Campbell of Stonefield, though we may feel it to be somewhat of a hard case, I do not see how we can give him relief, merely because at a certain time he sold his estate. It has been decided that the agreement constitutes a personal obligation binding on him. He has taken no measures for transferring that obligation to the purchasers; but, on the contrary, has taken the full price for the land, without any such burden made to affect it. It is, therefore, impossible that he can be allowed to throw on the other gentlemen who are bound, his own proper share of the responsibility.

Besides, no less than eight bonds were granted, for which he is liable. And it is in relief of these bonds and others that the agreement takes effect.

LORD COCKBURN.—1. I am of opinion that the plea of non-liability, from and after the sale of his estate, that is set up by Mr Campbell of Stonefield, cannot be maintained. Though the obligation which he undertook arose from his being at the time a landed proprietor in the district, and its extent was measured by the rent of that estate, still it was an obligation of a personal nature, and adheres to him, although the property be sold. He might have laid it on the purchaser if he had

chosen. To be sure this would have diminished the price; but, independently of No. 126. law, there would not even be equity, as in a question between him and his fellow-obligants, in his increasing and retaining the price at their cost. If all the obligants except one were to sell their estates, it surely could not be maintained that this could throw the whole burden on this one. May 30, 1845.
Duke of
Montrose v.
Edmonstone.

2. I am of opinion that the claim, as against the other obligants, cannot be enlarged by making them responsible, no matter in what form, for the share of Mr Graham, who has become insolvent. I cannot view them as sureties for each other. Accordingly, it seems to be admitted that they cannot be charged with Mr Graham's share directly, although this, however, be the way in which they actually are charged by the accountant. The pursuers only propose to change the form of doing it, by first stating the loss on his share against the road, and then adding this road debt to the sum chargeable annually against the solvent obligants. They do not propose to charge any obligant with a larger sum than his annual accumulated proportion; but the effect of what they wish would be to increase the debt, for which the obligants are liable, and probably to prolong the period during which their annual contributions must be paid. The form is immaterial; but I do not see how, under this obligation, those who pay can be affected in any way by the failure of those who do not.

The loss which they are, proportionally, bound to make up, is distinctly stated in the minute containing the obligation, to be a loss arising from the toll-bars not producing enough to pay "the interest of the money borrowed for making the road, and keeping it in repair." The loss arising from Mr Graham's insolvency is not a loss arising from the unproductiveness of the tolls—nor from the excess of interest on the money borrowed—nor from the expenditure necessary for its repair. I see no authority for the operation which is described as "stating Mr Graham's share in account against the road," merely in order to bring it, indirectly, against the other obligants. The insolvency of the whole except one can, no more than them all selling their estates except one, be made to operate against this one. If the idea of such contingencies had occurred at the time, and they had been asked whether each meant to guarantee the rest, every line in the minutes impress me with the conviction that they would all have started back.

3. I am of opinion that it was only the deficiency for the current year that the obligants bound themselves to make up; and this by an annual payment corresponding thereto. This seems to me to be implied in the terms, and in the object of the arrangement. They are to contribute £130, or such part thereof as may be necessary, in addition to the tolls, to pay the interest and the repairs. This was plainly an arrangement of an annual nature. The opposite view involves a result to which I can scarcely conceive any sane man agreeing. It implies, that though there might be little or no deficiency for any given number of years, still, if any casualty, such as the destruction of the road, should at last require an enormous sum, the full shares, formerly not necessary to be exacted, might, after all, be required to be paid up; so that, instead of being an obligation for £130, settled yearly, it might reappear in the form of a demand for many thousand pounds, exigible all at once, at the distance of half a century, and with interest on all the past years, during which the deluded debtors have been living and spending on the idea that each year settled its own debt. True, they can be called

No. 126. upon for no more than their accumulated shares and interest. But the accumulation is the evil; and interest, not brought against them by any failure on their part to pay the principal, which was never asked for, is a clear, unwarranted addition to the debt. This construction implies that, even when no contribution was necessary for certain years, still each obligant was bound to keep his annual sum, subject to distant claims, and with the comfortable knowledge that interest on it was always growing. It would require stronger words than I can find in these minutes to sustain such a conclusion.

May 30, 1845.
Duke of
Moutrose v.
Edmonstone.

It has been stated that the practice of the parties is against this view, because they occasionally paid more than the actual loss of the current year. But there is no evidence, and no probability, that on these occasions they had been told what the actual loss was. They paid in full, believing that the whole subscribed sum was due.

Another view has been taken, which, in one way, is the reverse of this one. It is, that though there may be no power to go back on the saved contributions of past years, it is competent to go forward, and to debit future years with the excessive deficiency of any single year; and this is not the view that has been adopted by the accountant. I do not know that it is either more or less reasonable than the view I have first spoken to. This diffusion of extraordinary loss over future years, seems to me to be liable to the very same objection with its diffusion over past ones. Both are equally inconsistent with that annual adjustment of the account, which I think is the clear object, and the clear provision, of the agreement.

It has been urged that, without such diffusion, there would not be that complete relief which was stipulated in favour of the trustees west of the Leven. But, I am not satisfied that these persons are entitled to be considered in this discussion for any separate interest of their own. They are not parties to the contract. They were only the objects of it, in an arrangement confined to the obligants among themselves. And, 2dly, as between these obligants, I do not see that it was a total relief that was secured to these western trustees. It was only such relief as the agreement could afford—that is, as I construe it, relief from the loss arising on each year by itself, not exceeding £130.

Their Lordships then appointed minutes of debate to be given in the following points, respecting the legal meaning and import of the agreement contained in the minutes of the 24th day of November and 22d day of December, both in the year 1801:—"1st, Whether the liability thereby undertaken extends further than to pay to the amount of the specified sum, the loss which may arise from 'the rents of the toll bars falling that much short of the payment of the interest of the money borrowed for making the road and keeping it in repair' in the particular years in which such loss occurs, and to the extent of such loss in these particular years, or whether the parties undertook a general liability for loss in subsequent or prior years, and in what manner, and to what extent? 2dly, Whether the parties can be called upon to pay more in consequence of the insolvency of one of the trustees, as determined by the said interlocutor, than the proportion of the loss allocated upon the whole

trustees, according to the note of valuation made out in 1802? And, No. 126. 3dly, Whether the defender, the said John Campbell, Esquire, continues liable after he sold his property, and ceased to have any interest in the district and roads?"

May 30, 1845.
Duke of
Montrose v.
Edmonstone.

It was argued for Alston's trustees ;—

(1.) That the agreement, under the minutes, was of a limited nature, applicable only to the interest of the debt as in 1801, and did not import any liability beyond £130 per annum, and that only for the loss, if any, which should occur in any one year. If there was no loss in any particular year, there was no liability. The fact of the parties to the agreement having paid at the rate of £130, could not be founded on, as these payments had been continued for a few years only.

(2.) It was contended that they could not be made liable directly or indirectly for the loss by the insolvency of one of the obligants under the agreement, as the obligants were all liable pro rata only.

Mr Campbell argued ;—

That as he had come under the liability in his character of proprietor only, it ceased on his disposing of his property ;¹ and that only two of the payments had been made by him after majority.

The Duke of Montrose, the pursuer, gave in a minute, in which he stated, that the extent of his liability for the debts would be nearly the same, whether his relief lay against the parties to the minutes of 1801, or against his co-obligants in the bonds ; and that, in these circumstances, he did not think it necessary to lodge a minute of debate, leaving the discussion to the two classes of defenders who had interests adverse to each other.

Sir Archibald Edmonstone and others maintained ;—

(1.) That the loss or deficit was of a varying and fluctuating nature, according to the extent of repairs upon the road, and that the obvious meaning of the agreement was to provide, not for the loss or deficit in any particular years, but for the average loss that might occur in a series of years.

(2.) That the loss occasioned by the insolvency of one of the obligants, to be charged against the road, though this might indirectly have the effect of making the other obligants answerable for it. At all events, it was the meaning of the agreement that the parties in whose favour it was made should not suffer the loss thus occasioned.

(3.) A party to the agreement was not entitled to get quit of his obligation simply by selling his estate. It was in Mr Campbell's power when he sold his estate to have transferred the obligation to the pursuer.

Earl of Traquair v. Williamson's Trustees, February 2, 1837, (15 Shaw,

No. 126.

The minutes of debate having been laid before the other Judges, the following opinions were returned on the above points :—

May 30, 1845.
Duke of
Montrose v.
Edmonstone.

LORD MACKENZIE.—In answer to the first question, I think that the liability undertaken by the agreement extended to the payment by the obligees of the sum of £130 per annum, applicable to the payment of the loss arising from the rents of the toll-bars, after defraying the expense of keeping the road in repair, falling short of the interest of the debt, as long as such loss should exist ; and that there are no grounds for holding that the payment of £130 in each year was applicable to the loss accruing in that year only, and restrictable to the amount of that loss.

On the 24th November 1801, when the meeting took place by which the agreement was made, there had been loss of this kind in years past, (see minute of 25d October 1799.) But that loss had not been the same every year. The rents of the tolls had varied considerably, as appears from the report of Mr Lindsay, (p. 20 :) and the expense of repairing the road must have varied still more, as sufficiently appears from the nature of such expense, and the statement by Mr Lindsay of such expense in the years following 1801, (p. 23.) What the meeting in November 1801 had therefore to look for, in estimating the loss that was to be expected in time future, was plainly not the actual precise items or sums of loss in each future year, but the average of loss per annum to be expected in future and this they estimated at £130 per annum. They did not take that sum to be the exact amount of loss in the year 1801, or any preceding year ; and never, by possibility, could think, or mean to say, that the actual items of loss in future years would always amount to £130 per annum, or any one precise sum. They must necessarily have looked to the average. Looking to this average loss, the meeting resolved to relieve the trustees on the west side of the Water of Leven, and those eastward of Milton Burn—i. e. who had no property in the parishes through which the road passes—of the whole of this loss in time future, not of part of it, but of the whole of it ; and for that purpose agreed, that this loss should be made up by the trustees who had property in the parishes through which the road passes, by paying into the hands of the road-treasurer their proportions of the estimated average loss—i. e. of £130 per annum—according to the valuations of their properties, meaning of course that this annual payment was to go into the treasury of the road, and be applied, year by year, in clearing off annually the varying amount of actual loss by which the average loss expected to be formed, that being the only way in which relief from an average loss can be imagined to be effected by the application of such a fund. The resolution is, I think, not susceptible of any other interpretation. It is in these words :—“ The meeting, taking into consideration that a loss of about £130 sterling per annum arises on the above line of road, by the rents of the toll-bar falling that much short of the payment of the interest of the money borrowed for making the road, and keeping it in repair, [here is the statement of average loss,] and that it would be a hardship to make the trustees on the west side of the Water of Leven, and those eastward of Milton Burn, liable in payment of any part of the loss, as their names were introduced into the Act, and they attended meetings merely for the purpose of making a quorum, having no material interest in the road—[here is the statement of intention to give relief in full]—resolve, that it is

the opinion of the meeting, that this loss [*i. e.* the whole average loss] should be made up by the whole trustees (with the above exceptions) who have property in the parishes through which the road passes, whether they acted or not, by paying their several proportions thereof, according to their respective valuations," &c. I have noticed what *is* expressed here. Observe, then, what is *not* expressed. There is not in this minute a syllable about various losses expected to occur year by year, which are to be made up in each year when not exceeding £130; but not to be made up when, or in case, they did exceed that amount; or of a contribution varying in amount from year to year, though not exceeding £130. One amount of loss is mentioned simply as £130 per annum, which, of course, was an average one; and the favoured trustees are to be relieved from liability, not in part, but wholly, from payment of any part of this loss; and that by an obligation to pay £130 per annum, being precisely the estimated average loss, and that to be paid simply, without any restriction or variation. Accordingly the minutes of the next meeting, held on the 22d December 1801, proceed:—"His Grace the Duke of Montrose then produced to this meeting the following letters, or extracts of letters, viz. from Sir Archibald Edmonstone of Duntreath, Baronet, Mr Macdonald Buchanan of Drumakiln, Mr M'Goune of Mains, and Sir James Colquhoun of Luss, Baronet, whereby these gentlemen agreed to pay a proportion of £130, arising from the Drymen road-trust, as mentioned in the former minutes; which being taken into consideration, the meeting resolve that the clerk shall immediately make out a list of the several trustees in the parishes of Dumbarton, Kilmarnock, and West Kilpatrick, with the exception of the trustees whose property lies on the west side of the Water of Leven, and to the eastward of Milton Burn, and the proportion to be paid by each trustee, of the said deficiency of £130, effeiring to such valuation, the same being done under the proposition made by the Duke of Montrose, who agrees to be rated as high as the highest trustee; and that the committee named by last meeting be requested to transmit such calculation to each trustee within the said parishes, with a request to pay his said proportion into the hands of Robert Mackenzie, the clerk and treasurer to the trustees, betwixt and the term of Whitsunday next." Here is the payment of the £130 annually into the hands of the treasurer, of course to be applied to clear the average deficiency of £130, in the way already noticed to be the only possible way. Nowhere is there one word about ascertaining the actual loss in each future year, and then dividing that actual loss, whatever might be its amount, among the obligees, under the limitation of its not exceeding £130, and charging against each the sum so ascertained to be due by them. On the contrary, the sum to be paid by each is a fixed proportion of the total contribution of £130. When the idea of an ascertaining of each year's loss, and proportioning that, was invented, I do not see; but I cannot discover any trace of it whatever at the meeting where the obligation was undertaken. The words of the agreement, it seems to me, give it no shadow of countenance. It has not a syllable in its favour, while every thing is adverse to it. What particularly strikes me is, the manifest inconsistency of the view contended for by the defenders, with the declared intention of the agreement to relieve the trustees having no interest in the road from any part of the loss upon it. That was a reasonable intention; but there was no reason in relieving them from only a part of this loss, and leaving them still exposed to a part; and that, too, a part of indefinite and uncertain amount, arising from the

No. 126.

May 30, 1845.
Duke of
Montrose v.
Edmonstone.

No. 126. accidental variations of the deficiency in particular years. To have allowed this must evidently have been to keep up the hardship which the obligees were anxious to do away, only diminishing its amount, not its injustice.

May 30, 1845.
Duke of
Montrose v.
Edmonstone.

After declaring, therefore, against the hardship of allowing "any part" of this loss to fall on the trustees not interested in the road, it seems inconceivable that the meeting should instantly proceed to adopt an arrangement, by which it must have been obvious from the first, that part of the loss must still continue to fall upon these very trustees. It could not but be apparent to the parties entering into the agreement, that the annual settlement of the contribution of £130, upon the footing that the actual deficiency in each year only was to be paid, if it did not exceed £130, any difference between that deficiency and £130 being to be either not levied or repaid to the obligees, while any excess of deficiency above £130 was to be left unprovided for, must have necessarily failed to afford to the parties intended to be favoured, the relief which it was admitted ought to be given them, and which the agreement was entered into for the purpose of producing because, according to the usual course of management in such matters, the charges for repairs and management must not only fluctuate, but greatly fluctuate in amount. In ordinary, small repairs are made for two or more years, and then comes a heavy charge on that account. This no doubt may perhaps be avoided, and an equalization of annual expense for repairs forced, but not without very great inconvenience and mischief; and it is a thing unknown in practice. Now, here the parties to the agreement were not contemplating what might possibly be accomplished by a special plan of management to be instituted in the particular case, but were proceeding with reference to the ordinary course of conducting such things, and making provision applicable to that. They must, therefore, have been perfectly aware that, had the sum to be paid under the contribution of £130 been to be settled off annually, and limited to each year's actual deficiency—instead of the heritors, to relieve whom from future loss the agreement was entered into, being so relieved—there must immediately, from year to year, have arisen deficiencies, which would fall upon them without relief.

And the actions of the parties, in carrying the agreement into effect, are utterly irreconcilable to this idea. They proceeded immediately to carry the agreement into effect, in a way that demonstrates their understanding of its meaning.

It appears that, at Whitsunday 1802, the interest on the debt

was	.	.	.	.	.	.	.	.	.	£180	0	0½
The Expenses,	.	.	.	.	.	.	.	.	.	13	2	7½
											<hr/>		
											£193	2	8
The Return from the road,	.	.	.	.	.	.	.	.	.	135	0	0
											<hr/>		
The Deficit, only	.	.	.	.	.	.	.	.	.	£58	2	8

Yet in that year the Duke of Montrose paid £40 14 10 on 15th Nov. 1802

Mr Campbell paid 40 14 10 on 16th Sept. —

Carry forward, £81 9 8.

No. 126;

Brought forward, £81 9 8			
Mr Buchanan, Ardoch, paid	12	8	8½ on 5th Oct. 1802
Mr M'Donald Buchanan paid	14	0	1½ on 16th Sept. —

May 30, 1845.
Duke of
Montrose v.
Edmonstone.

Being £107 18 6 actually paid in that year. And applying the first payments of the other obligees to that year,

Sir Archibald Edmonstone paid	8	10	0 on 10th Dec. 1803
Mr Graham paid	4	11	6 on 10th Feb. —
Mr Alston paid	8	0	0 on 8th Apr. 1806
Mr M'Gounne paid	4	5	9 on 16th Jan. 1804

Being in all, £133 5 9

This is evidently the £130, though levied with some trifling inaccuracy.

At Whitsunday 1803, the interest of the old debt was	£180	0	0
The Expenses,	76	1	4
	£256	1	4
The Returns from the road,	140	0	0
The Deficit, only	£116	1	4

Yet

The Duke of Montrose paid	£40	14	10 on 14th Dec. 1803
Mr M'Donald Buchanan paid	14	0	1½ on ————
Sir Archibald Edmonstone paid	8	10	0 on 10th ————

Being three payments of full shares within the year. And applying the second payments of the other obligees to that year,

Mr Campbell paid	40	14	10 on 17th Jan. 1806
Mr Buchanan, Ardoch, paid	12	8	8½ on 18th Nov. 1808
Mr Graham paid	4	11	6 on 5th Aug. 1805
Mr M'Gounne paid	4	5	9 on 27th Nov. 1809

Being in all £125 5 9

Now these were all evidently calculated as shares of the full sum of £130, according to the minute 1801; and were beyond the shares of the amount of the deficit. The sum raised in toto for this year 1803, was diminished by the failure of Mr Alston to pay his share.

At Whitsunday 1804, the interest was	£180	0	0
The expenses,	79	15	7

Carry forward, £259 15 7

No. 126. May 30, 1845. Duke of Montrose v. Edmonstone.						Brought forward, £259 15 7
	The returns,	.	.	.	.	161 0 0
	The deficit,	.	.	.	.	£98 15 7
	At Whitsunday 1805, the interest was	.	.	.	.	£180 0 0
	The expenses,	.	.	.	.	80 3 1
						£260 3 1
	The returns,	.	.	.	.	183 0 0
	The deficit,	.	.	.	.	£77 3 1
	At Whitsunday 1806, the interest was	.	.	.	.	£180 0 0
	The expenses,	.	.	.	.	71 2 8
						£251 2 8
	The returns,	.	.	.	.	171 0 0
	The deficit,	.	.	.	.	£80 2 8

These statements show that the deficiency was much less than the contributions levied on those who paid, and held as debt upon those who were irregular in payment; as, for example, Mr M'Goune, whose annual payment was £4 : 5 : 9, and who paid £80 on 27th November 1812, and again £25 on 11th November 1830, (Report, pp. 47 and 48.)

All these sums were set down and paid, at least by part of the obligees, without the existence, so far as I see, of a single complaint on the ground that the agreement was only to pay a sum limited to the actual deficit in each year.

Afterwards the payments failed; but never, as far as I can see, on the ground, that the sum for which they were liable was not a proportion of the £130, applicable to an average loss, but a proportion of a sum of actual loss, in a particular year, which did, or might, fall below £130. Every assessment, and every payment, and every thing indeed relating to this agreement at all, appears to have been done in the view of the agreement maintained by the pursuers. And, on the other hand, the agreement subsisted for years after it was made, without one instance of any one thing done or said in respect to it, on the view now brought forward by the defenders, which I cannot see to have been even thought of at all by any human being, till some very recent period. Such a practice, by the contracting parties, seems to me to afford an irresistible interpretation of the agreement.

In answer to these strong considerations, I see little said of any weight.

(1.) It is said that the obligees could not mean to load themselves with a perpetual annuity, which might run into arrear, and ruin them. But, in any view, the obligees undertook a perpetual annuity. Though it might, if limited each year to the amount of the loss in that particular year, be somewhat less in amount, still it must equally have been perpetual in endurance. So, in any view, it might run into arrear, if the matter was not duly attended to. Considering that the

annuity of £130 was divided among so many large or considerable proprietors, I cannot think there could have been any thing terrible in it, and still less in the difference between this and a perpetual payment of the actual loss accruing each year. It was obviously liable to terminate in case the road should prosper, and the debt of the road be paid off, or if the tolls should rise, so that it should become certain that all loss of the kind provided against was no longer possible. This would put an end to the annuity of £130; and nothing else but this could put an end to the variable, but equally enduring annuity alleged by the defenders. It must be considered that the meeting could not intend or expect to run into arrear. In fact, it appears that the returns from the road increased greatly, and the deficiency diminished; so that, if the sum of £130 had been annually and duly levied, there would, in no very long time, have been such a fund in the road treasury, as would have warranted a suspension of the burden.

No. 126.
May 30, 1845.
Duke of
Montrose v.
Edmonstone.

Prior to 1817, in which year a large sum was expended on repairs, the deficiency to be met by the contribution of £130—after providing for the interest on the debt prior to 1801 at 5 per cent—fluctuated from year to year. In some years it exceeded £130. In 1817, the excess was large. After 1818, there was in some years a deficiency to be provided for, but frequently not amounting to nearly £130; and there was, in others, a considerable surplus, so that no part of the £130 was required. Subsequent to 1830, the deficiency and surplus, after providing for the interest of the debt, stood thus, in the following years:—

In 1831, Deficiency	.	.	£25	14	3	
1832, Do.	.	.	17	13	1	
1833, Do.	.	.	16	14	9	
1834, Do.	.	.	27	1	2	
1835, Surplus,	.	.	.	.	.	£72 15 2
1836, Deficiency	.	.	92	5	5	
1837, Do.	.	.	32	10	2	
1838, Surplus	.	.	.	.	.	37 11 0

For the four years, from Whitsunday 1838 to Whitsunday 1842 inclusive, the deficiency appears to be £153 : 19 : 9½—the gross proceeds of the road for these four years having been £2811 : 15 : 11, while the amount of repairs and expenses was £2245 : 14 : 9, (Report, p. 17,) leaving a surplus of £566 : 1 : 2. Placing against which the interest of the debt prior to November 1801 at 5 per cent, there is brought out the foresaid deficiency for these years, of £153 : 19 : 9½, or £38 : 9 : 11½ per annum. There is very little force, therefore, in the above argument.

(2.) It is said, that no means are provided for accumulating the annuity of £130, and applying it to the variable loss, year by year. But it must be considered that the agreement was drawn, not by an expert and leisurely conveyancer, but at a public meeting of country gentlemen. And really, considering this, the provision that the proportions of an annuity of £130 should annually be paid to the treasurer, seems sufficient to answer its purpose. If that was done, it followed, of course, that the money should remain as a fund in the treasurer's hands, and that under the agreement the loss each year should be cleared off out of this fund,

No. 126.

May 30, 1845.
 Duke of
 Montrose v.
 Edmonstone.

so as to relieve the trustees favoured by the agreement. In case it had turned out that the loss was small, and the fund accumulated more than was likely to be wanted, there was nothing to prevent the adoption of a resolution to suspend payment of the annuity in whole or in part. I really can see no impracticability in the matter. The whole difficulties of the case have arisen from the failure to implement the agreement; and similar difficulties must have arisen from the non-implementation of the agreement, if it had been such as is represented by the defenders.

2d Question.—I think this question, as stated, must be answered in the negative. In no event can the obligees, or any of them, under that obligation, be called upon to pay more than the proportions of L.130 per annum, allocated upon them in 1802. I do not see any grounds for holding that the obligees were answerable for each other. But I think that the insolvency of one of the trustees may have the effect of continuing the payment of these proportions longer than it otherwise would have continued, by keeping up longer the deficiency to which these payments are applicable. Each obligee is liable to continue the payment of his own share into the deficiency fund, until the principal road-debt shall be paid off; or until at least the existence for time past, and probable risk for time future, of annual deficiency shall be done away. The insolvency of any one obligee diminishing the annual receipt, must of course make these events of more remote occurrence, and so lengthen the continuance of the obligation upon the other obligees. And this, and no more, is the import and effect of the finding, upon this point, in the interlocutor of the Lord Ordinary.

3d Question.—The obligation being personal, and not affecting the land of the obligees, I cannot see how the sale of his estate by Mr John Campbell can at all affect the continuance of his liability as obligee, unless he has taken the buyer bound to relieve him of it, which is not stated. If he had done so, it would have lowered, to the extent of his share of L.130, the rental of the estate he sold, and so lowered the price, probably by thirty years' purchase, of that share; so that it was more advantageous for him to do it. There is not the shadow of hardship in its continuing against him after the sale, as it did before.

LORD PRESIDENT.—I concur in the above opinion.

LORD WOOD.—I concur in the above opinion.

LORD JEFFREY.—I am of opinion that the interlocutor of the Lord Ordinary should be altered; and am inclined, indeed, to dissent from him on all the three points which have been remitted for our consideration.

When the resolutions of 1801 were first argued upon before me in the Outer House, I certainly considered them as not constituting any proper obligation, (at least of a prospective or permanent description,) but as a mere temporary and experimental arrangement, from which the parties might have resiled at any time, on due notice—and which I thought had consequently come to an end, by a long course of dereliction and abandonment, with the knowledge and apparent acquiescence of all concerned. This view of the matter, however, was finally superseded by the judgment of the Court of 11th March 1842, by which it must now be held to be fixed that these resolutions did import an obligation, by which the parties to it were bound—up at all events to the commencement of the present proceedings; and the only question, therefore, now remaining is, as to the nature and extent of that obligation.

Now, while I am decidedly of opinion that these resolutions, which obviously are not drawn up with any pretension to technical accuracy, are not to be defeated or deprived of their proper effect by any mere imperfection of expression, I think it at least as necessary to take care that they shall not be enforced beyond what there are clear grounds for holding was actually intended; and, with a view to ascertain this, I think it necessary, in the first place, to consider under what circumstances they were proposed and adopted.

It appears, then, that on the road now in question, there had been a growing deficiency in the returns from the tolls, to meet the necessary annual repairs, and the interests accruing on certain bonds granted by trustees, some of whom, from the local situation of their properties, had much less interest in this road than others whose names were not at these bonds. This deficiency in the interests, which fell of course by law on the bond debtors, appears to have amounted in 1799 to L.111—and, as I understand it, had risen to be about L.130 for the year ending in April 1801—some of the bonds having been granted in the course of the intervening years. Now the first resolution was come to at a very thin meeting, held in November of that year, (the minute of which, by the way, is not signed by any one, or authenticated in any other way,) and was afterwards adopted and acceded to by certain other parties, at an adjourned meeting in December following; the report of both being, that the trustees through whose lands the road passed, would relieve the bond debtors of the whole of this actual deficiency of L.130, by contributions proportional to the valued rent of their lands; and (as it has been once construed by final interlocutors) should also relieve them of similar deficiencies in future years, provided the demand on them should in no one year exceed the said sum of L.130. This, I think, is all that can be said to be yet titled as to the object and import of the agreement of 1801.

Now I would observe, in the first place, as a circumstance very material to the whole question of construction now before us, that though it has been found to be obligatory on the parties to it, and for a tract of future time, it cannot be considered to have constituted a properly onerous obligation. The parties through whose lands the road went were not legally bound to relieve the bond debtors of the whole or any part of this deficiency; and their interference, therefore, was undoubtedly voluntary, and in a certain sense gratuitous.* It was in its own nature, and even in its form, a mere unilateral engagement or undertaking, without any essential consideration or corresponding stipulation on the other part—a mere promise, in short, or pollicitatio, and properly to be reckoned, as I apprehend, among *pacta nuda*, to which, though not disregarded by our law, no effect would have been given by that either of Rome or of England. It may be true that the

No. 126.
May 30, 1845.
Duke of
Montrose v.
Edmonstone.

* I am aware, that at the advising of 11th March 1842, Lord Moncreiff did press an opinion that all the parties to the meetings of 1794, &c., were liable in proportional (not total) relief to those who had signed the bonds agreed upon or proved of at these meetings; and that the resolutions of 1801 did not in any way release, but only fulfil pro tanto that preceding obligation. But that opinion was not adopted by the Court; the judgment then delivered, and which is now the ruling judgment in the case, recognising no obligation prior to that held to be extracted in 1801; to which, indeed, the liability of parties is still more precisely restricted by the interlocutor of the Lord Ordinary, which, in this respect, has not been reclaimed against.

No. 126.

May 30, 1845.
Duke of
Montrose v.
Edmonstone.

parties to it were liable to an equitable claim for some such relief as is now contended for; but certainly not, as I think, to the extent that is now claimed, or even to the extent to which we must now hold them liable. It is palpably a mistake to hold that those whose lands were not actually traversed or touched by the road, had no interest in its maintenance in good condition. It was not a private road for the exclusive use of those who bordered on it; but a public road for all who had occasion to use it. Those whose properties marched with the last of those which it traversed, had evidently all but as great an interest in it as those strictly conterminous proprietors; and probably a greater interest in this near portion of it, than the others had in its remoter extremity. If the burden, therefore, was to be laid on by an equitable apportionment, based solely on the locality of the properties, there ought at all events to have been a graduated and descending scale of liability, terminating in a vanishing point on the confines of the county. But it is obvious that, in such cases, mere locality must always be a very unfair principle of apportionment—since some of those in the exempted district might very well be in the habit of drawing supplies of lime, coal, manure, or even manufactured commodities, from that exclusively burdened; and thus have a much greater and more beneficial use of the road, than those upon whom it is now proposed to throw the whole personal burden of maintaining it. The only absolutely equitable rule of apportioning the burden, in short, would have been to fix it according to the relative amount of the actual use habitually made of the road by the several parties or their tenants—to which it is obvious that the rule in the agreement does not make even an approximation.

The chief purpose, however, for which I now make this remark, as to the obligation constituted by the agreement not being legally onerous, and but very imperfectly equitable, is to explain both why it appears to have been actually limited and qualified as it has already been settled to have been—and also why it should be still further qualified in the way I am about to specify, in relation to the questions now before us. If there had been any such plain equity at the bottom of the arrangement as the respondents now maintain—viz. an equitable right to throw the whole personal burden of this road on those through whose lands it actually passed, then it should have followed—1st, That they should have relieved the other bond debtors not only from all claim for interests, but also for the principal sums acclamable on these bonds; 2d, That their obligation should have had a retrospect to the first time when a deficiency arose on these interests, and relieved them of all past advances; and, 3d, That it should have been calculated to afford them a total relief from all such deficiencies of interest in future, to boot, of great a sum these might amount. Whereas it is now finally settled—1st, That the obligation applies only to the interests, and not to the principal sums acclamable under the bonds; 2d, That it has no retrospect, and begins to operate only from 1801; and, 3d, That it does not bind the parties to a total relief of any emerging deficiency even in the interests, but is limited to a maximum of £1,000 for the deficiency of any one year.

In short, I think the terms of the agreement, and all that has yet been authoritatively settled as to its meaning, demonstrate that the parties to it by no means recognised or proceeded upon the notion of any general equitable right in those who subscribed the bonds, without having a great interest in the road, to any thing like a total or perpetual relief from the obligations thereby undertaken, from those

who might have a greater interest : my own impression certainly being, that they undertook to pay the whole deficiency for the preceding year, but without any retrospect, mainly because they had not paid a rateable part of it for the five preceding years ; and probably trusting to the necessity of any future contributions soon coming to an end, or being afterwards arranged on some better considered and more satisfactory footing.

No. 126.

May 30, 1845.

Duke of

Montrose v.

Edmonstone.

Now, such being my impressions as to the general nature and position of the case, I must say that, on all the three questions specified in the interlocutor of 9th July 1844, I have come to be of opinion that the views of the Lord Ordinary cannot be supported ; and to be satisfied, that according to the just and true meaning of the parties to that agreement, they cannot be held—1mo, to have bound themselves for more than the actual and separate deficiency of each year as it occurred—and that they would have been finally discharged from all claim for such deficiency, by each then paying over his rateable proportion, either of L.130, or of any smaller sum that might constitute such deficiency—without ever being liable to be charged, as for that year, with any thing more than the share so paid, although the actual deficiency should happen to exceed the maximum of L.130, either in that, or in any prior, or any subsequent year. 2d, I think the obligation was not a joint but a several obligation ; and that each party was liable only for his own actual proportion of L.130 as a maximum, or of any smaller sum that might be thus annually exigible, as finally fixed by the scheme or table of December 1801 ; and consequently, that the exemption, or failure, or inability of any one of these parties to pay up his proper share, would not warrant any additional assessment on those who remained solvent. And, 3dly, I think that the liability meant to be undertaken, though not actually made a real burden on the lands of the several parties, being yet undertaken solely and expressly in their character of proprietors, and assessed exclusively in proportion to the properties respectively held by them, must be understood as originally qualified by the condition of their retaining that character, and as attaching to them only so long as they continued to be proprietors—and consequently as not capable of being enforced against them, after they had lost all connexion with the district. I shall add but a few words in explanation of the grounds on which I have adopted these several opinions.

As to the first, it occurs at once to observe, that as the original and immediate contribution of 1801 appears to have been for the full actual deficiency of the preceding year, without any retrospect or recognition of liability for preceding years, so it is to be presumed that, when in any succeeding year the parties, in like manner, paid (or undertook to pay) all that was exigible for that year, it must have been equally exclusive of any further charge, as on the settlement for that year, on account of any surplus deficiency in other years, either past or to come. That was confessedly a settlement out and out, for all that was exigible at the time, and on a comparison of the returns, with the interests accruing and the expenses incurred in the preceding year ; and there was an end of it : and as any liability for future years is, up to the present hour, merely inferential, and can only be maintained on the ground, that what was actually done on that occasion must have been intended to be repeated on similar emergencies in future years, it would seem necessarily to follow, that all future settlements were intended to be made exactly as the first had been made—that is, by separately and finally making up the actual deficiency of each year as it occurred—that is, the shortcoming of the returns of

No. 126. the year, to meet the interests accruing and the repairs executed within it—and so having done with it, without reference, backwards or forwards, to any other deficiencies.

May 30, 1845.

Duke of

Montrose v.

Edmonstone.

But independent of this almost irresistible presumption, that subsequent annual deficiencies were meant to be separately and finally settled in full, as the first or pattern deficiency was settled, consider only how much more natural and probable it was that such a scheme of settlement should be adopted, than that recourse should be had to that which the Lord Ordinary's interlocutor assumes to have been really intended. The one met the exigencies of every year (as those of the first were met) either to the full extent of the deficiency, or, where that went beyond the maximum of L.130, to the full extent of that maximum—and, in either case, the accounts of that year were at once closed, and its liabilities satisfied simply, conclusively, and for ever. But on the other supposition, the full sum of L.130 must either have been contributed and paid over every year, without regard to the actual deficiency—and though, for fifty years together, there should in fact be no deficiency whatever—or, if not actually levied, must have left the parties under a liability to have the whole, or the unpaid balance, called for (with full legal interest) for the whole period of at least thirty-nine years after every yearly period of settlement, in the event that, at that distance of time, some very great and continued deficiency had arisen, as required the tardy exaction of the long arrears.

The respondents admit fairly, that their argument absolutely requires them to maintain that the only sure and correct way of fulfilling the obligation, on the view of it, was by actually paying over, every year, the full sum of L.130, whether the whole or any part of it was then wanted or not, in order that a board sinking fund might be accumulated to meet the possible chance of large deficiencies arising—it might be in some remote futurity;—and, though the palpable extravagance of supposing that any such obligation could ever have been truly carried under by reasonable men, seems to have led some of the Judges to think that the Lord Ordinary's interlocutor might be supported on other grounds, I am bound of opinion that this is really the only consistent or legitimate view that can be taken of the principle maintained by the respondents. If the whole maximum was not really due, and legally exigible, every year, whatever its deficiency might be, how could it be ultimately exacted, with full interest from the period of settlement in that year? And, after all, if the whole maximum contribution, with full interest, is now to be actually exacted from the reclaimers (as the Lord Ordinary has found) for every year since 1802 or 1807, down to the date of this action, is manifest that it would have been far better for them to have actually paid over at Whitsunday in each year, unless it is to be assumed that all these countess gentlemen have realized a larger return than five per cent on the sums which they then retained, and are now called on to pay with that interest.

As to the suggestion that this sum of L.130 was an average, anxiously and skilfully calculated as the probable amount of what, taking one year with another, might be required to meet the actual deficiency in a long tract of years, I must say that I cannot discover the least indication of any such average ever being in contemplation; and am persuaded, indeed, that the notion is a mere after-thought suggested entirely by the accidental (supposed) coincidence of the sum-total of widely-varying deficiencies, in a period of near forty years, with the sum which

such a contribution for the same long period, with interest on each contribution, would yield at the end of it. Without this long arrear of interests, there would be no approach to such a coincidence; and if the contributions had been actually paid as they fell due, there would have been no interests to be added. It should always, however, be recollected, that it is certain, on the face of the resolutions, as I read them, that this sum of L.130 was taken, in point of fact, not as a probable average of future deficiencies, but as the amount of the deficiency then actually existing; and this alone I take to be conclusive as to this whole hypothesis of average.

It is said indeed that it coincides wonderfully with the actual amount of the deficiencies for the last forty years. I confess, however, that I am by no means sure, that upon a strict view of the accounting there would be any such coincidence; since, if I rightly understand the reports of the accountant, this result can only be brought out by charging against the returns from the road in every year, not merely the ordinary and necessary expenses of "keeping it in repair," which is all that is spoken of in the resolutions, but the very large sums expended, or, more properly, the new debts contracted (sometimes amounting to L.800 or L.900 in one year) for improvements, and general expenses of management, apparently for the whole adjoining district. If these were deducted, the actual deficiency, I apprehend, would probably be diminished by more than a half. But however this may be, it is obvious, upon the least consideration of the nature of the case, that any such coincidence as is now alleged, must have been the result of accident merely, and not of calculation. In 1801, when the road had only been open for about five years, there could evidently be no facts upon which an average could be calculated; and all that we yet know of these years is, that in 1799 the tolls had been let for L.111 less than the interest and annual outlay, and, in 1801, for L.130 less—a considerable part of the bond debt having been contracted in that very year. But in truth the case could never, at any time, afford any elements for such a calculation; and the subsequent facts, of which we have now a full and full view in the reports of the accountant, demonstrate how utterly hopeless it must have been to have made a guess even at such a permanent average, at any one point of the intervening time. These accounts show, that for the whole thirty-four years the deficiency had varied from L.17 : 2 : 8 in one year—to upwards of L.550 in another—and that for five consecutive years, in one period, it had averaged no more than about L.22, while in other five such years it seems, according to what I have been able to make out, to have exceeded L.400. Nor did these extreme discrepancies recur at any thing like regular intervals, or in cycles that could admit of calculation; for, for the whole of the first ten years, or up to 1810, (with a single exception,) the deficiency was little more than a half of the supposed estimate of L.130, while, for a similar period after 1817, or up to 1827, it seems to have been more than double; and then again, in 1830, it falls, for the following years, to little more than a sixth, or an average of only L.22, and this in the year 1838 with an actual, though inconsiderable surplus, which is the account we have of it.

Now, could any mortal undertake to construct a safe, practical average for future compulsory assessments out of materials like these? And if, with all this knowledge before us, it would plainly be impossible, even now, to frame such an average, how extravagant must it be to suppose that such elements were thought

No. 126.

May 30, 1845.

Duke of

Montrose v.

Edmondstone.

No. 126. to exist, and were wisely and deliberately estimated in 1801, when there was no knowledge of any thing, but an uniformly increasing deficiency, for the short period of about five preceding years—a large share of the bond debt having existed for less than one of those years.

May 30, 1845.
Duke of
Montrose v.
Edmonstone.

The only thing, indeed, which gives the least colour of plausibility to this notion of an obligation to contribute, or to continue accountable for, the full maximum of L.130, as an average for all future years, (for to this it plainly must come,) is the fact that all the original subscribers (but one) did contribute their full proportions for a few years after 1801, though the actual deficiency for these years was, as I have already noticed, considerably less than this maximum. These contributions, however, were from the very first exceedingly few and irregular—and the sum of them is this: Of the nine original subscribers, one never contributed at all; one, only for a single year, (1802;) three, only for two years, (or to 1803;) one, for five years, (to 1806;) and three, for six years, (or to 1807;) when all contributions finally ceased, and appear, indeed, never to have been afterwards demanded. Now I must say, that I think it quite impossible to infer, from these few irregular payments, any proof or recognition of an original obligation to pay up the full maximum of contribution in every year, however far that might exceed the actual deficiency then arising; and, considering the smallness of the sums, (in relation to the means and usual outgoings of the parties,) I have no difficulty in explaining the fact of those trifling, though excessive payments, by supposing that, upon the collector intimating to the factors of these wealthy proprietors that a contribution was again necessary to meet the deficiency in the tolls, the contribution of the first year was simply repeated, without enquiry into the actual state of the deficiency, and not improbably before any detailed account of it had been made up.

As to the other two questions, a much shorter explanation will suffice. On that as to the liability of the solvent contributors to make up the shares of the insolvent, I have little more to say than that, looking either to the general probabilities of the case, or to the precise terms of the resolution of December 1801, and the cast or scheme of assessment then ordered, and afterwards transmitted to each of the parties, I feel satisfied that each of them must then have intended and understood that his future liability was to be restricted, in all time coming, to the precise sum there set down opposite to his name as a maximum, when the actual deficiency of any one year (taken of course by itself) amounted to or exceeded L.130, and to an exactly similar proportion of any smaller sum when the actual deficiency was less; that the obligation, in short, was undertaken as a several, and not a joint obligation, and consequently inferred no guarantee or vicarious responsibility for the shares of those who might be insolvent.

Even if the whole deficiency had been equally or numerically divided among the nine original subscribers, I should have held, considering the object of the engagement, and its plain reference to the property in land which must always remain, that each would have been liable, in all events, to no more than one-ninth share of each annual deficiency. But when it is considered how extremely unequal the shares actually agreed to and assessed on the respective parties were, according to the scheme or tariff furnished to each of them, it does appear to me impossible to suppose that they could ever have intended to undertake such a mutual responsibility. According to that scheme, the maximum for which Sir

James Colquhoun agreed to be assessed is only 5s. 6d.; while the maximum for two of the other parties is no less than L.40, 14s. each. Is it reasonable, then, to suppose, that by approving of that scheme Sir James really intended to bind himself, not only to pay that trifling sum as a maximum, but to help to make up a possible deficiency to four hundred times that amount? Nay, looking merely to possibilities, to bear himself the whole burden of the assessment, on the failure of all the other obligants? Nor is it any sufficient answer to say, that the contributors were all men of wealth, and that the risk of any deficiency was consequently so small, that it is not any way unreasonable to suppose that it may have been intended to undertake it. That it still was a risk, and a cautionry, is enough to raise a presumption against its being gratuitously incurred; and the result has shown that it was not altogether imaginary. In 1801, Gartmore, though his share was only L.4, 11s., was as solvent and reputedly wealthy as Stonefield, whose share was L.40, 14s.; and the chance of his taking to the gaming-table might perhaps be as little. But, independent of insolvency altogether, if I am right in the opinion I am about to express, as to the dependence of the obligation on the continued possession of the land in respect of which it was undoubtedly granted, it is quite obvious that there was nothing in the least improbable in all the parties, except Sir James Colquhoun, being freed of the burden by parting with their properties in the district; and thus leaving the whole of it to be borne by an individual, who was ceteris at the beginning that the most he could ever be called on to pay was 5s. 6d. in the year.

Upon the last question to which I have just alluded, and which (as yet) applies to the case of Stonefield alone, I have not much to add to what I suggested in the beginning. The obligation, no doubt, is a personal obligation only—in so far at least as it is not made a real burden on the land. But it was beyond all doubt undertaken with exclusive reference to the land, and its local situation—on account of advantages supposed to be derived to the land—and is apportioned accordingly, as to its amount, exclusively according to the valuation of the land. I say, further, though a personal obligation only, I confess I should not think it doubtful that it would transmit, (if it transmitted at all,) not like an ordinary personal obligation against the executor, but against the heir of the original party—and even against the heir of provision in the particular lands to which it related, and not the heir-at-law, as general representative. But this being the case, and considering also that the only equitable or intelligible ground or reason for coming under the obligation was the supposed benefit the land was to acquire by the outlay it was meant to repay, I must say that it appears to me in the highest degree reasonable, and perfectly competent, in construing a loose and general resolution of this unusual description, to hold that it was meant and understood to be qualified from the beginning by the condition, that the parties acceding to it should continue proprietors of the lands in relation to which, and on account of which one it had been entered into. If such a condition had been proposed to be inserted in the resolution at the time, it does seem to me that no possible objection would have been decently taken to it;—or that if it had been resisted when suggested by any one of the meeting, that individual would never have concurred in the resolution from which it had been excluded; or in any resolution containing words that would have clearly imported such an exclusion. But if this be so, is there any difficulty, or any violation or undue extension of the known rules of law,

May 30, 1845.
Duke of
Montrose v.
Edmonstone.

No. 126. in now giving effect to it, as a condition not only reasonably but necessarily implied? There is a long array of decisions in the Dictionary, under the title of Implied Condition; and in looking over them, I find scarcely one in which the grounds of implication are nearly so strong as in the present. I may mention one, for example, which appears to be strictly analogous, and is undoubtedly *a fortiori*. It is thus reported:—"A pension to an advocate, expressly for all the days of his life, on the narrative of bygone services, and also because the granter had given him the charge of his law affairs, was found not to subsist after the grantee had been made a Lord of Session; and consequently disabled from taking such charge."¹ In that case, therefore, the mere cessation of future services—which might have been equally occasioned by disease, or the infirmities of old age—was held to put an end to all claim for an annuity expressly granted for life, and partly in consideration of services already received—solely on the ground that the continuance of a corresponding benefit was held to have been an implied condition of the grant of such a continuing payment. While, in the present case, the cessation of the benefit is far more complete—and the original obligation is altogether indefinite, as to the period of its duration. Another case may also be referred to, where an unqualified bond of provision having been granted by a lady to her son, at a time when he had no sufficient means of living, was found, upon the same ground, to be no longer obligatory after he had succeeded to a competent estate.² And there are many such cases.

If, instead of leaving the undertaking really contemplated, to be spelled and construed out of the loose and vague words of a resolution hastily taken down at a meeting of road trustees, it had been reduced to the form of a regular obligation, is it possible to doubt that it would have been set out in some such words as the following:—"We, the undersigned proprietors of lands on the east side of the Leven, in such and such a district, in respect of the peculiar benefit our said lands derive from the road lately opened, &c., hereby bind and oblige ourselves and our successors in the said lands," &c. &c. Would not, at all events, such a recital—and such a recital alone—truly set forth the character in which the obligation was actually undertaken, and the consideration or inductive cause on which alone it proceeded? And if this be already as certain as such a setting forth could make it, on what ground is a mere voluntary obligation, the true nature and import of which is, by the admission of all parties, still largely and broadly open to construction—and whose very existence and efficacy, as an engagement for future years, is wholly constructive—to be yet so construed as to defeat, and not to give effect to the plain object and intention of the parties?

It is certain that there is not, in the resolutions, any express undertaking to continue the contributions for any period of future time. All that can be said is, that the parties probably contemplated their continuance for some such time; and it is obviously one of the questions still open, on the construction, for what period its prospective operation was truly contemplated? For my own part, I can never believe that it was really intended to be perpetual—or, what is truly the same thing, to be kept impending for as long as there was a possibility of any deficiency

¹ Lockhart v. Purves, Nov. 1729, (M. 6366.)

² Duchess of Buccleuch, Dec. 7, 1723, (M. 6396.)

is the returns. And I think it may still be made a question, whether the obligation might not have been put an end to by the mere protest and disclamation of the parties, after due intimation—or by their having incurred other special liabilities for the roads in that or any other district of the county—or by the lapse of forty years without any deficiency—or without any demand or intimation. I give no opinion upon any of these questions, and they may all be attended with difficulty. But on the case now before us I have no difficulty whatever; and, if the question of intended, or presumably intended duration, be still open—as I hold that it clearly is—I cannot entertain a doubt that no one of the parties ever intended to be bound, or would ever have consented to be bound, for these contributions, for a single day after he should cease to be proprietor of the lands on account of which alone he had agreed to them. For my own part, indeed, I should hold that the mere description (in the resolutions) of the parties on whom the obligation is to be laid, as “the trustees who have land in the parishes through which the road passes,” should of itself be conclusive of their having only agreed to be bound in that character, and only so long as that character was retained. It is remarkable, indeed, that it is only by this general description that they are in any way connected with the resolutions; for (except the Duke of Montrose in that of December) not one of them is named in any part of them; and the table or scheme of assessment mentions them only with reference to the valued rents of the lands in respect of which they are to be assessed.

It is also, I think, very material to this, as well as to every other view of the question, to keep it always clearly in mind, that the only basis of the claim of relief now insisted in, is the alleged equity of throwing the burden of defraying certain of the expenses of this road on those who have a great interest in it, rather than on those who have but little. But surely none of the proprietors in the exempted district, who have all lands at no great distance from the road, and some of them closely adjoining, can pretend that they have less, or as little, interest in it as Mr Campbell, who has no longer any land whatever in the county; and whose case would, in argument, be no stronger than it is, although he had neither lands nor residence in any part of the kingdom. And it does strike me as a very startling proposition, that, upon considerations of equity, (and there are no other,) this gentleman, now a stranger to the county of Dumbarton, and his representatives wherever resident, must, in all time coming, contribute L.40 a-year to relieve certain proprietors in that county of the expenses of a road in their vicinage—because he had, some forty years ago, agreed to relieve them, in respect of his then holding certain lands more immediately connected with that road.

This, it will be observed, was not an agreement to pay by instalments for a benefit already completely conferred; but an agreement to pay annually for a new annual benefit—that is, in extinction of the annual expense of keeping a road in repair, from the use of which the payer had an annual and constantly accruing advantage. The only pretence, therefore, of equity or onerosity, is in the continuance of this advantage; and where it ceases, there is no longer any pretext in justice for the continuance of the annual payment. To take a parallel and familiar case: Suppose a meeting of proprietors of houses in a particular street were to agree, in such general terms as occur in these resolutions, to contribute an annual sum, not exceeding a specific amount, for maintaining their drains and pavements in good condition—could it ever be maintained that an individual who sold his

No. 126.
May 30, 1845.
Duke of
Montrose v.
Edmonstone.

No. 126.
 May 30, 1845.
 Duke of
 Montrose v.
 Edmonstone.

house at the distance of years, should still remain personally liable in perpetuum for his original share of such contributions? or if the house were adjudged from him, and sold by creditors, could the other proprietors rank on the reversion, or claim as personal creditors in a statutory sequestration? To me it appears plain that no such proceeding would be competent; that the nature and consideration for the obligation ceasing, palpably and totally, the obligation itself must cease also; and that to convert an undertaking by a proprietor, expressly on account of his property, and for its benefit, into an absolute personal obligation for the benefit of other properties, and other proprietors exclusively, would require words of the most stringent and unequivocal description, and never could be inferred from any such general expressions as occur in the resolutions now under consideration.

As to the suggestion, that it was the duty and within the power of Mr Campbell, when selling his property, so to deal with the purchaser as to transfer to him the liability from which he himself was to be delivered, I need not say that, if I am right in the view I have now taken of this liability, his deliverance could be in no degree dependent upon such a transference. If he was not bound to make this a real burden on his estate while he held it, how should he be bound to do so on parting with it? and at the same time to pay, in the shape of a diminished price, for the value of a perpetual annuity? In this view, the suggestion must obviously appear as altogether extravagant; but there are, besides, two considerations, which seem to me to make it, upon any view, eminently unreasonable. In the first place, this sale was made in the year 1838, after more than thirty years' total discontinuance of this contribution, and as long a cessation of all demand or application for it, and when all memory of it had probably been lost, even by those who had once been subjected to it. And, in the second place, if the grounds of equity and justice, on which the respondents rely, are really so plain and irresistible as they allege, what reason have they to doubt that the purchaser of Mr Campbell's lands will accede to the agreement as readily as the seller did before him? The agreement by the seller was entirely voluntary, and proceeded indeed (as alleged) upon a sense of the more than equivalent benefit which his lands were to receive from the outlay, which was thus in part provided for. But if this be so, and be indeed the only equitable or intelligible ground on which the present claim can be rested, is it not much more fitting that it should be addressed to the sense of justice (and of interest) of the party who is now to receive all this benefit, than sought to be enforced against one on whom there is no longer a shadow of justice in enforcing it?—who, in the execution of a current engagement, has already paid, or is willing to pay, for all the time during which he did or could receive any benefit, and as to whom, and as to all future prestations, it has now ceased to have the slightest pretension to be either onerous or equitable?

I have dwelt rather longer on this third branch of the case than I at first intended, because I have come at last to have a stronger opinion in regard to it than perhaps on either of the others—though it also enters very deeply, as I have already intimated, into the grounds of decision as to the second, or that relating to the joint or several nature of the obligation generally. But upon all the three questions, I have no hesitation in saying, that I feel myself compelled to dissent from the Lord Ordinary, and to adopt generally the views of the reclaimers.

LORD FULLERTON.—I concur with Lord Jeffrey on all the three points submitted to our consideration.

On the first point, it appears to me that the minutes, considering their professed object, and contemplated mode of operation, do not admit of any other construction than that put upon them by the defenders.

No. 126.

May 30, 1845.

Duke of
Montrose v.
Edmonstone.

The first minute, that of the 25th November 1821, proceeds on the recital, "that a loss of about L.130 per annum arises on the line of road," &c., and that it would be a hardship to make a certain part of the trustees pay any part of the loss, and "resolves that it is the opinion of the meeting, that this loss should be made up" by the whole trustees through whose properties the road passes. The second, that of 22d December, regulates the mode of calculating the proportion which each trustee is to pay of the deficiency of L.130. One thing, then, seems to me clear, that though L.130 is mentioned as the limit of the sum for which the parties are to be liable, it is only "this loss" or deficiency—i. e. this sum, if the loss or deficiency should amount to it.

Accordingly, that is not directly disputed by the other party. They admit that it is loss, which the obligants are bound to make up; but they maintain, and the Lord Ordinary has found, that it is not each year's loss taken separately, but what is called the average loss; so that in the present accounting the full amount of the L.130, though not required for the loss of one year, is to be held exigible, and set against the higher loss occurring in the previous or subsequent years.

Now, in the first place, this construction derives no support from the words of the minutes. It is "loss per annum" which is to be provided for; it is loss which is to be ascertained by an annual accounting; and it is loss which is to be provided for by an annual payment. It is true the probable loss may have been calculated on the average of the preceeding years, and this average may have led to the fixing of the limit of the annual responsibility. But still the prospective obligation was to make an annual payment to the extent of the fixed sum, if, on setting the year's expense against the year's returns, there arose a deficiency to that amount.

But, secondly, this notion of average loss seems to me to be absolutely excluded by the consideration, that the expression is utterly unmeaning, and the calculation impossible, unless there had been specified in the minute some term of years on which such average was to be taken. Without that, the proposition is defective in one of the elements essential to any definite result. For an annual average loss, referring to no fixed term of years, truly involves an indeterminate problem, of which the solution may vary, according to the number of years to which it is extended, or within which it is restricted.

It is nothing to the purpose that a certain number of years have elapsed, now that the question has been raised. That is entirely accidental, and has nothing to do with the true construction of the minute. The question is, how it was to be dealt with each successive year, supposing it to have been in full observance. And tried by that, which I consider the true test, there could have been no better reason for demanding from any of the contributors the full sum of L.130 when the loss was less, because the next year it might be more, than there would have been for the contributors refusing to pay the actual amount of the loss ascertained by the amount of one year, because the next year might be more fortunate. To me it appears that the only admissible construction of the minutes is, that the loss should be calculated each year, and that the making up the loss thus ascertained should exhaust the annual liability of each contributor.

No. 126.

May 30, 1845.
 Duke of
 Montrose v.
 Edmonstone.

In regard to the practice which is said to have been followed during the first years, I am not disposed to place much reliance on it. The payments are few in number, and so irregular in date, that it requires some effort of calculation to adapt them to the supposed liability of the contributors. Then, what is of more importance, those payments seem to have been made under the impression that they were mere voluntary contributions. This is the very expression employed by those parties in the minute of agreement of October 7, 1815. And so, indeed, the matter seems to have been treated; for, after a few years of very partial and irregular contribution, the whole payments ceased, and nobody seems to have thought of these minutes for five-and-twenty years, when the question arose which led to the present action. This long-continued silence seems to me to afford a much more legitimate inference against the obligatory effect of these minutes altogether, than any which can be drawn as to their import, from the very equivocal fulfilment which, in some instances, they received, during the first year or two from their dates.

In fact, it was not till the present action brought the minutes into question, that their true "legal meaning and import" came to be considered of importance—matters which, as it appears to me, must be decided by the fair construction of their terms, independently of any loose practice which may have followed upon them, while they evidently were considered as in no respect obligatory.

On the second point also, I am compelled to dissent from the Lord Ordinary. I see no ground for holding that the arrangement or resolution embodied in these minutes did contemplate or provide for a joint contribution to the amount of L.130. The parties were to pay their "several proportions" of the annual loss according to their respective valuations, which seems to me absolutely exclusive of all obligation, beyond a several liability each for his own proportion of that loss.

On the third point, I was at first led to adopt the view of the Lord Ordinary, who considers Mr Campbell's liability to have continued notwithstanding the sale of his estate. But, in coming to this conclusion, I had assumed that, agreeably to the former interlocutor of the Court, these must be held as forming a valid and binding personal obligation, independent, like every other such obligation, of any change of the circumstances of the party bound.

On considering more attentively the judgment of the Court, however, it appears to me to be much more cautiously expressed; and, indeed, if their Lordships who pronounced the judgment had not held the obligatory effect of the minutes to admit of some qualification, there never could have been room for the third question put to us, "Whether the defender John Campbell continued liable after he sold his property?"

By the former judgment, which now forms the law of this case, all that was fixed was, that "the obligations and interests of the parties must be regulated by the agreement contained in the minutes, according to the legal meaning and import thereof;" and the question is, Whether, by the "legal meaning and import" of the agreement in these minutes, Mr Campbell continued bound by it after he sold his estate?

Now, in addition to those general grounds, so strongly pressed by Lord Jeffrey, in support of the view that the agreement was necessarily qualified, there is one

more particularly arising from the form and character of the minutes, which appears to me to afford a strong corroboration of his argument. No. 126.

The agreement, it will be observed, is not express. It is only gathered from the terms of the minutes, combined with the supposed adoption of the resolutions contained in them; and this last too, in Mr Campbell's case, only implied from the circumstance of the contributions being paid for some years by those acting for him during his minority. May 30, 1845.
Duke of
Montrose v.
Edmonstone.

It is of importance, then, to look at the minutes, and see whether they import an absolute or only a qualified liability; and I think there can be little doubt that the latter is their true import. They are the resolutions of a meeting of road trustees, declaring that an annual payment on an annual accounting shall be made by a certain description of trustees holding property in a certain locality, and expressly founding that resolution on the circumstance of those last parties holding such properties. I think the true legal import of these resolutions was, that the payments should be made so long as the parties held the character of trustees, and possessed the properties in consideration of which the liability was imposed upon them. Indeed, this admits of being brought to a very simple test. Suppose this had been a resolution within the powers of the road trustees, and that its effect had not depended on the voluntary compliance of the individual parties against whom it was directed, could there have been a doubt that it was directed solely against the parties while they were trustees, and possessed the properties? And could it ever have been construed as importing a perpetual personal obligation on each of those gentlemen, independently altogether of their holding the properties which formed the only declared ground of their liability? I think not. I think such a resolution of such a body was necessarily qualified, and could import nothing more than a declaration of the liability of the trustees holding the properties, so long as they possessed such properties. Must not that have necessarily been the decision of the Court, if, after a sale of one of these properties, the question as to that liability had arisen between the seller and the purchaser, which it might have done, on the hypothesis that the resolution was within the powers of a meeting of trustees. In truth, the true meaning of the resolution does not require explanation. It seems to me expressly to import, not indeed a real obligation fixed upon the land, but a personal obligation, thrown exclusively on the person by whom the land shall be possessed.

Now, if that be the true legal import and effect of those minutes, most assuredly the acquiescence in, or adoption of them by any party, cannot raise against him any obligation higher than that which the minutes assumed the right of imposing. The adoption of them merely waived the party's right to object to the power of the meeting; and if that implied an agreement, as the Court have found, still that agreement could not go beyond the resolution to which he had given his assent. That the meeting does not appear to have assumed the power of taxing a certain set of trustees, is quite immaterial. The minute merely expresses an opinion; but the very same question arises, as it would have arisen, if the power had been assumed, viz. what is the "true legal meaning and import" of the words in which they expressed the opinion? And I cannot adopt a construction by which it is to be made out that the opinion of the propriety of certain trustees paying annually certain sums variable in amount, and to be annually fixed, because they possess certain properties, is equivalent to an opinion that the individuals happening to be

No. 126. trustees and landowners at the time shall pay at all future times, whether they be trustees and landowners or not.

May 30, 1845.
Duke of
Montrose v.
Edmondstone.

It appears to me that this construction is not only unwarranted by, but is in direct variance with the terms of the resolution; and as the effect of acquiescence in, or adoption of the resolution, could not import an agreement beyond the true meaning of the resolution itself, it follows, in my opinion, that, according to the "legal meaning and import of the agreement," the defender John Campbell did not continue liable after he sold his property, and ceased to have any interest in the district and roads.

LORD MURRAY.—I concur with the opinions of Lord Jeffrey and Lord Fullerton.

LORD CUNINGHAME.—I concur in the opinion of the Lord Ordinary, and in the perspicuous explanations given by Lord Mackenzie in support of the interlocutor.

On the first consideration of the case, I had some doubt whether the defenders, under the obligation and agreement embodied in their minutes of 24th November and 22d December 1801, were not bound to continue the full payment of L.150 per annum till the capital of the debt contracted prior to November 1801 (which appears from the accountant's report to have amounted to about L.3600) was paid off. But, giving the agreement the most limited effect which its words bear, I acquiesce in the interpretation of the Lord Ordinary, which finds that the defenders must be debited with their shares of L.150 per annum, till the whole debt contracted for repairing, and deficient interest subsequent to November 1801, be paid off and extinguished—leaving the obligation still to subsist as to any shortcoming which may still arise in future times in the fund for paying the interest of the debt contracted previous to 1801, if such deficiency shall again arise.

I. With reference to the first question, on which the opinion of the Court has been required, the answer of Lord Mackenzie appears to me to be satisfactory in every view which I can take of the case.

(1.) The object and purpose of the arrangement proposed in the first minute of 24th November 1801, and concluded at the second meeting on 22d December in the same year, was unquestionably to give relief to those trustees, unconnected with the district, who had gone beyond their statutory duty, (under which they were only empowered to raise money by obligations to be granted by them as trustees, assigning the tolls,) and who had joined in personal obligations for the sums borrowed. The defenders and their predecessors, through whose lands the Drymen road passed, (which must have been a great accommodation to them and their tenants,) entered into the arrangement libelled on, in order to afford ultimate relief to the stranger trustees. That was a just, reasonable, and honourable engagement, entitled to high effect from the law, in every question which might arise at any future period, no matter at what interval, between the different sets of trustees and their representatives.

(2.) It is manifestly of essential importance in the enquiry as to the due construction of the agreement under discussion, to settle whether the arrangement was to be understood to be made for a single year only, *e. g.* for the following year after its date, or for a prospective period? On this point it is supposed that little doubt can be entertained. The agreement, both from its avowed object, and from the terms used, was intended to give a certain class of trustees perma-

ment relief from any risk of loss which they had incurred by signing bonds pro forma, of little or no benefit to themselves personally, or their properties. It is hardly possible, as I conceive, to read the minutes of 1801, without being satisfied that the arrangement was prospective and permanent. It is declared that the trustees had had an experience of five years, since the road was opened, of the insufficiency of its funds to meet the interest of the money borrowed, and of the necessary expenses of repairs; it is stated that this deficiency had been found to amount to L.130 yearly; and the trustees, through whose property the road passes, bound themselves to pay a proportion of L.130 effecting to their valuation, for relief of their co-trustees, who had no connexion with the road. It would have been an arrangement ludicrously nugatory, and insufficient for its declared purpose, to hold such an agreement as applicable only to a single year after its date; and it is believed that no such plea is now maintained.

No. 126.
May 30, 1845.
Duke of
Montrose v.
Edmonstone.

The detail given in the opinion of Lord Mackenzie, as to the payments by the leading trustees of their full shares of the L.130 for a series of years after 1801, when the actual deficiency of the road funds in these years was often less than L.130, is conclusive evidence of the understanding of the parties that the contributions were to continue beyond a single year, and so long as they were necessary for the ultimate relief of the stranger trustees.

(3.) This being fixed, I find some difficulty in understanding what is the precise plea or proposition of the defenders; but I presume it resolves into this, that the guaranteeing trustees only bound themselves to advance the deficiency of the road funds each year to the amount of L.130, when so much should be required, but subject to a diminution of their advance in those years when, from the productiveness of the tolls, or the absence of repairs, the deficiency was less. This construction, as applied to such a concern as a road, seems peculiarly unsuitable for its object, though, like all agreements, it should be interpreted *secundum subjectam materiam*. It is notorious and self-evident, that the repairs and expenditure on a road of any extent, are rarely on the same scale in each year. It is not alleged that they had been so in the years prior to 1801, but they amounted to L.130 on an average, and the same calculation must have been made as to the future exigencies of the road. If, therefore, an advance was not made in all the years equal to the average deficiency, it is plain that when any extra expense was required, the defenders must either have advanced the balances retained in preceding years, or, according to their present construction of the agreement, have thrown the loss in every year in which any extra repair was required, absolutely on the stranger obligants to be relieved—a consequence, as I conceive, inconsistent with the very object and purport of the agreement.

(4.) The obligation of the defenders, the proprietors on the east side of the Leven, to relieve their co-trustees in other districts to the extent of L.130 per annum, instead of being in the least degree extraordinary or imprudent in its extent, is one of the most common in the business of Scotland, and was positively a cautious act of justice, on the construction of the Lord Ordinary, to their co-trustees in other districts of the country, who had signed bonds substantially for behoof of the defenders. Nothing is more common in this country, than for parties to bind themselves for the regular payment of the interest, on sums borrowed by their friends for particular purposes. That obligation subsists till the whole are repaid, as is well explained by Mr Bell in his Commentaries, (Vol. I. p. 347,)

No. 126.

May 30, 1845.
 Duke of
 Monmouth v.
 Edmunstone.

who observes,—“In accomplishing loans on heritable or other security, the lender frequently desires to have a collateral personal obligation for the regular payment of the interest; and not unfrequently, the agent of the borrower, in reliance on the rents and produce of the estate being sufficient to secure himself against risk, undertakes ‘to pay regularly, every half-yearly term, a certain sum of interest during the not-payment of the principal sum.’ This looks like an obligation for the interest only; but if the subject of the security fail, it seems to result in an obligation for the principal sum, or an annuity redeemable by payment of that sum; and must be ruled by the same principles which regulate annuities.”

In the present instance, the defenders’ obligation was no formidable or inextricable obligation. Being limited to L.130 per annum, it was plainly short of an obligation of instant relief to the parties, whose right to relief was admitted by the proprietors more immediately benefited by the road. Manifestly justice and fair dealing require, that the obligation should be interpreted as broadly as possible to secure the ultimate relief of parties not interested in the road. It is probable and presumable that the latter parties made sacrifices and advances in their respective districts for their own roads; so that if any loss happened on the road in dispute, it was most reasonable and proper that it should fall on the trustees interested in the line, according to their valuations, as provided by the minutes of November and December 1801, and not on those who had comparatively nothing to do with the Drymen road; and, for aught that appears, might have undertaken similar obligations in their own districts.

(5.) In the earlier stages of this cause, the defenders relied much on their plea, that from the long lapse of time which had taken place since any payments were made, in terms of the agreement of 1801, there was ground to infer that the whole arrangement and obligation of 1801 had been lost by abandonment or dereliction. That plea is now finally repelled by the Court; but it seems to be in substance renewed, in the plea now maintained, that the omission or delay of the trustees or their office-bearers to settle their own accounts regularly for a series of years, entitles them still to plead that they were only to pay a proportion of the L.130, equal to the actual deficiency of the road funds in each year, and no more. This does not appear to be either a just or very consistent conclusion. If the defenders did not, for a long tract of time, advance the shares unquestionably due by them in any view, and strictly prove the species of responsibility undertaken by them to be of the limited nature now contended for, they are not entitled to found on their own negligence in the adjustment of their accounts, as affording any evidence, one way or other, of the proper construction of the agreement.

(6) On this part of the case, however, a strong inference arises from another fact in the conduct of the defenders, which appears not to admit of denial, though perhaps it has not yet been sufficiently adverted to. When the defenders found on the agreement of 1801 as derelinquished or restricted, as they now insist upon, it deserves notice that they do not allege any fact or circumstance to show that they made any intimation to the stranger trustees that their agreement of 1801 was to cease; nor is it averred that these trustees acted in any way to indicate that they acknowledged or supposed that the obligation for their relief had come to an end. No part of the borrowed money was levied or demanded from the stranger trustees west of the Leven, prior to the institution of this action. It is obvious, however, that the obligation of relief under the minute of 1801, could not

restricted nor abandoned without the consent of the stranger trustees to revive their obligation. No such case is alleged by the defenders; and, without this, they have nothing relevant to liberate themselves from their obligation. Notwithstanding all the time which has elapsed in the settlement of these accounts between the trustees themselves, who were liable to them, the other trustees, in whose favour the obligation of relief was granted, were allowed to rest on the understanding that the arrangements made for their relief by the minutes of 1801 continued in force, and that the obligants were providing to them the relief which they had become bound to secure. No intimation to the contrary was given. After bearing for nearly forty years, therefore, to bring forward any claim against them, it was too late for the defenders, at the institution of the present action in December 1837, to disclaim the minutes of 1801, or to attempt to put a construction on their agreement, which would truly revive the responsibility of the heirs of stranger trustees in other districts, when their predecessors who had relied in bona fide on minutes unrescinded, were in their graves.

(7.) When additional and very large advances were required from some of the obliging trustees in 1815, to keep the road from going to wreck, it appears from the record and productions in this cause, that four of the trustees having property eastward of the water of Leven, viz., the Duke of Montrose, Mr Campbell of Meffeld, Mr Macdonald Buchanan, and Mr Buchanan of Ardoch, then agreed to raise L.1400 additional by a credit from a bank, and to pay the interest of such advance annually, the minute of 7th October 1815 expressly bearing, that such payment of interest was "to supersede the voluntary contributions hitherto paid by the parties for the support of the road."—(See Revised Condescendence, art.

7.) This was a minute written fourteen years after the obligation of 1801, and it made direct reference to the contributions for which the defenders and their predecessors became bound by the minutes of 1801, as still in observance; and though the annual contributions first agreed to were styled in the minute last quoted as voluntary, perhaps from their being ultroneously subscribed for originally, it does follow that they would be so found in law, if a question had been then raised and tried between the trustees directly interested in the Drymen Road, and the proprietors on the other side of the Water of Leven. In point of fact, the accountant has given the trustees, who made the additional advance of 1815, the full benefit of the stipulation in the minutes of 7th October in that year, and properly made it to supersede pro tanto their share of the L.130 per annum guaranteed by the minutes of 1801. They could not get more with justice to the parties entitled to relief, under the minutes of 1801.

3.) It is not easy to see how the accounting can be extricated in any other manner but on the principles reported by the accountants, and sanctioned by the 1st Ordinary, that would not be most disadvantageous to the obligants themselves. If it were held that they were only bound to advance such parts of the L.130 per annum as was required in productive years, it would deserve consideration whether the larger expenditure required for extraordinary repairs in other years, would not be chargeable against the guarantee trustees, as truly expended for their behoof. The sums were laid out on a subject upon which they were the creditors; they were required for the road to keep up its traffic, and prevent it from becoming impassable, whereby the guarantee of L.130 would have become a loss, and been converted into a perpetual burden. Even under the express

No. 126.

May 30, 1845.
Duke of
Montrose v.
Edmonstone.

No. 126. terms of the guarantee, the defenders would be liable to the extent of L.130 per annum for the extinction of the new accumulation of debt, and accruing interest, and thus just prolong the burden on themselves and their heirs for an indefinite period. The debt thus contracted would fall to be redeemed either by the trustees who gave a warrant for its contraction, (limited to L.130 per annum,) or it must be paid by third parties not interested in the road. And so long as there are the trustees who bound themselves in 1801, and never intimated any recalc of their guarantee, accompanied by a tender of the previous contractions under it, it is thought to be only what law and justice require to lay the debt, run up since 1801, on the obligants who then became bound for it, limiting the charge in each year to the sum specified in the obligation of relief.

May 30, 1845.
Duke of
Montrose v.
Edmonstone.

(9.) There is another consideration which I think entitled to great weight in the present discussion. By the minutes under consideration, the trustees interested in the road agreed to make up any deficiency in its resources according to their valuations. Now, if this is not held as an arrangement of prospective and permanent endurance, the consequence must be, that the losses must be provided for by the obligants in the bonds in equal portions—that is to say, the smallest proprietor capable of being a trustee, (generally every proprietor of L.100 Scots of valued rent,) who signed a bond, must pay the same share of each bond, along with the proprietors of the largest estates, who were joined in the same obligation. From the scheme produced in this very process, it appears that Mr McGown and Mr Alston had properties each valued at only one-tenth part of the estates of the Duke of Montrose and Mr Campbell of Stonefield; but surely it would be doing violence to every presumption that can be reasonably raised in such a case to hold, that any association embarked in a common undertaking for mutual but unequal benefit, could intend that they should be liable equally in a contribution for ultimate loss between themselves. Yet this would be the result, if the arrangement of 1801 received a construction insufficient for the relief of the parties.

With reference to the whole pleas which have been raised in the present case, I beg to add that, in my humble opinion, great effect is due to the minutes of road-trustees, when these are traced either by actual subscription, or by posterior acts of ratification, to have been truly assented to, by acting trustees interested in the roads, more especially when the resolutions have been entered into for just and equitable purposes. The established mode of transacting such business, and of constituting and declaring the obligations of the trustees inter se, is by minutes, as the other proceedings of the trustees in this very county demonstrate. For example, when Mr Campbell of Stonefield subscribed the bill for L.1400, set forth in article 21 of Condescendence, can it be doubted that he thus ratified and gave his consent to the narrative in the preceding minutes of the trustees narrated in article 20, in virtue of which alone that bill was granted? It is impossible to figure stronger evidence of ratification.

When the well-contested case of Higgins and Livingston depended before this Court and the House of Lords, there was no doubt that road trustees may be competently bound by minutes, if the accession of the several trustees mentioned as present be satisfactorily established; but Lord Eldon, Chancellor, and latterly this Court, demurred to an obligation being inferred against any trustee, merely from his being entered as present at the meeting, which he might be, though he had only come into the room to speak to a neighbour on other affairs, and had taken

no share in the business of the meeting, (See 4 Dow, p. 341,) but the present is the very converse of that case. There is sufficient evidence here to prove in the most irrefragable manner the accession of all the trustees to the minutes of 1801; and I am unable to put any fair and rational construction on these minutes, except that they were intended, as far as L.130 per annum would go, to give a permanent relief, and not a temporary relief, to certain third parties nominally belonging to the same trust, but having no real interest in the road, who had entered into official engagements for behoof of the obligants and their properties.

No. 126.
May 30, 1845.
Duke of
Montrose v.
Edmonstone.

On these grounds I concur in the answer given by Lord Mackenzie to the first question on which the Judges have now been consulted; and it humbly appears to me that the answer of his Lordship to the second and third questions is equally well founded.

II. With regard to the portion of the debt that should have been paid by obligants insolvent, I conceive that the effect of such insolvency was just to add to the unliquidated debt or deficiency on the road, which the solvent trustees must ultimately provide for, by continuing their guarantee, limited always to L.130 per annum, till that and the rest of the debt be paid. The obligants were bound for their shares of L.130, so long as there was any part of the debt, contracted for interest or repairs subsequent to 1801, unliquidated and undischarged; and it is possible for me, on a fair and just construction of the obligation, to hold that any portion of the debt or deficiency arising from the bankruptcy of the obligants was meant to be left unprovided for, or rather was to be thrown as a loss on the solvent obligants. The report of the accountant I understand to have proceeded that principle.

III. I am of opinion that there is no just principle on which Mr Campbell of Stonefield can be exempted from his share of the debt, (which is apparently an considerable part of the whole,) contracted subsequent to the sale of his estate in 1835, and the institution of the present action in 1837. The obligation originally undertaken was a personal obligation of relief to third parties. Not being a real lien on Mr Campbell's estate, it did not transmit against the purchaser. Had it been imposed it as a burden on the purchaser, the average amount would have been put into account, and deducted along with the other public burdens from the value on which the price or value of the estate was to be estimated. Not having done so, Mr Campbell has the amount in his pocket at this moment, out of which he is to discharge his personal obligation. In thus dealing with the purchaser, he has acted most wisely; a fixed amount must have been stated and deducted, no part of which would ever have come back to him; but by undertaking to fulfil his personal obligation, and giving no deduction from the price on this account, he has benefited of the increasing returns from the tolls, and of course has smaller sums to pay; and finally, if they increase to such an amount as will afford payment for repairs and the interest of the debt prior to 1801, Stonefield will be relieved of any payment, and have the full price of his estate in his pocket.

It is obvious, that if a large debt was contracted on the faith of his original obligation, it would be giving effect to a plea without example in the law, to hold him liberated by the sale of his estate, without notice of his intention or wish to withdraw having been given to those for whose behoof the guarantee was first entered. If there were any considerable repairs subsequent to the sale in 1835, it were made to uphold and preserve the road, from which alone funds were

No. 126. expected to be realized, to redeem the previous portion of the debt for which, to one effect or another, it is admitted in all views, as I understand, that Mr Campbell is liable. It does not appear, therefore, that he has any claim, either in law or in justice, to make a distinction between any of the portions of the debt which form the subject of the present question.

May 30, 1845.
Duke of
Montrose v.
Edmonstone.

LORD IVORY.—I concur in the opinions of Lords Jeffrey and Fullerton.

I. As regards the first question, it is not to be overlooked that the obligation undertaken in the minutes of 24th November and 23d December 1801, was one of a special and limited character. It was one of relief, (and that but partial,) having reference to expenditure and liabilities already incurred. It was not one of universal indemnity or guarantee as regards further expenditure, or liability to be incurred hereafter. In other words, it was not intended to cover any future expenses of the trust; and still less, in case of its being necessary to contract future debt for the improvement or repair of the road, to cast the burden of the additional debt and expenditure upon the parties to these minutes. The relief contemplated to be given was confined to the past. Certain debt had been incurred, and the bonds of certain of the trustees had been granted to the creditors. The free revenues of the trust were inadequate to meet the interest; and it had thus become necessary, in some way or other, to meet the annual deficit. "Taking into consideration, therefore, that a loss of about L.130 per annum" was thus to be provided for, the parties to the minutes agreed, in relief of those trustees who had subscribed the bonds, proportionally to contribute, *de anno in annum*, the shares of the loss. But they did not agree in any year to contribute more than L.130. Neither, if the loss on one year fell short of L.130, did they agree to contribute more than was necessary to meet the loss actually incurred. If there was no loss at all in any particular year, they were for that year to contribute nothing. And, in short, beyond the very special and qualified relief expressly given, they left the trustees themselves who had subscribed the bonds to bear all the original liabilities, just as if the minutes in question had never been executed. It was, of course, implied in such a state of matters, that there was to be a general settlement out and out of each year's trust-accounts; and that the accumulating results of several years (whether for deficit or surplus) were not to be mixed together. Indeed, in any other way the obligation would have operated not in relief of the past—as in aid, *pro tanto*, of those trustees who had incautiously involved themselves for the early debt of the trust—but would have extended, prospectively, to an undertaking of universal liability for the doings even of future trustees, and (so far as a perpetual annuity of L.130 could go) for the whole trust expenditure and debt in all time to come. Such, indeed, is the substantial result practically worked out by the Lord Ordinary's judgment; for the heavy outlay of many years, and the whole accumulating liabilities of the trust arising therefrom have all been thrown into the general account, as against the parties to the minutes. I cannot give such effect to, or put any such construction upon the minutes. On the contrary, it seems to me as clearly against all justice, as against the fair import and sound legal construction of the obligation, to come to such conclusion.

II. As regards the second question, it follows as a direct corollary from what has now been said, that the parties can not be called upon "to pay more, in consequence of the insolvency of one of the trustees." The obligation, individually,

incumbent on each, was "to pay their several proportions, according to their respective valuations." Indeed, it is not contended that the parties to this obligation are liable singuli in solidum. What is said is, that the loss sustained one year (through the insolvency of any of their number) must go necessarily to swell the general deficiency on next year's accounts, and thus enhance the resulting proportions to be borne by the others for that succeeding year. Now, clearly, this cannot be maintained, if each several year's account falls to be disposed of periodically by itself; and if the liability of all and sundry, in regard to that year, be definitively fixed and settled then, once for all.

No. 126.
May 30, 1845.
Duke of
Montrose v.
Edmonstone.

III. As regards the third question, I was at first disposed to have taken a different view. But Lord Jeffrey's and Lord Fullerton's reasoning has completely satisfied me.

LORD ROBERTSON.—I limit my answer to the three points specified in the interlocutor of the Second Division of the Court, on which the opinion of the consulted Judges is required, and I am of opinion—1st, That, according to the legal meaning and import of the agreement contained in the minutes of the 24th November and 22d December 1801, the liability of the parties, which was gratuitously undertaken, does not extend beyond the loss arising from the rents of the toll-bars falling short of the interest of the debt in each particular year, and that by rateable proportion to the extent of L.130 in each year; and I think that, upon making payment of such deficiency in each particular year, the parties sufficiently fulfil their obligation, so that the loss of any one year beyond the sum of L.130 could not be thrown upon any other year, or the obligants be in any shape subjected for such loss.

2d, I think the obligation was a several, and not a joint obligation; and, consequently, that the parties are liable for the loss upon the road to the extent of their own rateable proportion merely, and that the failure of any one party to pay his share of such loss does not authorize an additional assessment on the other several obligants.

3d, Conceiving the obligation undertaken by Mr Campbell to be merely personal, and not to affect the lands belonging to him, I do not think that his liability ceased by the sale of the property, or that the purchaser, who did not expressly undertake that obligation, became in any shape liable in its fulfilment.

Of this date the case was finally advised.

LORD JUSTICE-CLERK.—In this case, before we consulted the other Judges, I delivered a very full opinion, the material views in which have been stated in the minute for Alston's trustees. In the opinion then expressed, I am much confirmed on the first two points stated in our interlocutor of the 9th July, for the consideration of the other Judges, by the opinions we have been favoured with. On these points I concur with the majority of the consulted Judges, and need add nothing.

The third point, as to Mr Campbell of Stonefield's liability after he had sold his property, appeared to me to be a question of much difficulty, and one which entered very deeply into the character and nature of the obligations, which we had found must be regulated by the agreement contained in two minutes referred to. As

No. 126.

May 30, 1845.
Duke of
Montrose v.
Edmonstone.

four of the consulted Judges entertain, after full consideration, a very clear opinion in favour of Mr Campbell, it is satisfactory to me that I then stated the doubts I entertained, and requested that this point should be introduced in the questions for consultation. At the time of our consultation, I was rather disposed to concur on this point with the Lord Ordinary; but, after further and fuller deliberation, my original difficulties have prevailed, and I now concur with Lord Jeffrey on this point.

It is necessary to attend to the terms of the original interlocutor of this Division, 11th March 1842. We pronounced no finding establishing an obligation against any one party to any extent. And we could not—for the Court was sitting then only three in number, and my Lords Medwyn and Moncreiff, who were for recalling Lord Jeffrey's interlocutor, which I thought well founded, differed essentially, and on a most fundamental point, as to what the obligation was which was undertaken. The interlocutor, after several trials of it, was framed in a very general form, viz.—“That the obligations and interests of the parties to the record in this action, must be regulated by the agreement contained in the minutes of 24th November 1801 and the 22d December 1801, mentioned in the said record, according to the legal meaning and import thereof.”

But in the arguments of the parties, and some of the opinions before us, I think too much is assumed as having been found by this interlocutor in considering the question as to the extent of Mr Campbell's liability. It seems to be assumed that the interlocutor of this Division at once found that the minutes were to be held equivalent to direct personal bonds in formal style, and drawing after them the usual and established liabilities of perpetual obligation, so long as the cause of debt exists against the parties and their representatives. This assumption seems to me to be at the foundation of the argument against Mr Campbell. Now, this may be the result of the legal meaning and import of the minutes, when we now decide on their legal meaning. But, most assuredly, that was not first by the interlocutor of the 11th March 1842. We are only now to say what is the effect and true construction as to legal obligation of these minutes—loosely expressed—never put into any other form—receiving no construction from the acts or admissions of parties—never referred to at all as containing an obligation in any subsequent minute—and neither acted on nor enforced according to any view of relative rights of relief or obligation, until this action was raised more than thirty-five years afterwards. The minutes express a resolution of gentlemen to do a certain thing—very loosely expressed—and there the matter is left.

Further, when the present question is raised against Stonefield, I think it is not only relevant but necessary to attend to the fact, that he was no party to the minute. He was then a minor. Although he paid when applied to (in what terms is not proved) two sums after his majority, at different periods, which are now said to be payments under these minutes, yet certain it is that the terms of these minutes are not brought home to him at all. When he made these payments he was under no legal liability at all. He might have refused to acknowledge the minutes, or desired to have their import ascertained by a clear writing. Two of the Court held that these payments were, after so long an interval of time, to be taken as acts of adoption, and that it would be unsettling matters to view them otherwise; but we must keep in view the fact, that the question remains, What is the extent of the liability that he can be presumed to have adopted? And we

cannot in this question overlook the fact, that soon after the last of these payments, in a very regular minute to which the Duke of Montrose and his own guardian were parties, and when Mr Campbell advanced more money for another purpose, these very payments were described to be voluntary contributions.

No. 126.
—
May 30, 1845.
Duke of
Montrose v.
Edmonstone.

The parties chose to leave matters on the loose footing of the minutes in 1801, but they are not entitled to have these at once taken as equivalent to formal and regular deeds, framed in terms which all know to constitute perpetual obligations against themselves and representatives.

Then the question now arises on these minutes, What is the character and nature of the undertaking come under by Mr Campbell in homologating them? And I am of opinion, along with Lord Fullerton, that he cannot be taken to have consented to a perpetual obligation binding on himself and representatives in all time coming, unless the proceeds of the tolls were sufficient to pay off the principal of the debt. This is the character of the undertaking ascribed to his acts in adopting these minutes. As it was an obligation to meet deficiency, it would emerge although the tolls were for fifty years sufficient to pay the interest, as soon as they fell short; hence, until the principal of the debt were paid off, it must be an obligation, on the principle of the interlocutor, which will endure perpetually. I cannot think that any man can reasonably be presumed to undertake voluntarily any such obligation; and I attach the more weight to this view of the case, which has influenced the majority in the main question in this special point, as to Mr Campbell of Stonefield, that it is not proved that he ever knew the terms of the minutes in question, and because his liability under them to any extent is denied, solely from his having made new payments many years before he sold his property.

LORD MEDWYN.—I have no occasion to make any further remarks—the minutes of debate have not altered my opinion.

LORD MONCREIFF.—I remain of the same opinion I was of before. I think that the effect of the former judgment was to find that there was a personal obligation upon those parties. As to Mr Campbell of Stonefield, he paid four instalments under the minutes—two of them after he was of age. If this was a personal obligation on his part, I cannot conceive on what footing of law he can be released, because he has sold his estate. He takes no means for having the obligation transferred to the purchaser; and he says that he obtained a full price for it. I am still of opinion that parties are not liable for Gartmore's failure.

LORD COCKBURN.—I am of the same opinion as formerly.

THE COURT then pronounced this interlocutor:—"In terms of the opinions of the majority of the whole Judges, alter the interlocutor of the Lord Ordinary, dated 20th March 1844, reclaimed against, except in so far as it finds, 'that by the interlocutor of the Court of the 11th March 1842, it is found that the obligations and interests of the parties to the record in this action, must be regulated by the agreement contained in the minutes of the 24th November 1801, mentioned in the said record, according to the legal meaning and import thereof; therefore find that it is now a final point in the case, that the said agreement of 1801 was, and is, a binding agreement, and has not been brought to a close, recalled or derelinquished, or given place to any other or different arrangement, and that it is to be enforced as a subsisting agreement according to the legal meaning and im-

No. 126.

May 30, 1845.
 Duke of
 Montrose v.
 Edmonstone.

port thereof: Find that, according to the legal import and meaning of the said agreement of 1801, no part of the sum of L.130, payable under that agreement, is applicable to the extinction of the capital of the debt contracted on account of the road in question, at and prior to the 24th November 1801, and remaining due at that date: Further find, that according to the legal import and meaning of the said agreement, the liability thereby undertaken in relief of those liable for the interest of the debts in the bonds, does not extend further than to pay to the amount of the specified sum of L.130, the loss which may arise from 'the rents of the toll-bars falling that much short of the payment of the interest of the money borrowed for making the road and keeping it in repair,' in the particular years in which such loss occurs, and that the parties did not undertake, in relief of the parties signing the bonds for the interest of the debts, any general liability for loss in subsequent or prior years, owing to the accumulations of interest or otherwise, as found by the interlocutor of the Lord Ordinary: Find that the parties are bound to contribute for the particular years in which such deficiency did or shall occur, the respective proportions of the said sum of L.130, set down in the note of valuation and contribution prepared by the clerk of the road, as payable by each, and founded on in the record, and no other sums whatever: Further find, that the parties cannot be called upon to pay more, in respect of deficiency in the particular years in which such loss did occur, than the said proportions so allocated in the said note respectively, in consequence of the insolvency of any of the trustees, whether directly, or in any indirect manner, the effect of such insolvency not being to alter or increase, to any extent whatever, the sums payable by the parties to the record: Repel the plea of Mr Campbell of Stonefield, and find that he remains liable to the extent above mentioned, along with the other parties to the said agreement: And further find, that in calculating the sums now due by each party for the particular years in which deficiency occurred as aforesaid, credit must be allowed for the sums already either paid by him directly, in name of contributions under the said agreement, or otherwise advanced for defraying the charges on said road: And with respect to the debt contracted prior to the 24th November 1801, find that the liability of parties for the said debts, whether to the creditors in the bonds granted for the said debt, or in relief inter se, is to be regulated by the said bonds respectively—that is, the parties subscribers to each of the existing bonds for said debt are liable for the amount of each bond, with relief inter se only, but without relief as against any other parties, whether in respect of their having subscribed some of the other bonds granted for said debt, or having attended and approved of the resolutions of the meetings of the trustees of the 10th June 1794, and 25th October 1799: With these findings, remit the case again to the accountant to prepare and report to the Court a state of the sums now payable by each of the parties, according to the effect of the principles above stated, and without reference to any of the views contained in the interlocutor of the Lord Ordinary, unless the parties shall settle and adjust the sums now payable in terms of this interlocutor."

DUNDAS and WILSON, W.S.—FERRIERS and DUFF, W.S.—TAYLOR and BOYAL, W.S.—
 SIMON CAMPBELL, S.S.C.—Agents.

R. D. KERR, (Dunlop's Trustee,) Appellant.—*Cowan*.
JAMES M'KECHNIE, Respondent.—*Penney*.

No. 127.

May 31, 1845.
Kerr v.
M'Kechnie.

Process—Expenses—Sequestration—Stat. 2 and 3 Vict. c. 41.—An interlocutor by the Lord Ordinary in a sequestration containing a general finding for “expenses,” includes the expenses incurred before the Sheriff, as well as those in the Court of Session.

SEE Report, ante, p. 494.

The Sheriff of Renfrewshire having reversed a decision of Kerr rejecting a claim made by M'Kechnie upon the sequestrated estate of Dunlop, and found M'Kechnie entitled to expenses, Kerr presented a note of appeal to the Court of Session.

May 31, 1845.
1st Division.
Ld. Fullerton.
Bill-Chamber
Clerk.

The Lord Ordinary on the bills pronounced the following interlocutor:—“ Alters and recalls the deliverance complained of, and sustains the decision of the trustee ; finds the appellants entitled to expenses.”

The respondent reclaimed, but the Court adhered.

The appellant claimed the expenses which he had incurred before the Sheriff, as well as those in the Court of Session ; but the auditor disallowed that part of his account.

The appellant, in consequence, objected to the auditor's report ; and the case was reported by Lord Fullerton, Lord Ordinary on the bills, in order that the opinion of the Court might be taken as to the meaning of the word “ expenses ” in his interlocutor.

The respondent pleaded,—That, though the Lord Ordinary had power under the bankrupt statute to find the trustee entitled to his expenses in the Sheriff-Court, he had not done so expressly here ; that, as an appeal given by the statute from the Sheriff-Court to the Court of Session, the former is an inferior court, as in the ordinary cases of advocacy and suspension ; and that, in advocations and suspensions, the expenses in the inferior court are not included under and carried by a general finding as to expenses in the interlocutor of the Court of Session.¹

The appellant pleaded,—That, under the statute, sequestration was a Court of Session process, the Sheriff acting by delegation merely ; and, therefore, that the word “ expenses ” included the expenses before him, as well as those incurred in the Court of Session.

LORD PRESIDENT.—Our relation to the Sheriff in a sequestration is not analogous to that which we hold to inferior courts in cases of suspension or advocacy. The process of sequestration originates in this Court ; and, though part of

¹ Graham v. Cuthbertson, Dec. 20, 1828, (7 S. 224.)

No. 127. the proceedings are carried on before the Sheriff, his decisions are subject to its review. Regarding the Sheriff, then, as the organ of this Court, I think that the general finding of expenses carries those incurred before him.

May 31, 1845.
Purves v.
Laudell.

LORD MACKENZIE.—The cases of advocations and suspensions do not apply. If by an appeal is meant the removal of a cause into a new court, it is an abuse of terms to call by that name the process by which the deliverances of the Sheriff are brought under the review of the Court of Session. The Court of Session is a court of review, and the note of appeal is just of the same nature as a reclaiming petition.

LORD JEFFREY.—Expenses generally mean expenses of process. Sequestration is an Inner House process; and, though certain powers are conferred on the trustee, the Sheriff, and the Lord Ordinary, yet all their proceedings are liable to review in the Inner House.

LORD FULLERTON.—This case is clearly distinguished from those of suspension and advocacy.

THE COURT sustained the objection to the auditor's report.

ANDREW HARDEN, W.S.—GRAHAM and ANDERSON, W.S.—Agents.

No. 128.

WILLIAM PURVES, Petitioner.—*Whigham*.
WILLIAM LANDELL, Respondent.—*More*.

Expenses—Process—Appeal.—Where the Lord Ordinary had sustained a defence to an action, and found the defender entitled to expenses, but the Inner House had altered, reserving expenses, and the House of Lords on appeal, had remitted to the Court with directions to adhere to the interlocutor of the Lord Ordinary, "and to proceed further as shall be just and consistent with this judgment,"—Held, in conformity with *Stewart v. Scott*, 11th March 1836, that as the judgment of the House of Lords exhausted the cause, it was not competent for the Court to award the expenses incurred subsequent to the Lord Ordinary's interlocutor, prior to appeal, with regard to which it was silent.

May 31, 1845. SEQUEL of case reported of dates 27th May and 20th July 1842, ante, Vol. IV. pp. 1300 and 1543.
2D DIVISION.
Jury Cause.

William Landell brought an action against William Purves, writer in Dunse, for relief from the damages and expenses in which he had been subjected in certain legal proceedings which had been raised against him by a party whom he had caused to be incarcerated upon a Border-warrant; Purves being the agent who had advised this step, and applied for the warrant.

Purves having objected to the relevancy of the summons, the Lord Ordinary (of date 19th March 1842) pronounced this interlocutor:—"Sustains the defence of irrelevancy, and assoilzies the defender, and decerns; finds the defender entitled to expenses."

Landell having reclaimed, the Court, on the 27th May 1842, pronounced the judgment formerly reported, which was in these terms:—
 “Alter the interlocutor complained of, find the summons relevant, and remit to the Lord Ordinary to proceed further in the cause, reserving all questions of expenses.”

No. 128.
 May 31, 1845.
Purves v.
Landell.

By a subsequent interlocutor, Purves obtained leave to appeal. The judgment of the House of Lords was in these terms:—“It is ordered and adjudged, by the Lords Spiritual and Temporal in Parliament assembled—That the said interlocutor of 27th May 1842, complained of in the said appeal, be, and the same is hereby reversed; and it is further ordered that the cause be remitted back to the Court of Session in Scotland, with directions to that Court to adhere to the interlocutor of the Lord Ordinary of the 19th of March 1842, (mentioned in the appeal,) and to proceed further therein as shall be just and consistent with this judgment.”

Purves then presented a petition, craving the Court to apply the judgment of the House of Lords, and to adhere to the interlocutor of the Lord Ordinary, and to find him entitled to the additional expenses incurred by him in the Court of Session since the date of that interlocutor.

The LORD JUSTICE-CLERK agreed with the opinion expressed by Lord Corehouse in the case of *Stewart v. Scott*, 11th March 1836,¹ holding that, wherever the terms of the judgment of the House of Lords exhausted a case, it was not competent for the Court to deal with expenses not found due under it.

LORDS MEDWYN and MONCREIFF concurred.

THE COURT accordingly pronounced this interlocutor:—“Find it incompetent to give expenses in this Court subsequent to the Lord Ordinary’s interlocutor, dated 19th March 1842; but, of new, find the defender entitled to the expenses incurred by him up to the date of that interlocutor, as found by the Lord Ordinary.”

Authorities.—*Stewart*, *supra*; *Forlong v. Taylor*, Jan. 19, 1838, (16 S. & D. p. 1168.)

AINSLIE, MACALLAN, and GRAHAM, W.S.—GREIG and MORTON, W.S.—Agents.

¹ 14 S. & D. p. 692.

No. 129.

DAVID CORMACK, Petitioner.—*E. S. Gordon.*HENRY TOD, W.S., Respondent.—*Patton.*

June 3, 1845.

Cormack v.

Tod.

Process—Expenses—Agent and Client.—A judgment having been pronounced in the Court of Session, by which a party was found entitled to expenses, and an extract decree therefor allowed to go out in the name of her agent; and this judgment having been reversed on appeal,—Held that the appellant was entitled to obtain repayment from the agent of the sums which had been paid to him in terms of the judgment reversed.

June 3, 1845.

1st Division.
R.

A judgment was pronounced in favour of Mrs Henderson, in the circumstances set forth in the previous report,¹ on the 5th July 1842, by which, *inter alia*, Cormack was found liable to her in expenses, and a remit was made to the auditor to tax the same and report.

Thereafter, the expenses found due by this judgment having been taxed by the auditor, and the auditor's report having come before the Court, an interlocutor was pronounced on 17th November 1842, approving of the report, decerning for the amount, and allowing extract to go out in the name of the agent.

The expenses decerned for by the above interlocutor of 17th November 1842, were paid by Cormack to Henry Tod, W.S., the respondent's agent, in whose name the decree went out on 5th December 1842.

Cormack appealed to the House of Lords, and obtained a reversal. The judgment of reversal contained, *inter alia*, the following order:—“That the said respondent do repay to the said appellant the costs decerned for by the said interlocutor of the 17th of November 1842 appealed from, if paid by the said appellant, and do pay to the said appellant the costs incurred by him in the Court of Session.”

Cormack petitioned the Court to apply this judgment, and “to order the respondent and her agent, the said Henry Tod, W.S., to repay to the petitioners the foresaid costs decerned for by the said interlocutor of 17th November 1842, amounting to £108 : 16 : 10, and 17s. 9d. as the dues of extract, with legal interest on these sums from said 5th December 1842, the date at which they were paid by the petitioner.”

The petition was objected to, in so far as it craved payment of expenses from Mr Tod, the respondent's agent.

LORD PRESIDENT.—The reversal of the judgment of this Court makes the agent liable to pay back the costs recovered by him under it.

LORD MACKENZIE.—The agent obtained a decree for expenses, and the House

¹ Ante, IV. 1478.

of Lords reversed that judgment, as well as the one in favour of his client. The No. 129. reversal implies of necessity the repayment by him of the expenses to which it has been found that his client, and consequently he himself, was not entitled. June 3, 1845. Ransan v. Mitchell. Does the agent mean to say that he is to keep the expenses, after the judgment under which he recovered them is reversed?

LORDS FULLERTON and JEFFREY concurred, and

THE COURT accordingly granted the prayer of the petition.

GIMON-CRAIG, DALZIEL, and BRODIE, W.S.—HENRY TOD, W.S.—Agents.

PIERRE RANSAN, Junior, and MANDATARIES, Respondent and Defen- No. 130.
der.—*Sol.-Gen. Anderson—Mackenzie.*

JOHN MITCHELL, Advocate and Pursuer.—*Buchanan—Maitland.*

Sale—Contract—Price—Fraud—Process.—A party ordered a cargo of goods of a stipulated quality, and, on receiving them, intimated to the vender that they were of an inferior quality, and that they had been deposited in a bonded warehouse at his risk; thereafter he removed from the warehouse, without legal warrant, and appropriated to his own use; the greater part of the goods:—Held, 1. That he was liable for the contract-price of the remainder. 2. That he could not maintain an action against the vender for fraudulent breach of contract.

In the summer of 1841, Mitchell entered into an agreement with June 3, 1845. Ransan, by which the latter was to send him a cargo of fine cork from Figueras. The price of the cork was to be 11,700 milrees per quintal; 1st DIVISION. Ld. Robertson. N. but no particular quantity was fixed upon, it being agreed merely that Ransan was to ship as much as he had.

Certain advances were made by Mitchell to Ransan to complete the agreement, and about 390 cwt. of cork was shipped on board a vessel belonging to the former. On the arrival of the cork in Glasgow, Mitchell was dissatisfied with its quality; he, in consequence, stored it in a bonded warehouse, and wrote to Ransan, complaining that it was of inferior quality, stating that it had been deposited at his disposal, and calling on him to pay back the money which had been advanced on account of it.

Before an answer to this letter was received, Mitchell presented a petition to the Sheriff of Lanarkshire, praying that a remit might be made to two cork-manufacturers to inspect and value the cork as it lay in the warehouse, and, in the event of its being found that the value of it was less than the sums advanced by him to Ransan, to reserve action to him for the difference. No opposition having been made to this petition, Ransan being then abroad, and it not having been intimated to him, a

No. 130. remit was made by the Sheriff to two valuers, who valued the cork at £577 : 8 : 2; and this being a smaller sum than that at which Mitchell estimated his advances, an interlocutor in absence was pronounced on their report, reserving to him right of action for his over-advances.

June 3, 1845.
Ransan v.
Mitchell.

After this, part of the cork was taken out of the warehouse and used up by Mitchell, and, when Ransan arrived in Glasgow, and went to examine the quality of the goods, he found that only about forty cwt. of the quantity originally sent remained.

In October 1842, Ransan raised an action against Mitchell in the Sheriff-court of Glasgow, in which he alleged that the cork shipped was of the stipulated quality, and concluded for payment of the balance of the price agreed upon.

Mitchell, in defence, pleaded *inter alia*, that Ransan had failed to furnish cork of the stipulated quality, and therefore that he was entitled to repudiate the contract; and that, not having used any of the goods until after failure to repay his advances, he was warranted in appropriating them for the purpose of meeting these advances.

A record was made up, and the Sheriff-substitute pronounced the following interlocutor, and note:—"Having considered the closed record, for the reasons stated in the following note, finds the defender liable to the pursuers in payment of the sums of £266 : 16 : 4½, with the legal interest thereof from the 30th October 1841, and of £4, 17s., with interest as libelled." *

* "NOTE.—In this case, the averments and admissions of parties appear sufficient to dispose of the case, without any further proof whatever being necessary. It is agreed on both sides, that the final bargain between the parties bore, that the pursuer was to ship for the defender from Figueras, a cargo of fine cork, at the fixed price of 11,700 milrees per quintal; that no particular quantity was agreed on, it being arranged that the pursuer was to ship as much fine cork as he had, and to ballast and fill up the vessel with salt. Under this agreement a cargo of cork was shipped by the pursuer on board the defender's vessel 'Oporto.' The cork, on its arrival in Glasgow, was examined by the defender, who wrote to the pursuer, complaining of its quality, refusing to receive it, and stating that it was in the mean time stored at Glasgow. Not receiving an answer to this letter when he expected, he presented the petition No. 4-5. After which he admits that he withdrew from the store and used up a part of the cork in question, so that on the pursuer arriving in Glasgow, only the remainder of it was forthcoming. There can be no doubt that, in the ordinary case of a sale, where the price has been previously fixed, the purchaser must either pay the agreed on price, or, if the cargo be not conform to order, he must return it entire; and if he has broken bulk and used any part of it, he will be debarred from afterwards objecting to the quality or price. The principal question, therefore, in this case is, whether either the previous letter of objection, or the proceedings under the petition 4-5, placed the defender in a different position, and authorized him to dispose of the cork, without incurring the usual liability consequent on breaking bulk. After a careful consideration of the point, the Sheriff-substitute is convinced that this is not the case. The letter of objection cannot by itself have such an effect; for it appears plain, that if a purchaser first writes to the seller, refusing to receive the goods, and then breaks bulk, and uses them, he will be held as departing from his objections, and

This judgment was ultimately adhered to by the Sheriff on the 22d No. 130. May 1844.

Mitchell advocated ; and at the same time raised an action of declarator and damages against Ransan, to have it found and declared that the original agreement between them had become void and ineffectual, in consequence of Ransan's having "fraudulently and dishonestly failed to deliver goods of the description and quality stipulated ;" and concluding for damages in consequence. Defences were given in by Ransan, but no new averments were made on either side, in addition to those already made in the original action in the inferior court. On the 7th December 1844, the Lord Ordinary pronounced an interlocutor closing the record on the summons and defences ; and conjoining the action with the process of advocacy at Mitchell's instance, also in dependence.

June 3, 1845.
Ransan v.
Mitchell.

A motion was then made by Mitchell to have the case remitted to the issue-clerks, in order to have an issue prepared to try the question of fraud ; and a counter-motion was made by Ransan for a diligence to recover excerpts from the books of the custom-house and the bonded warehouse, as evidence with regard to the deposition of the cork, and its subsequent removal by Mitchell.

On the 29th January 1845, the Lord Ordinary pronounced the following interlocutor :—"The Lord Ordinary having heard parties' procurators in this conjoined process, and considered the closed record, and having also specially considered the motion on the part of the defender for a diligence to recover evidence of the entries in the books of the custom-house, with respect to the deposit of the cork in question, and subsequent withdrawal thereof by the pursuer, from time to time, for the purpose of consumption, and by which deposit and consumption the defender maintains, in point of law, that the pursuer is barred from refusing payment of the price, and any enquiry into the alleged fraud is superseded ; and also the counter-motion, on the part of the pursuer, to have the case remitted to the issue-clerks, with the view of having an issue prepared, to try the question of fraud now stated against the defender, in the transmission of cork of an inferior quality: Finds, 1st, With respect to the

be liable for the contract price. Nor do the proceedings under the petition, No. 4-5, appear to afford the defender any more effectual protection. Had he procured a warrant from the Court, authorizing him to dispose of the cork in repayment of his advances, he would have stood in a very different position ; as it is, however, all he asked was a remit to skilled persons to value the cork, and that action should be reserved to him against the pursuer. He did not ask, and of course could not obtain, any warrant empowering him to dispose of, or meddle with, the cork in any way ; and if he chose afterwards at his own hand, and without any authority to do so, he must submit to the consequences. The pursuer was entitled either to receive the agreed on price, or, if the cork was not according to the bargain, he was entitled to have it returned to him, that he might make the most of it ; and if the defender, without the protection of the Court, disposed of the pursuer's cork, he must unquestionably pay the agreed on price for it."

No. 130.

June 3, 1845.
Ransan v.
Mitchell.

said motion on the part of the defender, that the said entries, however sufficient to establish the terms of the deposit, and the dates of taking delivery of the cork, would not be conclusive of themselves on this branch of the case, and would leave open much necessary enquiry with respect to the circumstances in which the deposit was made, and also as to the communications which passed between the parties, the state of advances made by the pursuer on account of the cork, and other considerations touching the consumption thereof, as to which there are various conflicting averments on record; and therefore refuses, *in hoc statu*, the said motion on the part of the defender, reserving for him to apply for the said diligence, or for any other diligence which may appear competent at a future stage of the cause. 2dly, As to the motion on the part of the pursuer to remit the case to the issue-clerks, in respect that the averment in the summons raised in this Court, of a fraudulent and dishonest mixing of the cork-wood is made therein, as is admitted in the defences, for the first time, and goes substantially to the voidance of the whole contract; and also in respect that it is competent for the defender to suggest any issue on his part which he may think proper, and which, if suitable, will be allowed by the Court; and finally, in respect that, on approval of the issue or issues, it is competent for the defender to suggest such order in the trial thereof as he may think fit; and that any motion on that subject will be disposed of, when made, in such manner as the Court shall deem just: Before further procedure, remits the cause to the issue-clerks to prepare such issue or issues as may appear proper and necessary for the trial of the question between the parties in this conjoined process."

Ransan reclaimed, and pleaded;—

1. That the remit to the issue-clerks was not the proper course to take in the circumstances of the case, as there was already a sufficiency of facts admitted to be proved, to furnish grounds for its decision; and as he was ready, if it was thought that there was not enough, to supply the deficiency by means of written evidence.

2. That the fact of the pursuer having broken bulk, and consumed part of the goods, rendered the contract binding upon him, and barred him from refusing payment of the contract price; and that it was a sufficient answer even to prevent any enquiry into the alleged fraud on the part of the defender;¹ but that the only grounds on which the charge of fraud was founded, were the averments which the pursuer had already made in the action in the inferior court, where such a charge was not brought; and that the action of declarator and damages was therefore incompetent.

Mitchell pleaded;—

¹ Smith's Mercantile Law, p. 472; Jaffray v. Boag, Dec. 7, 1824, (3 S. 375;) Watt v. Glen, Feb. 6, 1829, (7 S. 372.)

1. That as he had made an averment of fraud on the part of the defender, which must at present be assumed to be true, he was entitled to go to a jury in order to substantiate it. No. 130.
June 3, 1845.
Ransan v.
Mitchell.

2. That the rule that a purchaser by intermeddling with goods, which he had at first repudiated, subjected himself to the contract price, was not inflexible; but that a new contract might be created by implication, by which he would become liable only for the actual value of the remainder.¹

He ultimately admitted at the bar a certified excerpt from the custom-house books, produced by Ransan, showing that the whole of the cork, except forty-one cwts., had been withdrawn from the bonded warehouse by him at different times, and in various quantities.

LORD PRESIDENT.—I think that it is quite impossible to adhere to the Lord Ordinary's interlocutor. After all the proceedings that took place in the inferior court in the first action, is it possible for Mitchell to say that, merely because he now comes forward with broad allegations of fraud in his summons, he can get these mixed up with the original case, and then send the whole question to a jury?

If Mitchell had intended to repudiate the bargain, he should not have touched the cork; but he was not entitled to take as much as would reimburse him for his alleged advances, and say, at the same time, that he did not take it in implement of the contract. By using the goods, he left the ground he at first stated he was to occupy, and adopted the contract.

LORD MACKENZIE.—I am of the same opinion. This appears to be a case by no means an uncommon sort. Ransan says that he sent good cork, while Mitchell says that the cork was bad. Now, suppose that the latter statement were true, and even that bad goods were sent intentionally—What is to be done? Why, just what happens every day—the merchant says I repudiate the bargain, and deposit the goods at your risk. But then, though goods of an inferior quality were improperly sent, prices may rise, and they may consequently become more valuable, and the merchant may take and dispose of them after all. Now, if he did so, could he say that he would repudiate the contract still? But here, Mitchell has taken and used nearly the whole of the cork, which he at first rejected as being of bad quality, and therefore he is not entitled either to refuse implement of his part of the contract, or to claim damages for a fraudulent breach of it on the part of Ransan.

LORD FULLERTON.—Now that the statements of the pursuer, which it was the object of the diligence to establish, are admitted, it is, of course, unnecessary to notice the first part of the Lord Ordinary's interlocutor refusing the pursuer's demand of a diligence.

But, upon considering the facts as we have them established or admitted, I agree with your Lordships in thinking that the last part of the interlocutor must be adhered to; that there is no room for a remit to the issue-clerks; and that we ought once to return to the interlocutor of the Sheriff.

¹ Okell v. Smith, (1 Starkie, 107;) Fleming v. Simpson, 1806, (1 Campbell, 1.)

No. 130.

June 3, 1845.
Ransan v.
Mitchell.

Not that I think the special allegation of fraud may not in some cases be of great importance; as, for instance, where the party taking and using the goods has been thrown off his guard by the representations of the seller, and, relying on his honesty, has dispensed with that caution which he might otherwise have exercised.

All such considerations are clearly out of this case.

Here it is admitted, nay, it is averred and proved by the defender himself, that on the arrival of the goods, his attention was called to their alleged inferior quality; and that he wrote instantly to the pursuer complaining of that breach of contract, and intimating that they were put into the bonded warehouse, where they lay at the pursuer's disposal.

Then, again, the defender refers to the proceedings had on his part before the Sheriff in February 1842—proceedings quite sufficient to show that the defender's attention had been called to the quality of the cork; though I may add, that in my opinion they were from their nature quite irregular, and incapable of raising any presumption whatever against the pursuer. In the first place, the application was certainly founded on a misrepresentation, both of the terms of the bargain, and of the defender's letter. 2dly, And what is of more importance; the prayer is not for a report on the quality of the cork-wood, but merely of its nature, as compared with the sums which the defender had paid for it; and accordingly the report obtained says not one word of the bad quality of the cork-wood, but merely states its nature, as amounting only to £577, and less by £227 than the sum the defender paid for it. It is clear that such a report is quite irrelevant, or it at least proves, not that the cork-wood was of inferior quality, but merely that the defender had paid more for it than it would fetch, at the time of valuation, in the Glasgow market.

But however ineffectual these proceedings were to raise any presumption against the pursuer, they are quite irrelevant, as showing that the defender's attention had been called to the quality and nature of the goods.

Now, if matters had been allowed to remain as they were, the defender might yet have been admitted to prove the inferior quality of the cork-wood; and on that being proved, to annul the bargain.

But it is now established by his admission, that he did not allow the matter to remain as they were, but from the February till the March he continued to use the cork-wood as his own, to take it out of bond, portion by portion, as he wanted it, and to work it up for his own purposes.

I think that, in these circumstances, this is the case where we are bound to apply the ordinary rule, and to hold, that whatever objections the defender might originally have had, he has passed from them, by taking and using the goods. The alleged inferior quality of the goods might have enabled him to repudiate the contract altogether. But by taking and using the goods, to which he had no right but through the contract, he has actually adopted the contract; and the whole admitted facts of the case show that he did so with his eyes open, and quite aware of all the objections which he now seeks to establish.

These considerations seem to me conclusive against the counter-action, which the defender did not bring till after the judgment was pronounced against him by the Sheriff; and which, besides, is founded on an assumption directly disproved by the admitted facts of the case.

The summons is rested on the alleged rejection of the goods by the defender,

and concludes for declarator that the contract came to an end, and that the de- No. 130.
fender is entitled to recover the price which he had paid. It does not say one
word of the defender having taken possession of the goods. In short, it is just June 5, 1845.
the action which the defender would have raised, if the cork-wood were at this Ritchie v.
moment lying in the bonded warehouse. I think it quite clear that the admitted Barclay.
facts of the case are sufficient to bar such an action, and that, therefore, absolvitor
ought to be pronounced on it, while, in the advocacy, the case ought to be re-
mitted simpliciter to the Sheriff.

LORD JEFFREY.—On the whole, I concur with the opinions expressed. I
think that a just and effectual repudiation of the contract at one period took place,
but that that repudiation was afterwards as effectually retracted, and the contract
adopted by Mitchell's breaking bulk, and disposing of the cork without a legal
warrant. At one time I perplexed myself with one extreme hypothetical case. I
supposed a fraud more gross than that which is alleged to have been committed
here, for here there is nothing extravagantly fraudulent pretended. Suppose
one man writes to another to send him a service of silver plate, and advances
money to procure it, and then, when it is sent home, finds out that it is only plated
tin, and not silver at all. It occurred to me, in a case of this kind, would the
mere omission to obtain the authority of a magistrate, in the event of his having
rashly said that he held the base stuff at the risk of the other party, and then pro-
ceeding to sell it for what it would bring, bind him to the terms of the contract,
and prevent him from bringing an action for repetition? I would have hesitated
to say that it should. But, looking at a common case of this kind, I hold the
doctrine laid down in the books to be sacred, that if you make use of the goods
sent to you, notwithstanding an allegation of the inferiority of their quality, and
consequent breach of the bargain, you have made your election, and must stand
by the contract.

THE COURT accordingly recalled the interlocutor of the Lord Ordinary in
the advocacy—repelled the reasons of advocacy—and, in the action of
damages, sustained the defences, and assoilzied the defender.

W. A. G. and R. ELLIS, W.S.—JOHN CULLEN, W.S.—Agents.

MARY RITCHIE OF ALCOCK, and JOHN GILBERT, her *Curator Bonis*, No. 131
Pursuers.—*G. G. Bell—Pattison.*
JAMES BARCLAY, Defender.—*Solicitor-General Anderson—Patton.*

Husband and Wife—Forum Competens—Curator Bonis.—Circumstances in
which held, that a married woman, living separate from her husband, and engaged
in the management of her own heritable property, with the assistance of a *curator*
bonis, could be competently sued in an action of damages founded upon an act per-
formed by her in the course of her management.

June 5, 1845.

In 1837, the pursuer, who was born in Scotland, was married in Eng- 1st Division.
land to Ralph Henry Alcock, at that time a domiciled Englishman. By Lord Wood.
W.

No. 131. an antenuptial marriage contract, Mrs Alcock conveyed certain heritable subjects belonging to her, situate in Dundee, to trustees for her own behoof, excluding her husband's *jus mariti*; but the trustees nominated in the deed having refused to act, a *curator bonis* was appointed in their place.

June 5, 1845.
Ritchie v.
Barclay.

Soon after their marriage, Mrs Alcock and her husband came to Dundee, and resided there some months, when Mr Alcock returned to England. In the summer of 1839 he came back to Dundee, and resided there till January 1840, when he again returned to England; and since that time the pursuer and he have lived separately.

Mrs Alcock, in the year 1839, with the concurrence of her then *curator bonis*, let one of her houses in Dundee to the defender Barclay; but, about the removing term of Whitsunday 1840, she ejected him from possession, in such a manner as to lead him to adopt legal proceedings against her.

In November 1840, he brought an action in the Bailie-court of Dundee, to which he called as parties, Mrs Alcock, her husband, and her then *curator bonis*, Edmund Baxter; concluding in his summons, upon the narrative of certain violent and illegal acts on the part of Mrs Alcock, for the sum of £50, in name of damages and *solatium*. The execution of this summons bore that the messenger had left a copy of it, with a copy of citation, "for each of the said Mrs Mary Ritchie or Alcock, Ralph Henry Alcock, and Edmund Baxter, in the hands of a servant, within their respective dwelling-places in Dundee."

Mrs Alcock and her *curator bonis* appeared and defended this action, but stated no objection to the execution as incorrect or defective, nor to the jurisdiction of the magistrates to entertain the case.

A proof having been led, the magistrates decerned against Mrs Alcock for the sum of £50, with expenses; but the decree prohibited execution against her person during the subsistence of the marriage, and restricted it to the separate property belonging to her, from which the *jus mariti* was excluded. Barclay gave a charge upon this decree, and raised letters of horning, which bore to proceed upon an extract of it, "shown to the Lords of our Council and Session," and to be issued, "because the Lords have seen the precept above mentioned;" but the letters themselves did not make mention of a precept.

Mrs Alcock brought the present action of reduction of the decree, and the letters of horning proceeding upon it, concluding that they should be set aside on the grounds, *inter alia*—1. That the letters of horning were disconform to the warrant upon which they bore to proceed. 2. That the magistrates of Dundee had no jurisdiction over her, in respect that her husband was a domiciled Englishman at the time of the action. 3. That her husband was not properly called as a defender for his interest, as he was not resident in Dundee at the time when the summons was executed. 4. That her *curator bonis* being an officer appointed by the Supreme

Court, was amenable to its jurisdiction only, and not to that of any inferior court. No. 131.

Defences having been given in for Barclay, and a record made up, Mrs Alcock pleaded;— June 5, 1845.
Ritchie v.
Barclay.

1. That the letters of horning called for are null and void, and reducible, being disconform to the warrant, and bearing to proceed in respect of the Lords having seen “the precept above mentioned,” while the letters in their narrative contain no mention of any precept.

2. That the legal domicile of the pursuer, Mrs Alcock, being that of her husband, and he being at the date of the action domiciled in England, the Bailie-court of Dundee had no jurisdiction to entertain the action, and the decree called for is therefore null and void.

3. That the pursuer being a married woman, could not competently be sued without calling her husband as a party, and duly citing him; and he not being resident in Dundee at the time, nor for eleven months preceding the date of the action, could not be, and was not, cited to the action. The decree is therefore null and void, as proceeding against a married woman without any citation against her husband.¹

4. That the action in the inferior court having been directed against the pursuer's husband, as well as the pursuer, the defender cannot now be allowed to maintain or plead that the action was good without citing him, or making him a party.

5. That the *curator bonis* of the pursuer, Mrs Alcock, being an officer appointed by this Court, was not amenable to the jurisdiction of the Bailie-court of Dundee, or of any inferior court, and the action which was directed against him, was therefore null, for want of jurisdiction. His appearance to protect the trust-estate under his charge did not supply the place of the pursuer's husband as a *curator ad litem* to her.

Barclay pleaded;—

1. That no objection having been taken in the inferior court on the ground of defective citation, or defective jurisdiction, and issue having been joined, and a proof led upon the merits, without any statement of these preliminary and properly initial pleas, these objections cannot now be competently stated.

2. That the action having arisen out of personal and individual actings of the pursuer, in violation of a contract of lease entered into with her, and with reference to property of which she has the exclusive right of property and management, the proceedings were rightly instituted and proceeded in against her, even although her husband should not have been properly cited, more especially, seeing that her *curator bonis* was so called.²

¹ Freebairne, Dec. 8, 1749, (M. 6080.)

² Churnside v. Currie, July 11, 178, (M. 6082;) Orme v. Differs, Nov. 30, 1833, (12 S. p. 149.)

No. 131.

June 5, 1845.
Ritchie v.
Barclay.

3. That the institution of the present action by the pursuer, with concurrence of her *curator bonis*, and without the concurrence of her husband, is conclusive in a question with the pursuer, as to the proper citation of parties in the court below.

4. That the magistrates had sufficient jurisdiction to try the question brought before them, both with reference to the nature of the action itself, the residence and true domicile of the pursuer within the royalty, her state of separation from her husband, and her possession of her subjects there; and the *curator bonis*, as administrator of an estate situated within the royalty, and as resident there, was competently and properly called as a party.

5. That the pursuer must be held to have been responsible for her violation of the contract of lease, and her individual misconduct in the Scotch courts, and if so, the proceedings actually adopted must be held good, it being impossible to have effectually called her husband, who was a foreigner, without effects, real or movable, within Scotland.

On the 21st December 1844, the Lord Ordinary pronounced the following interlocutor:—"Repels the first reason of reduction; also repels the reason of reduction founded on the want of jurisdiction in the burgh court over the pursuer, Mrs Alcock, in the action brought against her at the instance of the present defender, James Barclay, which plea of want of jurisdiction is insisted in for the first time in the present process, and the decree in which action prohibits execution against the person of the said pursuer during the subsistence of her marriage, and thereby restricts it to execution against her separate estates enjoyed by her, exclusive of her husband's *jus mariti* or right of administration; and repels also the reason of reduction founded on the ground that Ralph Henry Alcock, the husband of the pursuer, had no dwelling-place in Dundee at the date of the execution of the summons against him, in respect of the *ex facie* regular execution produced, of which no reduction has been brought: And further, *separatim* and *esto*, that the said alleged falsehood in the execution of the summons against the said Ralph Henry Alcock could competently be enquired into in the present process without the necessity of a reduction; and assuming it was true that the said Ralph Henry Alcock had no dwelling-place in Dundee at its date, repels the reason of reduction founded on the allegation that he, the said Ralph Henry Alcock, was not regularly made a party to the foresaid action, in respect that, in the circumstances, it was not necessary, in order to enable the said action to be proceeded with, that he should be made a party to it; and, before further answer, appoints the case to be enrolled."

The pursuer reclaimed.

A doubt was raised at the bar, whether there was sufficient evidence on the record of the pursuer's husband never having been in Dundee after the month of January 1840—and consequently, whether the execution of the citation returned by the messenger as against him, were false? And

the further question was raised, assuming that the execution was false, No. 131. whether the objection could be pleaded incidentally, or a separate action of reduction would be necessary to set it aside.

June 5, 1845.
Ritchie v.
Barclay.

LORD PRESIDENT.—I am for adhering to the substance of the Lord Ordinary's interlocutor. I think that the cases of Churnside and Orme ought not rashly to be disturbed; and particularly that of Orme, which was decided after a consideration of all the doubts of Professor Bell, as to the propriety of the decision in the case of Churnside. This woman is proved to be the proprietor of heritable subjects, and to be in the management of them, having let them in her own name; and was it a good defence, then, against an action raised in consequence of her violent acts in the administration of her property, to deny the application of the cases, and say that she is not liable because she is a married woman, that her husband is a domiciled Englishman, and that he has not been properly cited?

LORD MACKENZIE.—I am of the same opinion. I think the point was decided *a fortiori*, by the cases of Churnside and Orme. There diligence against the person of the wife was allowed; but here the decree is limited to her property. In Churnside's case, the wife was carrying on a trade; and here she has a most particular employment. She is engaged, with the concurrence of a *curator bonis*, in the management of her own property, her husband being excluded from it; and in the course of this she commits a wrong. Now, if she is not liable to an action in consequence of this, she is not capable of bringing one; and how, then, is she to manage her business, in which it may be necessary to bring actions of removing? I do not go on the ground of her conduct amounting to a delict, because the action against her was not a penal one, but merely a civil action of damages; but I go on the authority of the cases of Churnside and Orme. The doctrine, that the husband's domicile is that of his wife, must be taken with qualifications. Can the pursuer here live separate from her husband, and commit all kinds of wrongs with impunity, unless her husband is called as a party to the action; or, on the other hand, is she incapable of pursuing an action for a wrong done to herself, without her husband's concurrence?

LORD FULLERTON.—I cannot help thinking that it would, to say the least, be highly inexpedient to take up and decide on that ground of defence which has been mainly relied on by your Lordships; while the other, and what I must consider the prejudicial question, remains undetermined—I mean the question of jurisdiction, turning on the fact of the domicile of Alcock, the pursuer's husband.

The original action was an action of damages directed against the present pursuer, and her husband for her interest; and the messenger's execution in that action bears that the summons was executed against both defenders, at their respective dwelling-places in Dundee. Now, if this had been correct, there would be an end to the question of jurisdiction, because there can be no doubt, that if both husband and wife were resident in Dundee, whether separate or together, the citation was effectual.

Accordingly, the Lord Ordinary has given effect to that, among other grounds of decision, resting on the general rule, that the messenger's execution must, until set aside by reduction, be held as true.

But there is in this case a specialty, which would go far to take it out of that general rule—viz. that in the record in this action, the defender has made the

No. 131.

June 5, 1845.
Ritchie v.
Barclay.

admission, or made statements, which, in fair computation, amount to an admission, that at the date of the original action the husband was not resident in Dundee, but in England. And I think admissions of that kind, which are truly admissions of the falsehood of the messenger's execution, must render unnecessary a challenge in the form of reduction to prove that falsehood. At any rate, these statements, if not held absolutely conclusive, surely entitle the pursuer, even at the close of the proceedings, to bring a reduction in order to remove any difficulty of form which may be supposed to exist.

I am the more inclined to have the point of the husband's domicile cleared up, as, I confess, I have the greatest doubts of the soundness of the other ground of defence sustained by the Lord Ordinary, and confirmed by the opinions of your Lordships, viz. that, in the circumstances of this case, there was no necessity for calling the husband at all; and that an action against a married woman, in which the husband is not called, and in which no *curator ad litem* was appointed, was a competent procedure, and beyond the reach of reduction.

And here I am willing to assume what the defender strongly presses in this part of his argument, though it is stranglely at variance with another part of his case, relating to the jurisdiction, viz. that the wife was living in Dundee, while the husband had no residence there, but was truly resident in England. There is, however, no averment, either that there was any deed of separation, or that the wife had assumed *de facto* a separate status, by carrying on a trade in her own name. All that is said is, that she had a separate property in Scotland, in regard to which the husband's *jus mariti* was excluded.

Now, I do not adopt the argument of the pursuer, that no action could be brought against her in Scotland, because her husband's domicile was England. I rather think the original action, being an action of damages against her for an act of violence done by her while resident in Dundee, should be brought against her in her own domicile. But then she, being a married woman, could not, according to the ordinary rule, be brought into Court, unless either her husband, in his absence, a *curator ad litem* appeared in protection of her interest. But the husband cannot be held to have been effectually summoned, unless on the supposition that Dundee was his domicile as well as hers. The Bailies of Dundee had no power to call a foreigner, which can only be done by the Supreme Court.

And this consideration removes the difficulty supposed to arise from the alleged responsibility of a married woman from claim of damages, if her husband is out of the country.

In the first place, he may be lawfully cited by the Supreme Court; and, secondly, at all events his absence may be supplied by the appointment of a *curator ad litem*.

So that the question comes to this, can there be, by the practice of the country, a good judgment against a married woman, in the pursuer's circumstances, without the appearance either of her husband or a *curator ad litem*? I have the greatest difficulty in adopting the affirmative, which appears to me to be contrary both to principle and practice.

The general principle is, that a married woman, like a minor, or other person under curatory, cannot be effectually decerned against, unless assisted by the appearance either of her legal guardian, or a *curator ad litem* appointed to supply

her place. And I rather think that in practice this form is, with the exception of No. 131. some very special cases, uniformly followed.

The question raised in the cases referred to, those of Churnside and Orme, was different. There the only point was, whether a personal obligation, granted by a married woman, did or did not warrant personal diligence against her. And the Court found that, in the particular circumstances of these cases, it did.

Here the point is, Whether an action for constituting a personal obligation against a married woman, undisputed either by her husband or a *curator ad litem*, is good? The two points are different. If the obligation be validly contracted by a married woman, those cases fix that, in certain circumstances, personal diligence may follow, but they do not determine by what form of legal procedure an obligation may be validly constituted against a married woman. The case of Murray may illustrate this distinction. A minor may, in some cases, validly contract personal obligations, and those obligations may and will warrant personal diligence; but if action at law is necessary to constitute such obligations, I am not aware of any case in which it has been found that the appointment of a *curator* could be dispensed with.

The calling of the *curator bonis* in the original action will not remove the difficulty. The *curator bonis* had been previously appointed by this Court, merely to act in regard to the separate trust estate, in place of the trustees, who had declined. He could in no sense be held to be the guardian of the married woman who happened to be interested in that estate, any more than the trustee could have been so held, if he had accepted.

On these grounds I am rather inclined to think that the decret against the present pursuer cannot stand.

LORD JEFFREY.—I concur in the opinion of the majority of your Lordships, and I confess I am not much moved by Lord Fullerton's difficulty, as to deciding the case without disposing of the question as to the sufficiency of the citation; but if it would be any relief to my brother, I would propose to recal that part of the Lord Ordinary's interlocutor, finding the reason of reduction, grounded on the want of proper citation, not to be good. (The Solicitor-General, for the pursuer, were consented to the recal of the third finding of the Lord Ordinary's interlocutor.)

Upon the remaining point, I am, on the whole, sufficiently satisfied with the judgment proposed. I think that the principle of the cases of Churnside and Orme applies to the present case. I believe that that principle was intended both for the benefit of women living apart from their husbands, and for the interests of commerce; and that when the husband is living apart, it is *debitum justitie* that action should go against the wife. I think that the principle of these decisions applies to this case, because here the wife was manager of her own estate, from which her husband was excluded both by the marriage-contract and by the appointment of a *curator bonis*. It is admitted that she proceeded *propria persona* to let the houses, and then she proceeds *via facti* to eject a tenant. Now, can she proceed in the removal without the consent of her husband, and at the same time say that she is entitled to suspend the proceedings against her, unless her husband is called as a party to the action?

I do not think that it is in all cases necessary that a *curator ad litem* should be appointed, in order to render proceedings against a wife competent, without the

June 5, 1845.
Ritchie v.
Barclay.

- No. 131. convention of her husband, who may live in some unapproachable region. I incline to the opinion of Lord Mackenzie, that the cases of Churnside and Orme apply *a fortiori*, and do not participate in Lord Fullerton's doubt; for in them personal diligence against the wife was found to be competent, while here decree was asked against her separate estate only.

June 5, 1845.
Carnegie v.
MacTier.

THE COURT pronounced an interlocutor, recalling of consent the third finding of the Lord Ordinary's interlocutor, repelling the reason of reduction, founded on the ground that the pursuer's husband had no dwelling-place in Dundee at the time of citation; and, *quoad ultra*, adhering to his judgment.

SANG and ADAM, S.S.C.—ANDREW MURRAY, W.S.—Agents.

- No. 132. SIR JAMES CARNEGIE, Baronet, Pursuer.—*Rutherford—Ingis*.
ANTHONY MAC TIER, Defender.—*Sol.-Gen. Anderson—Currie—Macfarlane*.

Expenses—Process—Jury-Trial—Bill of Exceptions—Title to Defend.—In an action regarding the property of a tract of ground, the pursuer, in the course of a jury-trial, took an objection to the defender's title to prove possession; the objection having been sustained, a verdict was returned in the pursuer's favour, but it was subsequently overruled on a bill of exceptions, and a new trial was granted; at the second trial the pursuer was successful; in disposing of the question of expenses—1. Held, that the objection to title should have been pressed by the pursuer to a decision before the trial, and that the defender was therefore not liable in the expenses of the first trial, though he was not entitled to payment of them. 2. Held, that neither was the defender liable in the expenses of the bill of exceptions, in which he had been successful, but as his success on the question of title was fruitless, he was not entitled to claim payment of these expenses.

June 5, 1845. SEQUEL of case reported ante, Vol. VI. p. 1381.

2D DIVISION.
Lord Justice-
Clerk.
Jury Cause.

This action between Sir James Carnegie, the proprietor of Strachan and Culpersach, and Mr Anthony MacTier, the proprietor of Durris, related to a tract of ground which was claimed by the former in exclusive property, and by the latter in common property with Sir James, or alternatively to the extent of a servitude of pasturage over it. Issues having been adjusted, and the case having proceeded to trial, the pursuer, Sir James Carnegie, at the trial took the objection, that Mr MacTier had not produced a sufficient title on which to establish, by the possession which he proposed to prove, either a right of common property or a right of servitude. The presiding Judge having intimated that he would direct the jury to that effect, the defender declined to proceed with his parole proof, and a verdict was returned for the pursuer.

The defender having excepted, the discussion, formerly reported, took place under the bill of exceptions, when the exception was sustained, and

the case was sent a second time to trial. On the second trial, a verdict No. 132. was returned for the pursuer.

Before the issues were adjusted, the pursuer had brought the point of title under the consideration of the Lord Ordinary, but his Lordship had refused, in hoc statu, to pronounce a judgment finding that the defender was excluded by his titles. The pursuer did not again raise the question for discussion till the objection was stated at the trial.

June 5, 1845.
Carnegie v.
MacTier.

Sir James Carnegie now moved the Court for the expenses of process generally.

Mr MacTier, on the other hand, claimed the expenses incurred at the first trial, in so far as not available for the second trial; and also the expenses of the bill of exceptions.

He pleaded;—

The question of title was one which the pursuer should have raised before allowing the issues to be adjusted, or, at all events, before trial; and he had ample opportunity of doing so, as all the titles were in process. He had pleaded the objection at the trial, and had succeeded in having it sustained, and thus obtained a verdict in his favour; but he was unsuccessful in supporting it under the bill of exceptions, and a new trial was accordingly granted. The defender was thus put in the same situation in which he was before the plea was stated. The whole question of title was a separate and incidental discussion, the expenses of which were to be regulated by its own merits. The pursuer had been unsuccessful. He had occasioned great expense to the defender by raising and maintaining an erroneous plea, and he ought, therefore, to be found liable in these expenses; or, at all events, the defender ought to be relieved from payment of any part of them.

The pursuer pleaded;—

That he had raised the point before the Lord Ordinary, who had refused to dispose of it hoc statu, which meant that it was reserved till some after stage, and till some change had taken place in the state of the cause. The only proceeding which had taken place after that, was the adjustment of the issues, so that the first opportunity of stating the objection that occurred was at the trial. At the second trial the pursuer had been completely successful on every point, and the pretensions of the defender had been found to be groundless. He was, therefore, entitled to the whole expenses of the action.

After delaying to consider the point, the Court advised the case of this date.

LORD JUSTICE-CLERK.—The Court are all agreed as to the interlocutor now to be pronounced. Sir James Carnegie has prevailed in the action, and we therefore find, that he is entitled to the expense of the record, of the trial, and of the necessary preparation for it. But Mr MacTier claims payment, or at least to be relieved, of the expenses of the first trial. This raises an important question.

No. 132. We think that he is entitled to be relieved from these expenses. We do not think he is entitled to payment of them. The question of title ought to have been disposed of before the trial, more peculiarly in this case. The pursuer had raised the point before the Lord Ordinary, who refused to dispose of it *hoc statu*. When the issue came to be prepared, he ought undoubtedly to have raised it again. It was not excluded by the form of the issues. The defender never contended at the trial that it was incompetent on this ground. I think that it is a wholesome principle, that where a party has an objection to title, which is separable from the facts of the case, it should be raised before the trial. If this is not done he must take the consequences. The next question is with regard to the expenses of the bill of exceptions, and the discussion before the Lord Ordinary. I acquiesce in the view of the Court, that the defender should be relieved from these expenses; but, as this discussion has been a fruitless one, that he has no claim for payment of these expenses.

The other Judges concurred.

THE COURT pronounced this interlocutor:—"Find Sir James Carnegie entitled to expenses generally in the actions, but exclusive of those of the discussions on the question of title, those of the first jury-trial and preparation thereanent, excepting in so far as made available to him in the second trial, and those of the discussion on the bill of exceptions taken at the first trial."

THOMAS MACKENZIE, W.S.—GRAHAM and ANDERSON, W.S.—Agents.

Authorities.—Hamilton v. Hope, (4 Murray, 222;) Leighton v. Neilson, 21d February 1844, (ante, Vol. VI. p. 728;) Opinion of Lord Justice-Clerk—former Report, (Vol. VI. pp. 1388-9.)

No. 133. MAGISTRATES OF CAMPBELTON, Pursuers.—*G. G. Bell.*
D. S. GALBREATH, Defender.—*Sol.-Gen. Anderson—Macfarlane.*

June 5, 1845. *Expenses—Process.*—In an action where certain of the defenders, after proceeding for some time with the case, consented to decree being pronounced in terms of the conclusions of the libel, the pursuer taking no finding of expenses against them, and the remaining defender continued to resist the action, but was unsuccessful;—In disposing of the pursuer's claim for expenses, the Court deducted one-half, (exclusive of the expenses specially applicable to the appearance of the defenders, who had compromised,) as the sum of which the other defender would have been relieved by his co-defenders, had the pursuer not passed from his claim for expenses against them.

FERRIERS and DUFF, W.S.—LOCKHART, HUNTER, and WHITEHEAD, W.S.—Agents.

EDWARD CONNELL and JOHN WRIGHT and MANDATARY, Suspenders and Pursuers.—*Penney—Inglis.* No. 134.

THE RIVER CLYDE TRUSTEES, Respondents and Defendants.—*Sol.-Gen. Anderson—Maitland—Mackenzie.* June 6, 1845.
Connell v.
River Clyde
Trustees.

Statute, Construction of.—Clauses of a local act, and circumstances under which held, 1. That the trustees appointed by it, who were empowered to acquire certain lands for the improvement of the navigation of the river Clyde, were not entitled, by means of the compulsitors conferred by the Act, to take possession of part only of the ground belonging to certain proprietors included in the plan referred to in the Act, but are bound to take the whole. 2. That an offer by the trustees to purchase certain subjects for the purposes of the Act, was a taking of them under it, which entitled the proprietors to have them valued by a jury.

By the 3 and 4 Victoria, c. 118, passed on the 4th August 1840, for June 6, 1845.
the “further deepening and improving the river Clyde, and enlarging the harbour of Glasgow,” the trustees appointed by it were empowered, upon indemnification to the owners, “to enter upon, take, occupy, and use,” the lands and other heritable subjects, upon, through, or adjoining which the improvements authorized were intended to be made, within certain boundaries or lines laid down in a relative map or plan of the projected works. It was provided by the 13th section of the Act, “That the said trustees, in executing the works and improvements hereby authorized, shall not deviate more than twenty yards from the boundaries or lines of works delineated or described on the said map or plan, to the east of the river Cart, and forty yards to the west of the said river.” 1st DIVISION.
Lord Wood.
W.

By the 15th section it was provided, that the trustees should have no right to acquire ground for the purposes of the Act without the consent of the owners, unless they should “actually and *bona fide* proceed to take, acquire, or occupy” the same, within three years of the passing of the Act.

The 90th and 91st sections contained provisions for the voluntary conveyance of lands to the trustees for the purposes of the Act, and for the fixing of the sums to be paid as the price thereof, and for damages arising from the contemplated operations.

By the 94th section of the statute, it was declared, “That in case the price or value to be paid for any lands, tenements, or other heritages, taken or used for the purposes of this Act, cannot be settled, adjusted, and agreed upon by arbitration or otherwise, by and between the said trustees or their agents, and the proprietors or occupiers thereof, and persons interested in such lands, tenements, or other heritages; or if any such proprietors or occupiers of, or persons interested in such lands, tenements, or other heritages, shall, for the space of one calendar month, after

No. 134.

June 6. 1845.
Connell v.
River Clyde
Trustees.

notice in writing given to the principal officer or officers of any bodies politic, corporate, collegiate, or to the proprietors or persons interested as aforesaid, or left at the last or usual place or places of his, her, or their abode ; or in case such proprietor or person be absent, or not known, with his, her, or their factor, or known agent ; or if there be no such factor or agent, then with the tenants and occupiers, or any of them, of such lands or other heritages, neglect or refuse to treat, or shall not agree with the said trustees, or by reason of absence shall be prevented from treating, or through disability cannot treat for themselves, or make such agreement as shall be necessary for enabling the said trustees to proceed in widening, deepening, and improving the said river, enlarging the said harbour, or constructing the said wet-docks, wharfs, and other works, or shall not produce and evince a clear title to the premises in dispute, or to the interest which they claim therein, to the satisfaction of said trustees ; or if the said trustees shall, for the space of one calendar month, after notice in writing given to their clerk or treasurer for the time being, by any proprietor or occupier of, or persons interested in, any lands or heritages taken or used for the purpose of this Act, neglect or refuse to treat with such proprietor or occupier, or other person, or cannot agree with him, then and in every such case, the said trustees, or the proprietor or occupier, or other person interested in, or entitled to such lands or heritages, shall be, and they are hereby respectively empowered to make application, in writing, to the Sheriff of the county within which such lands or heritages may be situated, for the purpose of having such price or value ascertained by the verdict of a jury."

Edward Connell and John Wright were proprietors of certain heritable subjects on the south side of the Clyde, situated within the limits of the plan referred to by the Act, and described in the schedule and book of reference.

On the 26th May 1843, the secretary to the Clyde Trustees addressed a letter to Messrs Connell and Wright, by which, referring to the Act of Parliament, he, as authorized by the trustees, made an offer to them of the sum of £4700 for a portion of their property, containing 4281 square yards, lying within certain boundaries specified in the title, and marked on a plan, by which it was accompanied. The letter concluded in the following terms :—

" And I hereby certiorate, and give notice, that if you neglect or refuse to treat, or shall not agree with the said trustees, or by reason of absence shall be prevented from treating, or through disability cannot treat as prescribed by the said Act, or shall not produce and evince a clear title to the premises, or to the interests claimed by you therein, to the satisfaction of the said trustees, or any right of property and interest belonging to you, in the said subjects, within one calendar month from the date of these presents being served on you, the said trustees shall,

under the foreshaid Act of Parliament, make application to the Sheriff of Lanarkshire, for the purpose of having the value and amount of compensation due or payable to you, in respect of the said subjects, ascertained, assessed, and fixed by the verdict of a jury, in manner provided by the Act

No. 134.
June 6, 1845.
Connell v.
River Clyde
Trustees.

"I beg you to acknowledge receipt of this offer and notice.

(Signed) "A. TURNER,
Secretary to the Clyde Trustees."

The boundaries of the portion of ground thus proposed to be purchased did not coincide with the line laid down in the Parliamentary plan, and fell considerably within those of the subjects authorized to be taken by the Act.

Connell and Wright presented a note of suspension and interdict, praying for a suspension of the proceedings of the trustees under the letter, and for an interdict against their proceeding to take or occupy the property, or having its value fixed by jury trial. Interim interdict was granted by Lord Wood, and the note of suspension, with answers, reported to the First Division, who, on the 12th of July 1843, unanimously passed the note, and continued the interdict.

After this judgment was pronounced, a second letter was addressed to Connell and Wright by the secretary for the trustees, dated the 1st August 1843, three days from the expiry of the three years within which the trustees were authorized by the Act to acquire lands without the consent of the owners.

This letter contained an offer of £14,000 for the whole of the subjects belonging to Connell and Wright situated between the Clyde and the boundary line of the proposed operations fixed by the statute. The greater part of this letter was in precisely the same terms as the former one, the offer being made, with reference to the Act, by the secretary, "as authorized by the trustees appointed by or acting under the said Act, and in terms thereof;" but it did not conclude, like the first, with a notice of the intention of the trustees, in the event of the offer being refused, to apply to have the value of the ground fixed by a jury.

Connell and Wright returned an answer on the 3d of August, declining the price tendered; but to their refusal it was added,—“But at the same time we now specially intimate to you our willingness to have the whole claims of the said Edward Connell and John Wright ascertained and decided upon by a jury; and to consent to an application in the usual form to the Sheriff to summon a jury, to meet on the 11th, 12th, or 13th of September first, or any other suitable day between the 12th and 25th of that month, being at the distance of the thirty-nine days allowed by the Act of Parliament for parties to prepare for the trial; and we further give you notice, that, after this intimation, we will

No. 134. hold ourselves entitled, if needful, to become pursuers of the action in question before said jury, and to apply to the Sheriff to empanel a jury."

June 6, 1845.
Connell v.
River Clyde
Trustees.

On the 4th of August, Connell and Wright presented a petition to the Sheriff, craving the statutory valuation by a jury; and this petition having been served on the trustees, parties were appointed to be heard before the Sheriff, with a view of fixing a day for the trial.

The trustees argued, that the 1st August must be regarded as a conditional offer, contingent upon the question of the validity of the offer of 26th May; and, therefore, that they were entitled to have the proceedings under the petition sisted, until the issue of the process of suspension and interdict, then pending in the Court of Session.

The Sheriff pronounced an interlocutor giving effect to the argument, and sisting proceedings until the determination of the question in the sequestration and interdict.

Connell and Wright then raised an action of declarator against the trustees, as represented by their secretary, to have it found and declared "that, according to the true intent and meaning of the said Act of Parliament, the said trustees are bound to take the whole ground and subjects belonging to the pursuers, within the said Parliamentary line, as described in the said offer by the said trustees of 1st August 1843, expressly and absolutely, and not contingently or conditionally; And that the said offer of 1st August last not only supersedes and withdraws the former offer of 26th May last, but is, in the sense of the said Act, equivalent to the trustees' acquiring and taking possession of the said whole ground and subjects belonging to the pursuers within the said Parliamentary line, and described in the said offer: And further, that, in regard the price or value of the said ground and buildings cannot be settled, adjusted, and agreed upon by and between the said trustees and the pursuers, the price or value of the said ground, buildings, and pertinents, and the compensation and damage payable to the pursuers, therefore fall to be forthwith ascertained and determined by the verdict of a jury before the said Sheriff, in terms of the said Act, and that, in virtue thereof, and more especially of the said 94th section, the pursuers are entitled to have an immediate trial for that purpose, and to stand as pursuers in said trial."

The summons also contained conclusions for setting aside the judgment of the Sheriff sisting the procedure, should that be considered necessary or proper; and for damages for the loss "already sustained, and still to be sustained," by the wrongful delay and refusal of the defenders to have the value of the subjects ascertained in the manner prescribed by the Act.

Defences were given in to this action, which were then conjoined with the suspension and interdict already in dependence; and a record having

been made up in the conjoined process, cases were ordered by the Lord Ordinary. No. 134.

The pursuers pleaded ;—

1. That the Clyde River Trustees were not entitled to take or acquire property except for the purpose of the works authorized by the statute ; that they were precluded from taking partial possession of the ground within the Parliamentary lines, and were bound to take the whole of it, or none, except under the right of deviation provided by the Act. That, therefore, the offer made by the trustees on the 26th May 1843, to take part of the pursuer's ground only, was unwarranted and incompetent under the Act.

2. That the offer made by the trustees on the 1st August 1843, for the whole of the ground belonging to the pursuers, which was a regular and formal offer, according to the construction of the Act, was a departure from and abandonment of the previous offer of the 26th May, and was, by itself, equivalent to the trustees acquiring and taking possession of the property ; and that the offer thus made required no express acceptance to render it final and binding on the trustees, the statute itself, in such circumstances, accepting for the proprietor, and completing the contract.¹ That the trustees were bound to have followed up this offer by a valuation of the subjects by a jury, and were not entitled to have the proceedings under it suspended and delayed, to the damage of the pursuers ; because, under the statute, every offer must be express and absolute, and there cannot be a contingent or conditional one ; and that they, having failed to do so, the pursuers were entitled to make an application for a jury trial, and to have that trial immediately proceeded with.

The trustees pleaded ;—

1. That, according to the sound construction of the Act, they were entitled to acquire the portion of ground specified in the statutory notice of the 26th May ; and that the pursuers had no right, either at common law or under the statute, to compel them to purchase the whole of the ground within the bounds of the Parliamentary plan.

2. That the offer in the letter of the 1st August was extrajudicial, and formed no abandonment of the previous statutory notice ; and that the pursuers having rejected it, they, the trustees, on the one hand, were not bound to follow it up by an application to the Sheriff for a jury trial ; nor were the pursuers, on the other, entitled to make such an application, because, 1. no statutory notice had been given by them under the

June 6, 1845.
Connell v.
River Clyde
Trustees.

¹ Rex v. Hungerford Market Company, (4 Barn. and Adolph. p. 327 ;) Stone v. Commercial Railway Company, (1 Nicol and Hare's Railway Cases, p. 315.)

No. 134. 94th section of the Act; and, 2. the ground had not been "taken or used" in the sense of, or for the purposes of the Act.

June 6, 1845.
Connell v.
River Clyde
Trustees.

The Lord Ordinary reported the case, accompanying his interlocutor with the subjoined note, which further explains the views and arguments of the parties.*

* "NOTE.—This case, which is one of considerable importance, having, to a certain extent, been previously before the Court, and it being the intention of the parties, in whatever way it may be decided, to take the interlocutor to review, (for which purpose the revised cases have been already printed,) the Lord Ordinary has reported the cause without pronouncing any interlocutor; but he has explained, in the following note, the views which he entertains of the questions at issue.

"In the suspension, the Lord Ordinary concurs in the view taken by the Court, of the point which it presents for decision, when it was before their Lordships on the note of suspension and answers.

"Referring to the first conclusion of the process of declarator and reduction, it will be seen that the leading and essential question which the action involves, relates to the true character and effect of the offer of the 1st of August made by the defenders to the pursuers, and the rights thereby conferred on the parties respectively.

"The defenders, in their case, argue at some length that they ought to be absolved from the whole conclusions of the declarator, because the pursuers cannot compel the trustees (defenders) to acquire the whole of their ground within the Parliamentary line. It is not apparent how this bears on the conclusion of the declarator. It seems to proceed on a misapprehension of the position there taken by the pursuers. The pursuers do not say that the statute gives them a power, independent of any move on the part of the defenders, to force upon them the purchase of the pursuers' property. They only say, first, in the suspension, that the defenders cannot take a part of that portion of their property to which the Act applies, or at least cannot take a part manifestly insufficient to execute the improvements specified in the Act; and, second, in the declarator, that by making the offer of 1st August, the defenders have bound themselves to take the whole absolutely, and not contingently or conditionally; and that, in the sense of the Act, there has, by the said offer, been a taking of the pursuers' property sufficient to warrant the proceedings authorized by the 94th section. There is no abstract point raised, that, without any initiative by the defenders, they could be compelled to take either the whole or a part.

"Then, upon the operation and effect of the offer of the 1st August, which the defenders chose to make, whereby they were proceeding *activé*, (which the statute entitles them to do, although it gives no power to the opposite party to compel them so to do,) the Lord Ordinary, as at present advised, is of opinion, that looking to the prior correspondence of the parties, in which the defenders had been certiorated that no offer could be received except one under the statute—to the time at which the offer was made, being three days before the date when the period would have elapsed beyond which no offer could be made at all—to the terms of the offer itself, in which not a hint is given that it was to be received merely as a proposal for a private or voluntary purchase, to be accepted or rejected as such, it must be held to be a statutory offer, which laid a proper foundation for the proceedings made competent by the statute to follow thereon, and not an *extrajudicial* offer, to be the basis of a private voluntary agreement only, and which fell to the ground, upon its terms not being out and out acceded to by the pursuers.

"It is not thought that, in the difference between the terms of the offer of 1st August, and the preceding offer of 26th May 1843, there is any thing to create a

LORD PRESIDENT.—There are two questions before us under this conjoined No. 134. process. As to that under the suspension and interdict, I was formerly of opinion

June 6, 1845.
Connell v.
River Clyde
Trustees.

substantial distinction between them. There is nothing in the statute which implies (certainly there is no direct provision) that an offer, to be a statutory offer, carrying with it the statutory consequences, must intimate expressly, that if there shall for one calendar month be a failure to treat, or to agree, the pursuers will follow it up by an application to the Sheriff. According to the sound meaning of the 94th section of the Act, such intimation or notice may or may not be necessary before, in any case, proceedings can be instituted before the Sheriff, and it may be in the discretion of the pursuers to make their offer in a form which shall combine with it a notice, and thereby—if a notice is in all cases requisite before applying to the Sheriff—save the necessity of giving it separately; but the Lord Ordinary sees no provision in the statute, from which it can be inferred that without such notice there cannot be an offer which will be perfectly binding upon all parties to all the statutory effects.

“As little does there seem to be any thing in the defenders not having, prior to the offer, or in the offer itself, abandoned the proceedings under the former one, which can be considered as impressing upon it the character of a private offer, whatever ground the existence of these proceedings might afford for raising a question with regard to the offer being so far conditional, that it was only to take effect if the defenders were unsuccessful in maintaining the validity of the prior offer, and other questions which it appears the defenders raised before the Sheriff.

“Still, if it could be soundly argued, that in the sense of the 94th section of the Act, there was, notwithstanding the offer, no taking or using of any of the lands or heritages of the pursuers by the defenders, so as to entitle either party to avail themselves of the compulsory machinery of the statute upon failing to settle amicably, there might be room for the defenders’ plea, that the offer not having been accepted, the whole matter came to an end. But the Lord Ordinary cannot adopt that view of the meaning of the terms of the 94th section. He, on the contrary, thinks, that according to a sound construction of them, (in arriving at which the provisions of the Act generally must be attended to,) an offer by the defenders, made under the statute for lands for the purposes of the Act, is a taking in the sense of the 94th section, and is all that is necessary to give either party a right to follow forth the proceedings thereby made competent. Indeed the defenders themselves do not say that their first offer did not operate to that effect. But, in reference to it, there was no more any actual taking or use of the pursuers’ lands, by entering thereupon, than in reference to the second. No doubt, in the first offer, there was added a notice, that if within one calendar month the pursuers neglected or failed to treat, or did not agree, the defenders were to apply to the Sheriff, under the 94th section. But it is plain, from the terms of that section, that the taking of lands there mentioned is a thing which might precede any notice in regard to proceedings before the Sheriff, in case of failure to treat or agree, whatever might be the necessity for a notice preceding any application to the Sheriff, which is an entirely different point, although the Lord Ordinary may remark in passing, that of the three cases specified in the section, it would seem to be only in the two last that notice is requisite. But if the taking lands, in the sense of the section, may precede notice, and is assumed to do so, it follows that it cannot be the addition of the notice to the offer that makes a taking of lands in the sense of the Act. If, therefore, by the first offer, the pursuers’ lands were taken, in the meaning of the Act, supposing the offer to have been in other respects competent, it must have been by the offer alone, independent of the notice contained in it.

“But apart altogether from any argument to be founded on the first offer, the Lord Ordinary is of opinion, that to constitute a taking of lands, in the sense of the 94th section, no actual entry upon them is necessary, and that an offer made, if it be an offer which is otherwise to be held to be one under the statute, amounts

No. 134. that the note of suspension ought to be passed, and the interdict granted; and I still remain of the same opinion.

June 6, 1845.
Connell v.
River Clyde
Trustees.

to a statutory taking of the lands to which it refers, and therefore so far affords all that is necessary to enable a party to whom it is made, to avail himself of the rights and privileges conferred on him by the 94th section of the Act.

"But if this be the case, then, returning to the question of the character and effect of the offer of 1st August, the Lord Ordinary thinks, that reversing the position of the parties, and supposing it were the defenders who were maintaining that it was to be held to be a statutory offer, which gave them a right to acquire the pursuers' lands under the statute, and to follow out judicial proceedings instituted by them for fixing the value, and was binding on the pursuers, so as to tie up their hands from otherwise disposing of their property, it would be no easy matter for the latter to show, that the offer was unavailing to produce any such result, and that the defenders had, notwithstanding their having made it, lost the time for acquiring the lands under the statute. It is apprehended, that were the pursuers so pleading, their plea must have been rejected, and if so, then the same fate must attend the plea here maintained by the defenders. If, by the offer of 1st August, the defenders put themselves in a position to proceed with the statutory valuation, had they desired to do so, and the pursuers in the position of being bound to retain their property for the use of the trust, then the pursuers must also have thereby acquired the right to enforce the statutory valuation. For it is conceived to be a clear matter, that the statute in no shape countenances the idea that the one party can remain free while the other is bound, or that, under the 94th section, the course of procedure there provided for compulsory settlement (when the defenders have once taken the step which requires to be taken within the permitted period, to secure to them the benefits of the Act) is open to the defenders only, and not equally so to the pursuers, each observing those requisites as to the notices, &c., which, in each respective case, are, by the provisions of the section, rendered necessary.

"If the defenders really meant that the offer of 1st August should have no statutory operation, and be in no way available to them as such, they ought to have put that beyond all doubt. Plainly, nothing could be easier than to have done so; and it is difficult to imagine that, if it had been distinctly in their mind at the time to leave all their absolute rights under the statute on the original offer, the second would have been expressed as it is. It is far from apparent that, in the proceedings before the Sheriff, in which the interlocutor of sist brought under reduction was pronounced, the view of the offer now desired to be adopted was brought forward by the defenders. The terms of the reservation in that interlocutor do not necessarily imply that it was. It may be otherwise explained, for there was an objection to the want of due notice. And the terms of the interlocutor otherways, rather suggest an opposite conclusion. They lead to the inference, that what the defenders then desired was to have the benefit of both the first and second offer alternatively, as statutory offers made within the appointed time, and under which they would have right to acquire either a part of the pursuers' property, (the preferred alternative,) or failing that, the whole.

"Assuming the suspension to be decided against the trustees, (the defenders in the declarator,) and the first offer to be thereby found not to have been competent under the statute, and so put out of the way, and holding the second offer to be a statutory offer, which the defenders were entitled—notwithstanding its non-acceptance by the pursuers—to follow up by an application to the Sheriff, and which the pursuers were also entitled to follow up by such application, either with or without further previous notice, then it would be unnecessary to the disposal of the substantial interests of the parties, to determine a point raised by the conclusions of the declarator, viz. whether it was competent to make the offer of 1st August as a conditional or contingent offer, only to come into operation if the prior offer was decided to be not within the statute, or whether the offer of Au-

No. 134.

June 6, 1845.
Connell v.
River Clyde
Trustees.

The question raised under the action of declarator is a difficult one ; it is, whether, in consequence of the letter of the 1st August, the parties who refused to accept the offer contained in it were entitled to insist on having the value of their property ascertained by the verdict of a jury ? Now I must own, that I had at first great doubt, whether the proceeding on the part of the trustees warranted the owners of the property in applying for a jury-trial ; and I was struck with the terms of the letter, which contains no warning, of an intention on the part of the trustees to have recourse to a jury. But on further consideration, and seeing that the statute requires no particular form of communication, I think we must look to and compare the two instruments of May and August, and see if there is any substantial difference between them ; for as the first is admitted to be a formal offer in terms of the statute, if there is no such difference, the second must be held to possess the same character. Now it is to be observed, that both offers are by the same person in his official character, and addressed to the owners in the same formal terms and phraseology ; for I can find no variation between the two till I come to the closing words ; and then, to be sure, the second letter omits the certification of the intention of the trustees to apply for a jury-trial, in the event of their offer being refused. The question, then, just seems to be, whether, as there is nothing in the statute requiring a formal notice, in particular prescribed terms, of an intention to take and use property under the Act, when every thing is set forth in terms of the statute with regard to the whole land in the one letter, and the same expressions are employed in the other with regard to part of it, any substantial distinction can be drawn between the two ? And, therefore, whether a sufficient notice under the statute was not given in both ? If both the letters contain a proper statutory notice, it cannot be doubted that the pursuers have a right under the statute to apply for a valuation by a jury ; for both parties, the trustees and the owners of property, are placed in the same situation as to this matter by the offer after a proper notice has been given. It is said by the trustees, that the offer of the 1st August was a mere private and extrajudicial tender, by which they are not bound ; but to decide upon that, we must look at the true purpose of the

offer superseded the prior offer. There would be enough to decide the case substantially against the defenders, by the adjudication of the first-mentioned question. For, setting aside the first offer as out of the case, it plainly then becomes unnecessary to say, whether the defenders could justly maintain that they might competently make a conditional and contingent offer, and that the second offer, if a statutory offer, was of that character, leaving them still a right to try the validity of the first offer, and only coming into full operation if that point should be decided against them, seeing that that point being *ex hypothesi* so decided, the sole question left is, whether the second offer was a statutory offer at all in the sense contended for by the pursuers, or only an extrajudicial private offer in the sense contended for by the defenders.

" Upon this matter, which, although raised by the declarator, would, on the above assumption, be superseded, the Lord Ordinary shall only say that the inclination of his opinion is in favour of the pursuers, and generally upon the grounds stated by them in their revised case.

" There are other subordinate points in the cause, with regard to the notice by which it is alleged by the defenders that the application of the pursuers to the sheriff ought to have been preceded, and the mode in which the reductive conclusions of the declarator may require to be dealt with, which seem to require no remark."

No. 134.
 —
 June 6, 1845.
 Connell v.
 River Clyde
 Trustees.

letter. The trustees first tried to get a portion of the subjects, but were prevented by the interdict; and then, seeing that the three years were running out, they apply for the whole. Now, what was the refusal of this offer? I think it was only a rejection of the sum offered—a refusal of the price tendered, but accompanied by a statement on the part of the pursuers, that they were ready to have their claims settled by a jury in terms of the Act.

The question, then, is just this, whether there is any real and substantial difference between the offers of the 26th May and the 1st August, allowing that there is a certioration of the trustees' intention of going before a jury, in the event of the pursuers refusing the price tendered in the one, but not in the other? I think that there is not; and therefore, on the whole, I am of opinion that we cannot resist the conclusions of this action. I concur with the opinions expressed in the note of the Lord Ordinary, though not entirely, for I do not go on the idea of a constructive possession having been taken by the trustees.

LORD MACKENZIE.—I concur. There are two questions in this case; and as to the first, I am quite clear that the first offer by the trustees was not a valid one in terms of the statute. I have not changed the opinion which I had when the question was formerly before us on the note of suspension; I adhere to that opinion, and therefore think that the interdict should be made perpetual.

The second question is certainly attended with more difficulty; it relates to the nature and effect of the second offer made by the trustees. Upon the whole, I am inclined to think that offer was a good one under the statute. There are two objections to it, which are quite distinct, though they have been mingled together in the discussion. The first is, that the second offer was not a sufficient one, because there can be no requisition for a jury-trial unless the trustees are in actual possession. I thoroughly reject that construction of the statute, because it leads it in a preposterous absurdity; we are asked to say that no possession can be taken till after the jury-trial is over and the price paid; and are also called upon, at the same time, to say that there can be no trial till after possession has been taken. We are just called upon to say, that of two things each must be done before the other.

The second, and chief objection, however, is more deserving of consideration. It is, not that actual possession is necessary to give a right to go before a jury, but that a regular notice of an intention to take is, by the statute, necessary to create that right; and that the second offer was not an intimation that the trustees meant to take the subjects under the statute. But, giving a fair construction to the statute, I think that there was a requisition under it—that a proper notice was given. It is material to observe, that there is no particular form prescribed by the Act, in which the notice is to be expressed; and, therefore, provided that an offer is made, which is understood between the parties as an intimation of an intention to take, I can't think that the statutory notice has not been given. And it seems clear that such was the understanding of the parties here. The letter of the 1st August begins with a statement, that the offer is made under the statute, and in terms thereof. This could mean nothing else than a notice of an intention to take the lands and use them under the statute. Then, when the other party rejected the offer, they certainly understood it to be so; for they said, "we reject the price you have offered us, but we will go to a jury to fix that which ought to be paid." If the trustees, on the other hand, did not think they had

made a formal statutory offer, why, when they got this answer, did they not say, No. 134.
 “there is some mistake here, we made you no offer under the statute—it was
 merely a private and voluntary one.” But they never said any thing of the kind; June 6, 1845.
 Connell v.
 River Clyde
 Trustees.
 on the contrary, they applied to the Sheriff to put off the trial which had been
 asked for by the pursuers, evidently assuming that it was quite competent under
 the statute. And then the offer was made just three days before the expiry of the
 three years, when the trustees’ power to compel proprietors to sell, and to fix the
 price by jury trial, was just about to cease. Can it be doubted, then, that this
 was intended as any thing else than an offer and notice under the statute, by which
 their right might be still preserved?

LORD FULLERTON.—The declarator truly raises a question which, I think, we
 must take up first, because the decision of it may entirely supersede the consider-
 ation of the other, arising under the suspension. For, if the offer of the 1st Au-
 gust is to be held, as the pursuers of the declarator maintain, a binding statutory offer
 by the defenders for the whole ground, it becomes quite immaterial to require a
 deliverance, whether it was competent for the defenders to acquire a part only of
 the ground by the force of the statute.

But the decision in the declarator must depend on the true legal construction
 of the proposal made by the defenders on the 1st August. If that is to be held,
 in the sense of the statute, “as a taking of the ground,” then it follows, that the
 pursuers were entitled to give the notice, and to have the price of the ground so
 taken fixed by a jury.

On this question, I am bound, after what has been said, to express my opinion
 with great diffidence; but still I must say, that I am not satisfied that the offer of
 the 1st August can receive the construction maintained by the pursuers.

Not that I am disposed to adopt the argument of the defenders, when they
 maintain that there can be no taking of the ground without actual possession. I
 think it clear that that construction is untenable. By the 15th section, for in-
 stance, it is provided, that the trustees must take the ground within three years,
 otherwise they lose the right of acquiring it without the consent of the proprie-
 tor. Now, I think it impossible to construe this clause of the Act, so as to bar
 the right of the trustees under the statute, unless they actually enter into posses-
 sion during the three years. “Taking,” as I understand it, means the exercise of
 the option held out by the statute; intimated, clearly and unequivocally, to the
 proprietor.

In substance, the statute enacts, that the trustees may acquire the lands speci-
 fied in the schedule and plan at a price to be fixed by the trustees; or, if they
 cannot agree, to be fixed by a jury. I consider this as truly a tender of these lands
 to the trustees, through the medium of the statute, on the terms there men-
 tioned.

If the trustees accept that tender, by intimating unequivocally that they do so
 to the proprietors, it appears to me that the tender and acceptance completes the
 transaction; and it is in this view that I think that the intimation so made by the
 trustees constitutes a taking of the lands, which, in the case of non-agreement as
 to the price, enables either them or the proprietor to give the requisite notice for
 having the price ascertained by a jury.

But then the question arises here, was the letter of the 1st August an unequi-
 vocal and absolute acceptance of the lands on the terms held out by the statute?

No. 134.

June 6, 1845.
Connell v.
River Clyde
Trustees.

No doubt, it is described as being made in virtue of the statute. But for the statute, the trustees had no right to acquire at all. But is it an adoption of the terms of acquisition specified in the statute? This is what I doubt. It was but a proposal to take the lands at a certain price, which in the ordinary use of language neither expresses nor implies any consent to take the lands, unless the specified price is accepted as the equivalent. It amounts to this—"we propose to take the lands if we get them at that price, but no otherwise." Now, I have great difficulty in holding that this is a taking of the lands—I mean, such an unequivocal acceptance by the trustees of the tender made by the force of the statute, as to complete the transaction between the seller and purchaser, and to enable the former to give the notices for fixing the price through the means of a jury. It rather appears to me that, if the proprietor rejects the price, the proposal falls to the ground, and cannot be founded on by the proprietor for any other purpose.

In this particular, the letter in question differs most essentially from the previous letter—that proposing to take a part of the lands. In the latter, there is not only the proposal to take at a certain price, but an intimation, that if the price is not accepted, it shall be fixed by a jury. That was clearly an absolute taking, in terms of the statute.—"We take the lands at the price mentioned, and, if you do not accept that price, we take them at the price which shall be fixed by the jury." That would have been clearly effectual, had it not been exposed to the other objections, that it applied only to a part of the lands. But, in the letter of August, the essential alternative is omitted. There is nothing but a proposal to take at the specified price, and not otherwise.

It is but a conditional proposal, which seems to me to have no legal effect whatever, independently of the condition attached to it; and, therefore, must be held to expire on the non-acceptance of the condition.

On these grounds I rather think that the pursuers are not entitled to decree on the declarator; and, on this view, it would be necessary to take up the question raised in the suspension. On that point it is unnecessary for me to say more, than that I remain of the opinion expressed when the point was formerly before us.

According to the view of the statute already expressed, it appears to me to import a tender to the trustees of certain portions of land particularly described; and I do not think that this can, in sound construction, be held to imply a right to take, not the whole subject tendered, but any particular fragment of it, which may happen to suit the purchasers.

LORD JEFFREY.—On the whole, I concur in the opinions first delivered, though not without the difficulty felt by Lord Fullerton, but yet with less feeling of its weight.

As to the first point, I shall not go into it. My former impression with regard to it has been confirmed, and I have no difficulty upon it.

But, on the other point, I have had great difficulty—a difficulty which has arisen from the ambiguity of the Act, for I have never seen a more obscure, ambiguous, and defective statute. I quite agree, however, with your Lordships, as to the proper meaning of the words "taken or used;" and I think the difficulty would be removed by reading, instead of them, the words "to be taken or used," by the

substitution of the future for the past or present tense, which at once explains their true meaning. **No. 134.**

There are, I think, three cases stated in the Act, in which parties may go to a jury. There is, first, where the parties have begun to treat about taking lands, but cannot agree as to the price to be paid for them. In that case either of them is entitled to go before a jury at once, to have it fixed, without a previous notice of such an intention, a month before. The second case is, where proprietors, on requisition by the trustees, fail or refuse to come to an agreement within a month. Another third is the converse of that :—Where the trustees refuse or fail to treat or agree with the proprietors for a month after notice given by them. In each of these last two cases, the parties are respectively empowered to apply for a jury-trial at the termination of the month.

June 6, 1845.
Connell v.
River Clyde
Trustees.

Now, I think the present case falls under the first class of these cases, that where the parties have begun to treat, but cannot agree as to the price, and in which they are respectively entitled to go at once to a jury, without any previous notice. There was here a *taking* of the lands, in the sense of the statute, inasmuch as there was an intimation on the part of the trustees that they would be taken and used at a certain price. That price was refused, and the parties were, therefore, in the situation of having begun to treat, but not being able to agree ; consequently, there was no necessity here for a notice, either by the trustees or the pursuers, of an intention to apply for a jury-trial a month before the application was made—a necessity which exists only in the other two classes.

It is not necessary, then, in such a case as this, that there should be a formal requisition by the trustees ; it is sufficient that there is an offer to treat under the statute, and the parties here were in actual treaty under it. The offer of 1st August was made with reference to the statute, and “in terms thereof,” but the price offered was refused by the pursuers, and the parties were thus just placed in the situation provided for by the Act, of having commenced to treat under it, but being unable to agree as to the price. I think that, looking at the terms of the offer itself, and the circumstances under which it was made, just on the spur of the moment, only three days before the compulsory powers of the trustees were to expire, it cannot be doubted that it was an offer, a beginning to treat under the statute ; and that therefore, as there has been a failure to agree as to the price, the proprietors are entitled to their statutory remedy, to have the price fixed now by the verdict of a jury.

THE COURT pronounced the following interlocutor :—“ In the suspension, sustain the reasons of suspension, and declare the interdict perpetual ; in the declarator, find, decern, and declare, in terms of the declaratory conclusions of the libel ; and, in respect the pursuers pass from the conclusions for damages, find it unnecessary to pronounce any further finding in the conjoined processes, and decern : Find the suspenders and pursuers entitled to expenses.”

ANDREW HOWDEN, W.S.—S. CAMPBELL, W.S.—Agents.

No. 135.

June 6, 1845.
2D DIVISION.

T.

Williamson v.
Taylor.Fisken v.
Thomson.B. WILLIAMSON, Pursuer.—*Monro*.
J. M. TAYLOR, Defender.—*R. Bell—B. R. Bell*.

Process—Proof—Compromise.—WHERE a correspondence and other papers which had passed between the agents in a cause, in reference to an extrajudicial settlement not carried into effect, had been printed as an appendix,

THE COURT ordered them to be withdrawn.

ANDREW DUN, W.S.—BELLS and CUTHBERTSON, W.S.—Agents.

No. 136.

JAMES FISKEN and COMPANY, Appellants.—*Sol.-Gen. Anderson*.
WILLIAM THOMSON (John S. Robb and Co.'s Trustee) and OTHERS,
Respondents.—*Buchanan—Inglis*.

Bankruptcy—Stat. 2 and 3 Vict. c. 41, §§ 21 and 81.—A sequestrated bankrupt, while still undischarged, recommenced business, and was sequestrated a second time,—Held that the creditors in the first sequestration were entitled to claim under the second, and be ranked *pari passu* with the creditors in it.

June 7, 1845.

1ST DIVISION.
Bill-Chamber
Clerk.

THE firm of Webster and Robb, merchants in Greenock, became bankrupt, and was sequestrated in March 1842, the sequestration including both the company and the individual partners. James Gourlay was appointed trustee on the sequestrated estate; the sequestration is a still subsisting one, and neither of the partners have received their discharge.

In August 1842, Robb again commenced business in Greenock, in the same premises as had formerly been occupied by Webster and Robb under the firm of John S. Robb and Company; but, in fact, there was no partner in the concern. Fisher and Company furnished goods to him in the belief, as they alleged, that he actually had a solvent and responsible partner; but, in June 1843, the firm of Robb and Company, and Robb himself, as the only known partner of it, was sequestrated at their instance, and William Thomson appointed trustee on the sequestrated estate. Previous to this sequestration, Robb had disposed of his whole stock, and taken bills for the price; and the proceeds of these bills formed the sequestrated estate.

Certain creditors of Webster and Robb lodged claims under this No. 136. second sequestration, and among these James Gourlay, who, however, ^{June 7, 1845.} did not claim in the character of trustee in the first sequestration. These ^{Fisher v. Thomson.} claims were sustained by Thomson, the trustee, and the claimants included in the list of creditors entitled to draw dividends from the estate.

Fisher and Company appealed against this deliverance of the trustee to the Sheriff; but he confirmed it, without however assigning any reasons for his judgment.

Fisher and Company then appealed to the Court of Session, when an interlocutor was pronounced, in January 1845, remitting to the Sheriff to reconsider the cause, and to assign the reasons of his deliverance.

The following interlocutor was accordingly pronounced, in terms of this order :—

“ The Sheriff-substitute having, in obedience to the remit of the Court of Session dated the 15th ultimo, reconsidered the case, and having heard parties’ agents further at the appellant’s desire, on 25th ultimo, now subjoins, in addition to what is contained in the note appended to his interlocutor of 18th June last, the following reasons in support of the deliverance of 23d September :—

“ First, The sequestration of the company of J. S. Robb and Company, when, in point of fact, there was no real partnership, and no trader under the firm but J. S. Robb, must be held as a sequestration of that individual as a sole trader. But Robb, as a partner of Webster and Robb, was an undischarged bankrupt under the existing sequestration of that firm and of the individual partners.

“ Second, It has not yet been decided that a sequestration against a party in Robb’s circumstances is null, although Professor Bell, in his Commentaries, 5th Edition, Vol. II. p. 478, states that, by the law of England, a second commission of bankruptcy pending a first is null, but on grounds which, at the time of his writing, did not exist in the bankrupt law of Scotland. By the recent sequestration statute, however, such an approximation towards the law of England, as to subsequent acquisitions by an undischarged bankrupt, has been enacted, as would appear to justify, and perhaps to require, the extension to Scotland of the English principle of nullity.

“ Third, That principle not having been yet fixed, so far as known to the Sheriff-substitute, by decision or enactment, and Professor Bell having laid it down in his work that a second sequestration was competent, and that all the creditors of the bankrupt, both old and new, were entitled to be ranked, according to certain rules which he specifies, there did not, in the face of such authority, with which the trustee’s deliverance appealed from is conformable, appear to be valid legal grounds for doing otherwise than confirming the trustee’s deliverance. The Sheriff-substitute cannot reckon the assumption by the bankrupt of a firm with-

No. 136. out partners as making his case different from what it would have been had he traded in his own individual name."

June 7, 1845.
Fisken v.
Thomson.

The appellants pleaded, that the creditors in the first sequestration were not entitled to be ranked under the second, and so to carry off from the creditors in the second, the property which had been furnished to the bankrupt by them: that although, by the 81st section of the Bankrupt statute, all property acquired by a bankrupt subsequent to the date of his sequestration, and before his discharge, vested in the trustee, the property included in Robb's second sequestration, which had been acquired by him subsequent to his first bankruptcy, could be appropriated to the creditors under the latter, only by the trustee appearing, and claiming for them in his official character, which had not been done by Goulden in this case: that by the same section of the statute, there is a reservation of the rights of parties from whom property shall have been acquired by the bankrupt after his sequestration, intimation being required thereby to be given them of the claims of the trustee; but that here no such intimation had been given.

The respondents pleaded, that whatever objection there might have been to the second sequestration, it was now beyond challenge, under the 21st section of the statute; that, as by the 81st section, all property acquired by the bankrupt betwixt his sequestration and his discharge vests in the trustee *ipso jure*, for the purposes of the Act, from the date of the acquisition, this was in effect just a sequestration as at that date, and that the creditors in the original sequestration were, therefore, entitled to claim and be ranked *pari passu* along with the new creditors of the property falling under the second sequestration.

LORD JEFFREY.—It may perhaps be doubted whether, under the 81st section of the Act, the second sequestration was competent, but it is unnecessary to decide that, as it is admitted to be a valid one by both parties. Upon the merits of the case, I think we should adhere to the deliverance of the Sheriff.

LORD PRESIDENT.—The 81st section of the Act vests every thing in the trustee, for the behoof of the creditors, which is acquired by the bankrupt between his sequestration and his discharge; and, therefore, I think there is no doubt that the creditors are entitled to be ranked upon those acquisitions, although there may have been a second sequestration awarded against the bankrupt.

LORD MACKENZIE concurred.

LORD FULLERTON also concurred, but doubted whether there was any ground for holding a second sequestration incompetent during the subsistence of the first.

THE appeal was accordingly dismissed.

THOMAS SPROT, W.S.—JOHN CULLEN, W.S.—Agents.

WALTER BAINE and OTHERS, (Lang's Trustees,) Pursuers.—
G. G. Bell—J. Wood.

ROBERT CRAIG, Defender.—J. Donaldson.

MRS MARGARET LYON OF SINCLAIR, Defender.—Cowan.

MRS JEAN HASTIE OF PRATT, Defender.—Penney.

No. 137.

June 8, 1845.
Baine v. Craig.

Fee or Liferent—Substitution—Settlement.—1. Terms of a conveyance of heritable subjects by a husband to himself and his wife, and their heirs, under which held, that after the death of the husband the wife had a fee in one-half of the subjects, with a power of disposal. 2. Held that a substitution, in a deed conveying certain heritable subjects, was effectually altered by the institute's general trust-disposition and settlement, which did not specially mention these subjects.

ON 16th July 1784, James Lang and his wife executed a mutual dis- June 8,* 1845.
position in the following terms:—"Considering that we have been mar-
ried for some time, and have not as yet been blest with any children, and
being resolved to settle and provide the heritable and moveable subjects
belonging to either of us, so as to prevent all debates and disputes there-
ment amongst our friends and relations, in the event of our having no
children, at the decease of the longest liver of us two: Therefore, and
for the love, favour, and affection which we mutually bear and have to
each other, and other good causes and considerations us moving, witt ye
as the said spouses, with the special advice and consent of each other, to
have assigned and disposed, lykeas we by these presents, with and under
the reservation, burdens, and conditions underwritten, assign and dispo-
se and in favours of us the said spouses, and longest liver of us two in
liferent, for the longest liver's liferent use allenarly, and to the child or
children to be procreated betwixt us in fee; whom failing, to our own
nearest heirs and assignees equally betwixt them, all and sundry goods,"
&c.—(Here followed a specification of the moveable estate.) "And,
moreover, I the said James Lang, by these presents, and with and under
the reservations, burdens, and conditions underwritten, give, grant, and
dispo- to and in favour of myself and of the said Isobell Craig, my
spouse, and longest liver of us two in liferent, and to the child or children
to be procreate betwixt us in fee; whom failing, to our own nearest heirs
and assignees equally betwixt them, heritably and irredeemably, all and
sundry lands, heritages, tenements, tacks, steadings, rooms, and other
heritable subjects, which shall be pertaining and belonging to me, the
said James Lang, at the time of the decease of the longest liver of us the
said spouses; and particularly," &c.—(Here followed the conveyance of

2d DIVISION.
Lord Cuning-
hame.
R.

* Decided 7th March.

No. 137. a particular tenement.) "Declaring always, as it is hereby expressly provided and declared, that the longest liver of us, the said spouses, shall be bound and obliged to pay the whole just and lawful debts that shall be resting and owing by the first deceiver of us two, with the first deceiver funeral charges, and sick-bed expenses: As also, reserving power to the said spouses, at any time during our joint lifetimes, either to sell or dispose of the subjects generally and specially before conveyed, or otherwise to burden and affect the same, as we shall think proper, and to revoke and annul these presents in whole or in part, as we shall see cause and likewise, reserving power to each of us, the said spouses, at any time during our lifetime, in the event there are no children procreate of the said marriage, to convey and make over the subjects generally and specially above disposed to our heirs, as said is, to any one or more of the said relations we shall think proper to convey the same to, by a writ under either of our hands."

June 8, 1845.
Baine v. Craig.

On 7th April 1807, James Lang executed a disposition, which recited the above mutual disposition, and proceeded as follows:—"Considering that, since the executing of the said mutual disposition, I have acquired right to that tenement of land, erected and built upon that piece of garden ground underwritten, and it being reasonable I should convey the same in terms of the said mutual disposition; therefore I hereby give, grant and dispone to, and in favours of myself, and of the said Isobell Craig my spouse, and longest liver of us two in liferent, and to our own nearest heirs and assignees in fee, heritably and irredeemably, with and under the conditions and provisions mentioned in the said mutual disposition, and Hail," &c. (Here followed a description of the tenement.) "And lastly, Considering that there being no issue of the marriage betwixt me and my said spouse, and being now resolved to settle and dispose of the just and equal half of the heritable and movable subjects that shall be pertaining and belonging to me at the time of my death, as specially provided for by the before-recited mutual disposition and conveyance, therefore witt ye me, for the love, favour, and affection which I have and be to my nephew, Thomas Lang, only surviving child procreated of the marriage betwixt the deceased Thomas Lang, shipmaster in Port-Glasgow, my brother-german, and Mary Lewis, spouses, and the persons after named and designed, and for other good and weighty causes moving, to have assigned and disposed, as I by these presents, with and under the several conditions, provisions, and reservation underwritten assign and dispone to and in favour of the said Thomas Lang, and the heirs of his body lawfully begotten; whom failing, John M'Naughton &c., the just and equal half of the movable property. He then conveyed to his nephew, Thomas Lang, and the same series of substitutes, "one just and equal half of all and sundry lands, heritages, tenements, tacks, steadings, rooms, possessions, and other heritable subjects, which shall be pertaining and belonging to me at the decease of the longest living

of me and my said spouse ; and in particular, All and Hail the just and equal half pro indiviso of all and whole the aforesaid tenement of land, consisting of two square storeys and garrets, acquired by me from the said Angus Kerr, bounded and described in manner particularly above mentioned ; as also, my just and equal half, pro indiviso, of All and Whole the aforesaid other tenement of land," &c.

No. 137.

June 8, 1845.
Baine v. Craig.

James Lang died in 1805, survived by his wife, and also by his nephew, Thomas Lang. Mrs Lang took infeftment in the liferent of the whole, and in the fee of the half of the tenement particularly conveyed in the mutual disposition of 1784. In 1810, she executed a disposition and settlement, by which, on the narrative, that by the disposition of 1784, " the just and equal one-half of the whole heritable and movable, real and personal, means and estates, in the event of no issue being of our marriage, was assigned, disposed, and conveyed to me the said Isobel Craig, the other half being conveyed to my said husband,"—she conveyed to her husband's nephew, Thomas Lang, and his heirs and executors whomsoever, the whole of her movable property ; and she further disposed to him, and the heirs of his body lawfully begotten, whom failing, to a certain series of substitutes, the pro indiviso half of each of the two tenements disposed by her husband.

Thomas Lang survived Mrs Lang, and died, leaving a general trust-disposition and settlement in which they were not specially mentioned. The trustees under his settlement, with the view of making up their title to the tenements in question, raised the present action of constitution, calling as defenders the whole parties interested in the several deeds of James Lang and his wife.

Robert Craig, the heir-at-law of Mrs Lang, lodged defences, pleading, that under the deeds of 1784 and 1807, no right of fee was conveyed to Mrs Lang, the whole fee being retained by the husband during his life, and therefore it was not in her power to convey to Thomas Lang. Failing children, there was a destination of a pro indiviso half to the wife's heirs, and in that character the defender was entitled to succeed as heir of provision to James Lang.

Mrs Sinclair, the heir both of James and of Thomas Lang, and one of the substitutes in James Lang's deed of 1803, lodged defences, and pleaded, that as regarded one-half of the subjects, the substitution in the deed of 1803 was not effectually evacuated by the general disposition in trust executed by Thomas Lang. As regarded the other half, she concurred in Craig's argument, that Mrs Lang had no fee or power of disposal, but contended that she was entitled to this half, as James Lang's heir-at-law.

Mrs Pratt, one of the substitutes in Mrs Lang's settlement, pleaded that the fee of one-half of the subjects was effectually vested in Mrs Lang, but that she and the other substitutes were entitled to it by virtue of the substitution to Thomas Lang, which remained legally effectual.

No. 137. The Lord Ordinary repelled the defences, and decerned in terms of the libel.*

June 8, 1845.
Baine v. Craig.

* "NOTE.—The deceased Mr Lang, who died in 1843, by his general disposition, conveyed, in the most ample terms, to the pursuers, all and sundry lands and heritages of every description that he should be possessed of at the time of his death.

"The two properties libelled on, which both belonged originally to James Lang, the uncle of the truster, had been possessed by the latter without question for twenty-five years prior to his death. The titles on which he so possessed were derived, 1st, from the mutual settlement of James Lang and his wife in 1784; 2dly, from the settlement of James Lang himself (as to the second property) in 1803; and, 3dly, from the settlement of James Lang's widow in favour of Thomas Lang in 1810, after her husband's death, which are narrated with sufficient accuracy in the summons, and besides, the deeds are separately printed. The Lord Ordinary is of opinion, on the following grounds, that the claim of Mr Lang and his disponees on the subjects libelled on is indisputable:—

"1. Although some argument was raised as to the technical character of the right belonging to James Lang and his wife after the execution of the mutual settlement in 1784, and although some discussion took place at the bar as to the point, in whom the right of fee to the subjects in dispute vested after the execution of that deed, the Lord Ordinary views that technical question as of little consequence in the present case. The subjects libelled on belonged undoubtedly, prior to the settlement, to James Lang; it is probable that the fee, even after the settlement, would have been held to remain with James Lang during his life in a qualification with creditors. But when James Lang and his wife executed a mutual settlement, containing a destination by the husband of the whole heritages at the time of his death, to and in favour of themselves and the longest liver of them two, liferent, and to their own nearest heirs and assignees equally betwixt them, heritably and irredeemably, and when this deed contained first a reservation to themselves jointly to alter the settlement, and next a reservation to each of them, any time during their life, 'to convey and make over the subjects generally and especially above disposed to our heirs, to any one or more of our said relations, we shall think proper to convey the same to by writing under either of our hands, that settlement could not be defeated gratuitously even during the husband's life, nor could the ample power of disposal of her own half be recalled by the husband, if the subjects were not onerously burdened or alienated by him. In point of fact he never attempted to do so.

"2. Looking to the terms and purpose of the destination and settlement, the Lord Ordinary rather thought that these imported a right of liferent over one-half of the heritages to the wife, if she survived her husband, and a right of fee to her in the other half on the same event. The conveyance was not limited to her liferent use only, and when the half was given to her heirs and assignees, it implied a power to make her own assignees, which is of itself tantamount to a right of fee. In that case her 'heirs and assignees' substituted to her, in the half of the property, would be to be viewed as mere conditional institutes, intended to take effect if she predeceased her husband, but leaving the property at her absolute disposal if she survived him, so as to vest the fee of her half during her life.

"3. Independent of the vesting of the fee, the special power reserved to the wife to name her own heirs, which she was entitled to exercise during her husband's life, would, of itself, validate her conveyance of the fee of her half to Thomas Lang. It is said that, from the peculiar terms of the faculty, she had only a power of selecting any one or more of her own relations in her disposal of the fee, and that Thomas Lang was not a relation of hers, but of her husband's; but this seems a strained and unsound construction of the reservation, inconsistent with the probable meaning of the parties. The destination of the wife's half was to her heirs

The defenders reclaimed.

No. 137.

June 8, 1845.
Baine v. Craig.

LORD JUSTICE-CLERK.—I do not think that it is necessary to enter upon the legal construction of the terms in the dispositive clauses of the deeds of 1784 and 1803 in the abstract, in reference to the point whether they constitute a fee in the wife, or in the wife's heirs, or in the husband, as to the half of the properties which the husband did not himself subsequently dispose of; not, however, on the grounds on which the Lord Ordinary holds the determination of that question to be immaterial in the present case. For if the deed is not challengeable by creditors of the husband, and did convey a fee of one-half of these properties to the wife, and was irrevocable and delivered, then her right or that of her heirs under the deed would be exactly the same, and must be decided on the same rules as to the construction of the deed itself, whether the question occurred between her disponent and the creditors or the heirs of the husband. Neither in like manner, if the deed once took effect at all, is it, in the question of construction, of the importance (as I conceive) which the Lord Ordinary thinks it is, that the husband could not have defeated the right. That would apply equally, although the right of the wife was one of liferent alone. And if the deed was onerous, and had taken effect during his lifetime, am not prepared to admit, as the Lord Ordinary seems to hold, that the right of the wife could have been defeated by an onerous sale. But these points do not arise in the present case, and I only make these remarks to save my own opinion. I think we must have been driven by the pleas of the parties, and the nature of the action, to decide on the effect of the dispositive clauses in the abstract, as they are contained in these deeds, in giving a fee to the wife, or to the wife's heirs, or leaving it wholly in the husband, if there had not been another clause of the most direct bearing on the question raised by this action—I mean the right expressly given to the wife to dispose of one-half of the property, to the extent of affecting the relations referred to. The summons expressly sets forth the wife's power to settle and convey one-half of the property to the trustee, Thomas Lang,

and assignees without limitation, and the power to select her heir among her relations did not limit her right to assign *de presenti* to any third party, if she chose to exercise that right. In fact, the import of the clause, in its sound and true meaning, was just a reservation to the wife to divide her half among such of her relations as she thought fit—and the term 'relations' included Thomas Lang, who was a relation by blood of her husband, and of hers by affinity—and so fell within the class specified in the reservation. But even that view of the title will be superfluous, if the fee of the half in dispute vested in the widow upon her survivance of her husband.

"4. Thomas Lang's right as to the half of the premises destined to him by James Lang himself, is too clear for dispute. James's destination to Thomas, as a primary disponent, is special and unquestionable. He survived the disponent, and took infestment. His feudal title to that half, therefore, is complete. No doubt there was a substitution in the disposition, but Thomas evacuated that substitution by his general disposition and settlement in favour of the pursuers. The efficacy of that mode of discharging a simple destination, not fortified by any prohibitory clause, was settled by the decision both of this Court and of the House of Lords, in the case of Leitch, in a manner not to be questioned. (See 3 Wilson and Shaw, 366)."

No. 137. and the right acquired by her deed of conveyance to Thomas Lang, and hence maintains that the heir of Mrs Lang must make up titles to complete the conveyance to Thomas, on which no title was expedite, and Mrs Lang's title, so far as hers was incomplete; and the same ground of action is also a direct answer, if in law well founded, to the plea of the husband's heir—viz. that the fee was in him; for if the power of disposal was validly exercised, then the husband's heir has no case.

June 8, 1845.
Baine v. Craig.

Now, by the deed 1784, there is an express power to each of the spouses, if there are no children, to make over the subjects generally and specially *disposed to our heirs*, as said is, (clearly including the heritable property,) to any one or more of our said relations we shall think proper to convey the same to. It may be a very nice question, whether this does or does not import that the wife had a right of fee. I need not give an opinion on that point. The clause, at all events, gives an undoubted power of disposal to a certain extent. That is clear. If the wife's conveyance is within the terms of this power of disposal, then the heirs either of husband or wife are excluded. But then it is said, "*our said relations*" can only mean that each spouse obtained the right to prefer one or more of their own heirs respectively, but not to take the heir of the other. I think this critical remark (for it is really such) is quite untenable, not founded on the fair construction of the expression, and I should say directly against the plain object of the provision. I believe the object was just the very reverse—to enable either of the spouses, if they had no children, to prefer any relative of each other they chose notwithstanding the destination to the heirs of each. A conveyance by the wife of her half to the nephew of the husband, to whom he had conveyed his half, was most strictly, in my opinion, within the terms, as it was eminently within the meaning and spirit, of the above statement of the object or extent of the power of disposal.

I consider the wife's right, under the second deed of 1803, to be exactly the same as under the deed of 1784. It is declared by the husband to be in implementation of the former deed. The conveyance is stated to be made in terms of the mutual disposition, and the disposition itself in the dispositive clause is made—"with and under the conditions and provisions mentioned in the said mutual disposition." I apprehend, therefore, that no question can arise on the terms of the dispositive clause in this latter deed, apart from the construction and effect of the former deed. Neither the heirs of the husband nor of the wife can reject the direct introduction into the latter deed, by the above reference, of all the conditions and provisions in the former. The question is the same under both deeds.

Then by this second deed it is found that the husband, with a view to act as proceeds to exercise the power of conveying one-half of his heritable property, as specially provided by the original mutual disposition; and he conveys only one-half of all his property, and specially one-half of the heritable property described in the original deed, and the one-half of that very heritable property which he had conveyed by this second deed, in terms of the mutual disposition. Nothing can be clearer than the acknowledgment thereby evinced of the wife's equal right of disposal, which she afterwards exercised.

The property then is thus validly conveyed to Thomas Lang, half under the husband's deed of disposal, and the other half under the wife's deed of disposal, who also preferred him in the first instance.

Thomas Lang succeeded and possessed in both characters—accepted the wife's No. 137. disposition—and, by the way, he being the heir-at-law also of James Lang, the husband, his acceptance of her deed of disposal bars the claim of the next heir of the husband. June 8, 1845.
Balne v. Craig.

But then it was said that Thomas, the donee in the wife's deed, could not convey or assign his right, because in her deed there was a special substitution; and a general conveyance of heritage will not evacuate, it is said, this special substitution. I really do not understand this. Thomas was the institute or donee under Mrs Lang's deed. He takes, and, before infestment, executes a general conveyance, which, it is beyond doubt, would carry his personal right just as much as if he had sold it in his lifetime, but for, it is said, the specialty, that there was a substitution. I do not know how the fact that there is a substitution bears on this at all. A substitute succeeding after infestment must make up his title by infestment, before he can alter; but the institute in a fee-simple deed may convey or assign as he chooses. A general conveyance carries his right (in the absence of proof of contrary intention) as much as a special disposition. That there may be others called after him in the fee-simple right, if he does not alter, does not detract in the slightest effect from his general conveyance. Whether he was infest or not makes no difference. Is it contended, that if he had been infest, a general conveyance would not have carried right to all his fee-simple lands? Much more before infestment, when his right was personal. I am really at a loss to know how the fact that others are called after him in Mrs Lang's deed, which does not confessedly narrow his absolute right of disposal, can narrow or exclude the effect of one of the usual modes of conveying property held in fee-simple by a general disposition, on which the donee makes up a title, as is here proposed. I do not require the authority of the case of Leitch on this point, the question being totally different.

LORD MEDWYN.—The three settlements in this case, the mutual one of James Lang and his wife 1784, the disposition of James Lang 1803, and the settlement of Mrs Lang 1810, are properly testamentary deeds, and their import being questioned by the heirs of the parties, therefore their effect is to be ascertained according to the obvious meaning and intention of the parties, properly carried out. Now, the intention is not disputable. It is quite clear, by the disposition of James Lang in the second deed, and of Mrs Lang in the last, that each understood that they had right to convey one-half of the heritable subjects as belonging to them; and they were, I think, well founded in this notion. For, by the first deed, the mutual settlement subscribed by both spouses, made in the event which happened of their having no children, Lang gave all his heritages which should pertain to him, at the death of the longest liver, to himself and his wife, and longest liver in life, and to the children to be procreated of them in fee; whom failing, to their own nearest heirs and assignees, *equally betwixt them*; reserving power to them, at any time during their joint lives, to sell or burden the subjects, and likewise reserving power to each, if there are no children, to convey the subjects to any one or more of their relations, by a writing under their hand.

The second deed by James Lang, conveying another subject acquired since the date of the first, was intended to be in the same terms, and to follow out, by a special conveyance, what was generally conveyed in the first. It is true there is an omission in the destination to their heirs of the words, "*equally betwixt them*;"

No. 137.

June 8, 1845.
Baine v. Craig.

but that this is an accidental, and not an intended omission, is clear from this, that, after narrating distinctly the terms of the first deed, and as containing the above words, and subjoining that it was reasonable that he should convey the subject since acquired in terms of the said mutual disposition, therefore he makes the conveyance of it to himself and his wife, and longest liver in liferent, and to their nearest heirs and assignees in fee, with and under the conditions and provision mentioned in the said mutual dispositions; and then, further showing his understanding of the import of his settlements, he disposes of what he calls his just and equal half of the subjects, as specially provided for by the mutual disposition and makes them over to his nephew, Thomas Lang, and the heirs of his body, whom failing, other relations, and among these Margaret Lyon or Sinclair. The import of the conveyance in these two deeds I hold to be the same, notwithstanding the omission of the words already mentioned in the destination to the heirs.

In like manner, Mrs Lang, in 1810, on the narrative that, by deed 1784, the half of the heritage had been made over to her, conveyed the same to Thomas Lang, and the heirs of his body; whom failing, Jean Hastie, and other relations, thus showing her conception of her rights under the mutual disposition. Now although Thomas Lang was a blood-relation of the husband, he was a relation of the wife by affinity; and I cannot hold the clause in the mutual disposition, as expressed or so intended, as to preclude such a conveyance by Mrs Lang, as restricting her to bestow it on her own blood-relations only.

I think it clear that she was far of one half of the heritage, and specially entitled to dispose of it; so that Robert Craig, her heir, cannot maintain that he, as heir of provision under the mutual disposition, is entitled to succeed now—deed to have excluded Thomas Lang, who took up the succession to her in 1818.

I have already said, that I think the two conveyances in 1784 and 1803, by James Lang, equivalent, and of equal import. I cannot, therefore, hold that the destination to heirs in the latter is different from that in the former, so as to imply that the husband's heirs only were to take the heritage in it after the spouses; and, therefore, I must reject Margaret Lang's plea as the heir of the husband.

Then, if Thomas Lang was validly vested in the property thus conveyed to him, by seisin as to some, and under a personal title as to other, and under destination to other parties, heirs both of husband and wife, yet, as this is but a simple destination, it may be defeated; and I think it has been validly defeated by the general settlement in favour of the pursuers, to whom he has conveyed all his means and estate, heritable and moveable, and thus excluding the claim of Jean Hastie, as a substitute, and the others, and giving the pursuers the right to call upon the heirs of the spouses to make up titles and convey to them, first constituting their claims against them. I am, therefore, for adhering.

LORD MONCREIFF.—There are abundant grounds for adhering, though I do not feel myself called on to acquiesce with all that is in the Lord Ordinary's note. His third ratio is sufficient. There is a distinct power in the spouses to dispose of a half of the property each, and that has been exercised. In the case of Leitch, a general settlement was found to be sufficient to carry a fee under destination. The point was held too clear for argument.

LORD COCKBURN concurred.

No. 187.

THE COURT pronounced the following interlocutor :—" Refuse the re-claiming notes, and adhere to the interlocutor reclaimed against; and, of consent of all the parties, recal the finding in the interlocutor as to expenses."

J. PATTEN, S.S.C.—J. STUART, S.S.C.—Agents.

GEORGE ROBINSON FORBES, (*Curator Bonis* for Peter Morrison,) Sus-
pender.—*Sol.-Gen. Anderson—Hector.* No. 138.

ALEXANDER MORRISON and JAMES MOIR, Respondents.—*Inglis.*

Curator Bonis—Expenses—Process.—Circumstances in which held, that a *curator bonis* to a lunatic, who had sisted himself as pursuer of an action in his room, was not personally liable for the expenses found due to the defender who gained the cause. Observed that personal liability, of a *curator bonis* so sisting himself, is the exception to the general rule, and where proper, ought to be found in the original action in which the expenses are incurred.

In the month of March 1831, Peter Morrison became insane, and was sent to the lunatic asylum at Aberdeen. His business as a merchant was for some time carried on by James Moir, under the direction of his brother, Alexander Morrison; but, on the 19th August 1835, he was cognosced as insane, and Alexander Morrison appointed his *curator bonis*. An inventory and valuation of his shop goods was then made up; these were sold by the curator to James Moir, and the price having been paid, a formal discharge was executed in Moir's favour by the curator, on the 28th March 1836. Peter Morrison was restored to health in November 1836, and resumed the management of his own affairs, when, after some negotiations with Moir and his wife, who was his own sister, on the 12th April 1837 he granted to them a formal deed of discharge, narrating the sale of the goods, the payment of the price, and the discharge granted for it by the curator.

In December 1837, however, he brought an action of reduction, declarator, count and reckoning, and damages, against Morrison and Moir, for setting aside the two discharges before mentioned, upon the ground *inter alia*, that the first of them had been made and granted "fraudulently, collusively, and illegally, and to his great hurt and prejudice;" and that the second had been "elicited and impetrated from him by fraud and circumvention." The summons contained additional conclusions directed against the validity of the sale of the stock, and for payment by the defenders of large sums on account of their intromissions, and for damages.

June 10, 1845.
Forbes v.
Morrison.
1st Division.
Lord Cunningham.
W.

No. 138. A record was made up in this action, and issues were finally adjusted on the 21st May 1840.
 June 10, 1845. Forbes v. Morrison.

In the course of this year, and when the cause was on the eve of trial, Peter Morrison again became insane, and the suspender, Forbes, was appointed *curator bonis* to him by the Court. Upon the 5th June 1841, Forbes was, upon his own motion, sisted in the character of *curator bonis*, as pursuer "in the room of Peter Morrison," and the cause was tried before a jury on 20th December following.

The issues tried were in the following terms:—

"1st, Whether, on or about the 28th March 1836, the date of the first discharge sought to be reduced, Alexander Morrison, as curator, wrongfully, collusively, and fraudently transferred to James Moir, all or any of the pursuer's stock in trade, and wrongfully, collusively, and fraudulently granted, and James Moir wrongfully, collusively, and fraudulently accepted the discharge, to the loss, injury, and damage of the pursuer?"

"2d, Whether the discharge, dated 12th April 1837, sought to be reduced, was not the deed of the pursuer?"

"3d, Whether, on or about the 12th April 1837, when that last discharge was granted, 'the pursuer was of weak and facile disposition, and easily imposed on; and whether the defenders, or either of them, taking advantage of said facility and weakness, did, by fraud or circumvention, wrongfully procure or obtain the said discharge, to the lesion of the pursuer?'"

"4th, Whether, from 23d March 1834 to 12th April 1837, or during any part of that period, the defenders, or either of them, wrongfully and fraudulently intromitted with, and have failed to account for all or any part of the stock in trade, or other property of the pursuer, to the loss, injury, and damage of the pursuer?"

"Or,

"Whether, on or about the day of November 1836, the pursuer was convalescent and of sane mind; and whether, during the months of November 1836 and September 1837, and intervening months, or any of them, after the said convalescence, the pursuer homologated, approved of, or acquiesced in all or any of the aforesaid acts or deeds of the defenders, or either of them, during the said period from March 1834 to April 1837?"

The defenders led no evidence, and the jury returned the following verdict:—"In respect of the matters sworn before them, find that the pursuer, Peter Morrison, was of weak mind; but find for the defenders on all the issues, there being no fraud."

In consequence of this verdict a decree was pronounced by the Court on the 18th January 1842, assoilzieing the defenders from the conclusions

of the libel, and finding “the pursuer liable to the defenders in the expenses incurred by them in this action.” No. 138.

On the 12th April 1842, a charge was given on this decree by Alexander Morrison and Moir, to Forbes, as *curator bonis* to Peter Morrison, for payment of the sum of expenses which had been found due to them. Forbes presented a note of suspension, which, however, was refused, from his having failed to find caution; and he afterwards made payment of part of the sum claimed, to the extent, as he alleged, of the free funds of his ward then in his hands. On the 6th June 1842, Peter Morrison was sequestrated; and, thereafter, on the 21st December, Forbes was, upon application to the Court, exonerated and discharged from his office of *curator bonis*. June 10, 1845.
Forbes v.
Morrison.

In February 1844, Alexander Morrison and Moir intimated their intention to use personal diligence against Forbes for the balance of the expenses incurred in the action of reduction, which still remained unpaid. He in consequence brought the present suspension, and the note of suspension was ultimately passed without caution or consignment on the 8th June 1844.¹

On discussing the reasons of suspension before the Lord Ordinary, the defender pleaded,—

1. That he became subject to no responsibility except *qua curator bonis*, the character in which he sisted himself in the process, commenced and prosecuted by the ward himself previous to the complainer's appointment as curator.
2. That no decree having passed against him, except in the official character in which he was allowed to sist himself in the discharge of his duty, a charge to pay the expenses of process, under pain of imprisonment and poinding, or arrestment of his individual funds and effects, was wholly illegal.
3. That having made such a payment to the chargers as the funds of Peter Morrison, under his curatorial management, enabled him to make, and Peter Morrison's estate having been thereafter sequestrated, and he discharged of his office, actings and intromissions, as curator, and being now in possession of no funds to satisfy the decree against him as curator, suspension ought to be granted.

The respondents pleaded,—

1. The ultimate diligence threatened, was fully justified by the terms of the decree, warrant, and charge.²
2. Where a curator or trustee had engaged in litigation with third par-

¹ See report, ante Vol. VI. p. 1113.

² Scott v. Pattison, 21st December 1826, (5 S. 112;) Gibson, 25th May 1833, (5 S. 656.)

No. 138.
June 10, 1843.
Forbes v.
Morrison.

ties, and been subjected in expenses, it was no answer to a charge for payment of such expenses to allege, that the estate under his administration was exhausted, and that he was not, in his official character, possessed of any funds.

The Lord Ordinary pronounced the following interlocutor:—"The Lord Ordinary, having heard counsel in this process of suspension, and thereafter considered the record and whole process, suspends the letters *simpliciter*, and finds the suspender entitled to expenses." *

The respondents reclaimed.

LORD PRESIDENT.—I cannot see any grounds for inferring the personal liability of this curator. We see that there was a process in dependence, in which the

* "NOTE.—The Lord Ordinary conceives it to be clearly established in our law and practice, that when tutors and curators are subjected in expenses, in a suit carried on by them solely for behoof of their ward, the judgment imports their subjection only in their curatorial capacity, and is satisfied and suspended by their setting forth that the curatorial property or funds are exhausted. There is no example of any decree against tutors and curators being carried further.

"The exemption of judicial curators and factors from personal responsibility for proceedings in the fair and *bona fide* exercise of their office, is perhaps still more clear. It is often part of the duty of factors *loco tutoris*, of curators *ad litem*, of curators *bonis*, and other similar functionaries, to insist on suits for behoof of the parties or estates judicially under their charge; but a decree against them *nomine officiorum*, has never been held to infer personal responsibility.

"In all cases, both of judicial and of extrajudicial curators, it is no doubt possible to figure cases of such wanton and unwarrantable litigation, as to call on the Court to award expenses against the curators personally; but no such decree was asked or pronounced in the present instance.

"The case was assimilated to that of trustees upon insolvent and other estates, who are held to guarantee funds for the costs of any suit in which they engage with third parties, just as they are bound for contractions to their own agents, or furnishers of necessities to the estates under their charge. In these instances, a direct engagement to pay the articles ordered may be implied. But the cases are essentially different from the present. Trustees generally act for behoof of parties of mature age and capacity, able to instruct and guarantee them. But the contract of *litis* contestation, as between the curator and adversary, does not infer that personal liability which, in other special cases, may possibly be raised up, even against tutors and curators, for special furnishings on their mandate. It is not clear, however, that an officer of Court, such as a curator *ad litem* or a curator *bonis*, would be personally liable, even to the ward's agent, for the expenses of their own side of the suit. The latter is bound to look to the extent and resources of the curatorial estate for his indemnification, as by law the inventories must be publicly recorded.

"In the present instance, the specialties of the case are all strongly in favour of the suspender. He was appointed in *medio litis*—in fact, at an advanced stage of the cause—to attend to the interest of a litigant who had become insane. The suit was of an aspect which entitled and bound the curator to proceed; he could not with propriety abandon the action, and leave the lunatic's property (which was then reputed to be considerable) open to decree of reduction and costs, at the instance of the chargers, without a fair and temperate discussion of the case on trial; and the loss of a fund to answer the costs of the chargers, seems to be imputable to causes over which the judicial curator had no control."

issues were adjusted and ready for trial ; and at this time he comes forward and assists himself as a party, and then the issues were tried before a jury. The verdict returned was a very special one, and contained nothing to show that the transaction was a foul one on the part of the pursuer from beginning to end, or that the action was a groundless one. In such circumstances is the curator, who did not himself originate the litigation, to be held personally liable for the expenses of it ? There is a manifest distinction between the case of a *curator bonis*, and that of the trustee on a sequestrated estate. A trustee is in constant communication with the creditors ; and if he enter on a suit, or carry on one without their concurrence, he is not doing his duty. It is his duty to see that there are funds sufficient for the payment of expenses before he embarks in litigation. I am not able to see the application of the cases quoted to a *curator bonis*.

No. 138.

June 10, 1845.

Forbes v.
Morrison.

LORD MACKENZIE.—On the whole, I see no grounds on which to differ. The case here is very different from that of a trustee. A trustee can consult with the creditors as to whether there is a chance of success such as will warrant an action to be brought ; but here the curator cannot consult his client ; and though the client might have known very well that the action was ill founded, the curator could not tell this. It would be difficult to lay down any precise rule, that curators are never to be personally liable ; and I think it would be most dangerous to do so. They are not to be held liable if they perform their duty fairly ; but they are liable if they commit a gross breach of it. Such a breach of duty may arise from different causes ; and I think here, if the curator knew there were no funds out of which expenses could be paid, that would be sufficient if it were clearly made out ; but I am not satisfied that that has been done. Upon the whole, I think we could not be safe in finding the curator personally liable.

LORD FULLERTON.—I agree with your Lordships. A trustee in a sequestration does not act as trustee for the bankrupt, but as the representative of the creditors ; he may be viewed as a mandatary for them, and so be considered as liable for the responsibility of the parties who employ him. But a *curator bonis* is different ; he is appointed to represent his ward ; and, as in this case, to appear for the lunatic, and carry on proceedings which the lunatic himself might have done, had he been sane. But he incurs no further responsibility ; and I do not see that there is any hardship in this. If the party were not a lunatic, he might have gone on with the action himself, and the opposite party would have had no additional security for the expenses beyond his own responsibility. Where, then, is to be the difference if he is a lunatic ? If we hold the curator who acts for him liable, we give the other party additional security ; we just give him a cautioner for the expenses of the action.

I agree with Lord Mackenzie, that a curator litigating for his ward, is not in every case to be exempted from personal liability for expenses ; for I believe there might be a great many cases in which such liability would be held to exist. But this question ought always to be decided in the original action, when the whole merits of it are before the Court.

LORD JEFFREY.—There are here considerable elements undoubtedly for inferring the personal liability of this curator ; but, at the same time, not sufficient, I think, to overcome the legal presumption in his favour. The action was ready for trial at the time when he was appointed ;—could he have been asked to abandon

No. 138. it, which he could have done only upon payment of the expenses already incurred at the very moment of entering on his office?

June 10, 1845.

Brock v.
Speirs.

THE COURT adhered to the Lord Ordinary's interlocutor, with additional expenses.

JOHN STEWART, W.S.—INGLIS and BURN, W.S.—Agents.

No. 139.

HENRY BROCK, Pursuer.—*Marshall—T. Mackenzie.*
ALEXANDER SPEIRS, and SPEIRS' TRUSTEES, Defenders.—
Rutherford—Cowan.

Entail—Title to Pursue.—A party directed his trustees to execute and record an entail of certain lands in favour of a series of heirs; the trustees executed the entail, but neglected to record it, and the first heir in possession granted a writ of reduction, in contravention of the entail, to one of the trustees; the next heir of age, who had incurred a general representation of the contravener, having become bankrupt, the trustee on his sequestrated estate brought a reduction of the deed on the grounds that it was a contravention of the entail, and that the creditor, accepting it had violated his duty as trustee;—Held that he had no title to maintain the action, and the reasons of reduction repelled.

June 10, 1845. THE late Alexander Speirs of Elderslie executed a trust-disposition

1st DIVISION.
Lord Murray.
W.

and settlement, dated 23d May 1782, by which he conveyed generally his whole estate, real and personal, to certain parties, as trustees for the purposes therein mentioned. Archibald Speirs, his eldest son, and Peter Speirs, his youngest son, were included in the nomination. Among the purposes of the trust, he directed that the sum of £8000 should, under certain qualifications, be employed by the trustees in the purchase of lands to be entailed and settled upon Peter Speirs, and other heirs of entail, in terms of an entail of the lands of Culcreuch, which he had previously executed in favour of his second son. The trustees were directed to record such deed of entail in the register of tailzies. This deed contained an express clause exempting the trustees from liability for omission or negligence of any kind, or for any thing but their own actual transgressions.

Alexander Speirs died in the end of the year 1782. He had previously become the purchaser, at a judicial sale, of the lands of Colquhoun Glens, in Stirlingshire, and his trustees, in conformity with the direction of the trust-deed, completed the transaction after his death, 1783-5, and conveyed these lands to Peter Speirs, and the other heirs in entail of Culcreuch, with and under the conditions and provisions contained in that deed. The trustees subsequently purchased the lands of Culmore and Easter Glenboig, and they of new executed a disposition

1793-94, by which they conveyed the lands of Colquhoun Glins, with the additional lands above mentioned, to Peter Speirs and the other heirs, and with and under the conditions and provisions contained in the fore-said entail. These deeds, however, were never recorded in the register of entails, in terms of the directions to the trustees contained in the trust-deed.

No. 139.
June 10, 1845.
Brock v.
Speirs.

Peter Speirs took up the estates, and was infeft under these deeds, and possessed them until his death in June 1829.

Peter Speirs for some time carried on business under the firm of the Culcreuch Cotton Company, of which he was the sole partner. In the year 1827, Archibald Speirs, the elder brother of Peter Speirs, was applied to by Peter Speirs, and Alexander Graham Speirs, his eldest son, to assist them with funds to enable them to carry on that concern. This he agreed to do, on receiving, by way of security against loss from any obligations he might undertake, an absolute conveyance of the lands of Colquhoun Glins and others, (he giving his back-bond to hold them in security merely,) and a bond of relief by Alexander Graham Speirs and his brother.

Accordingly by a disposition dated 5th May 1827, Peter Speirs sold, alienated, and disposed to Archibald Speirs, the entailed lands of Colquhoun Glins, Culmore, and Easter Glenboig; and Archibald Speirs granted to Peter Speirs a back-bond, dated 9th May 1827, declaring that he held the subjects under that disposition for debts due and to become due to him by Peter Speirs, to an amount not exceeding £10,000. In virtue of that disposition, Archibald Speirs was infeft in the subjects, and the instrument of sasine in his favour recorded in the general register of sasines, 1st June 1827.

On the 7th of May 1827, Alexander Graham Speirs and his brother executed, in terms of the arrangement, a bond of relief in favour of Archibald Speirs. This bond proceeded upon the express narrative of the obligations which Archibald Speirs had undertaken, and had agreed to undertake, for Peter Speirs as an individual, and as a partner of the Culcreuch Cotton Company; and narrated the execution of the absolute disposition above mentioned, and the back-bond.

Peter Speirs died in June 1829, and was succeeded by his son Alexander Graham Speirs, who expedite a general service to him on the 9th February 1830. Archibald Speirs died in November 1832, leaving a general trust-disposition and settlement, conveying his whole fee-simple estates to trustees for certain purposes. He was succeeded by his eldest son Alexander Speirs, who completed his title to the unentailed property as his heir-at-law, and took up, *inter alia*, the lands of Colquhoun Glins, in which his father had been infeft upon the disposition of 1827.

Alexander Graham Speirs continued to conduct the Culcreuch Cotton Company for some years after his father's death; but having become

No. 139. bankrupt, he, as an individual, and the company itself, were sequestrated on the 26th May 1837, and Henry Brock was appointed trustee on the sequestrated estate.

June 10, 1845.
Brock v.
Speirs.

Brock brought an action of reduction against Alexander Speirs of Elderslie, for setting aside the disposition granted by Peter Speirs to Archibald Speirs in 1827, and the whole titles which followed upon it, on these grounds—1. That the disposition was ineffectual against Alexander Graham Speirs, the next heir of entail, and the pursuer as trustee on his sequestrated estate, in respect that it was granted in contravention of the deeds of entail and infeftments thereon, being the only titles under which Peter Speirs had right to the subjects, so that it was *ultra vires* of him to grant any such conveyance; and, 2d, That Archibald Speirs was not entitled to take or accept the disposition, notwithstanding that the deeds of entail were not recorded in the register of tailzies, because it was incumbent on him as one of, and along with, the other trustees of Alexander Speirs first of Elderslie, to cause the entails to be duly recorded, and having failed to do so, the defender, as representing him, was barred from founding on the omission to record the deeds which arose from his father's breach of duty.

The conclusions of the action were originally directed against Alexander Speirs alone, but his father's trustees were afterwards added as parties to it.

Defences were given in, in which it was maintained that the pursuer had neither title nor interest to insist in the action. A record was made up and cases given in.

The pursuer pleaded, that as trustee on the sequestrated estate of Alexander Graham Speirs, he had both a title and an interest to insist in the action.

1. The bankrupt, as the next substitute heir of entail, had a title to reduce the disposition of 1827, as being a contravention of the entail. He might have raised a declarator of irritancy against his father at any time during his life, and his title to reduce continued the same after the death of his father, the contravener; for, although he had succeeded to him as his heir and general representative, that did not bar him, in his character as next substitute under the entail, from setting aside any deed that could be shown to be a contravention of it. There was nothing in the circumstances of the case to show that the bankrupt himself was a consenter to the deed under challenge, which was granted by Peter Speirs alone, and without the concurrence of any other person. If the bankrupt had thus a title to pursue a reduction of the disposition, it was now vested in the pursuer as the trustee on his sequestrated estate. The creditors of an heir of entail in possession could

¹ Fraser, May 26, 1830, (6 S. & D. 806.)

adjudge his life-interest in the estate; and in the same way, a faculty No. 139. to reduce a deed as flowing *a non habente*, or on any other ground competent to a debtor, may be adjudged by his creditors, and the reduction June 10, 1845. Brock v. Speirs. be pursued by them; but the sequestration of Alexander Graham Speirs was equivalent to an adjudication, and, along with the rest of his estate, carried his title to set aside the disposition of 1827, to the pursuer, his trustee, who was therefore entitled to pursue a reduction, in order to secure to the creditors his life-interest as substitute heir under the entail, which it was the object of the deed to disappoint.

2. The *interest* of the pursuer to challenge the disposition was clear, as that deed contained a total alienation of the estate; and the result of the action, if successful, would be to secure to the creditors the bankrupt's life-interest in it; while, if it should ultimately be found, that from the non-recording of the entail it was altogether ineffectual, the whole of the estate would be thrown open to the creditors.

The defenders pleaded;—

1. The substitute heirs under an entail were the only parties who had a title to enforce its fetters in virtue of their *jus crediti* under the tailzie; and, at any rate, the creditors of an heir had no title to do so.¹ Although it might be competent for the substitute heirs under an entail to complain of a neglect to record it, inasmuch as their hope of succession was thereby defeated, yet if that omission had taken place, and the estate had in consequence become a fee-simple one, the creditors of an heir and their trustee had no title to object to an onerous security which formed an effectual burden upon the estate. As the bankrupt represented his father by an universal title, he was liable to implement all his obligations; and as his father could not, in the circumstances of the case, have set aside a security which he himself had granted, so he had no title to pursue the reduction; and, therefore, the trustee for the creditors had no title to bring an action which the bankrupt himself, in whose right he was, could not have brought. In addition to the liability under which the bankrupt lay, as the representative of his father, to implement all his obligations, he was barred, *personali exceptione*, from objecting to the disposition, because he was himself a consenter to it, and a party to the whole transaction; inasmuch as the bond of relief granted by himself and his brother to Archibald Speirs, proceeded upon the narrative of the disposition, and the statement that Archibald Speirs undertook the obligation for which it was granted, at the desire of himself and his brother, and on their agreement to relieve him.

2. Supposing the security in question were set aside, on the ground that the entail was valid and effectual, the result would necessarily be, that the estate would only gain the value of the bankrupt's life-

¹ Wedderburn v. Colvill, Jan. 29, 1789, (M. 10426.)

No. 139. interest in the lands, under burden of the preferable debt of £10,000, which the security had been granted, while the fund for division would be diminished by a ranking for the same amount. The real purpose of the pursuer in the reduction was, that after he had set aside the security as being a contravention of the entail, he might turn round and sweep the whole fee-simple of the estate into the sequestration; but this could not be founded on as an interest to sue the present action, inasmuch as it was inconsistent with his title as libelled; the right to the land which he professed to hold, being one subject to the conditions and restrictions of the entail.

June 10, 1845.
Brock v.
Speirs.

The Lord Ordinary pronounced the following interlocutor, reporting the case:—"The Lord Ordinary having considered the revised cases, the parties and whole process, appoints the said cases to be printed and boxed to the Lords of the First Division, in order that the same may be reported to the Court." *

LORD PRESIDENT.—The questions here raised for determination are rather singular in nature, and I shall be glad to have them further discussed. Before perusal of the cases, I at present entertain the greatest doubt of the pursuer's title and interest, as trustee for the creditors of Mr Alexander Graham Speirs and Culcreuch Cotton Company, to insist in the conclusions of this action. We now attend to the conclusions of the summons of reduction, which, after the narrative is rested on the ground, that the disposition granted by Peter Speirs to his son, Archibald, was in contravention of the deeds of entail under which alone he had right in the subjects, and was *ultra vires* of him; and that Archibald Speirs was not

* "NOTE.—In this case objections are stated to the title of the pursuer to sue this action of reduction, and which the Lord Ordinary was the more disposed to report, as it appeared to be the wish of the parties that it should receive a decision, and from there being no former precedents in favour of this action of reduction.

"It proceeds on the ground that a trustee, who had omitted to record an entail, did afterwards, for a sum advanced by him, receive the security now under reduction over lands which were included in the entail. It is objected by the defender to the title of the pursuer, Mr Brock, trustee on the sequestered estate of the heir of entail in possession, 1st, That although the heirs of entail might have a right to complain of the omission to record an entail, which deprived them of the security, yet the creditors of the heir in whom the estate became fee-simple, as the trustee, can have no right to reduce a security, in respect that the property had, by a previous omission, become subject to all onerous debts and obligations. 2dly, That as the heir represented his father in all his debts and obligations, he was bound to support the security which his father had granted, which this action is brought to reduce, the trustee for his creditors had no title to bring this action, which the common debtor, in whose right he is, could not have brought.

"The Lord Ordinary considers it very doubtful, whether, after the decisions that have been pronounced regarding unrecorded entails, a subsequent heir of entail, who was no party to the proceedings, could bring an action of damages in such circumstances, and he came to be of opinion that the trustee had no right to insist in an action of reduction in the circumstances of the present case, but he thought it better to report the case to the Court, in order that they may decide the question."

titled to accept of said disposition, notwithstanding that the entails were not recorded, in respect it was his duty, as one of his father's trustees, to obtain these entails to be recorded; and that the disposition, and all following upon it, are null and void, and ineffectual against Alexander Graham Speirs, the next heir of entail, and the pursuer as trustee upon his sequestrated estate.

No. 139.

June 10, 1845.
Brock v. Speirs.

Considering the circumstances in which Peter Speirs granted the disposition in question, with absolute warrandice, in consequence of advances by his brother to him, and in security of which also, his son, the present Alexander Graham Speirs, granted a bond for his uncle's benefit, and as becoming liable for the whole of his advances, it would appear that Peter Speirs himself could not have been heard in an attempt to reduce that disposition, as being barred from setting aside that which he bound himself expressly to make effectual. But can his son and general representative, as well as heir of entail, be in any better situation?—or can the trustee for the son's creditors be so? This is at least extremely doubtful, as the heir, now bankrupt, is bound for every debt, and subject to every exception, which would have lain against his predecessor; and, by being a partaker in the whole transaction, he could not be heard to reduce it in the character of heir of entail.

The pursuer libels on his title to have this estate brought under his control, subject to the fetters of the entail; but it cannot be overlooked, that when the disposition, which is alleged to have been a contravention of the entail, is set aside, the object will be to secure the estate, in respect the entail is unrecorded, for the benefit of the creditors.

But is such an interest as this consistent with the terms of the title on which the summons proceeds? It is well put, that if such an interest was expressly set forth, it could not avail in support of the title maintained by the trustee, to bring back, as in right of the bankrupt heir of entail, the estate to be subject again to the fetters.

It is likewise not to be overlooked, that if the pursuer was to succeed in having it found that the disposition is not available to the heir of Archibald Speirs, as having been in contravention of the entail, it follows that the whole of the securities granted by the bankrupt in his favour must be ranked on the estate. Where, then, will the benefit accrue to the general creditors?

Holding that the trustees of the elder Mr Speirs were guilty of a neglect of duty in not recording the entail of Glins and Glenboig, and hence subjected themselves to a claim of damages at the instance of the substitute heirs of entail, still, as the property was not secured by an entail duly recorded, it was liable for the debts of Peter Speirs, and he was not debarred from granting a security over it for sums advanced for his behoof; and it is on such security that the representative of Archibald Speirs alone insists in retaining it.

LORD MACKENZIE.—I am of the same opinion as your Lordship. This case proceeds upon an alleged contravention of an entail, and is intended for the reduction of the deed of contravention. Now, it is quite plain, that such an action could not be maintained by the contravener himself, nor by his creditors; and if that is the case, as little can it be maintained by his representative.

I thought at first that there might be no general representation of the ancestor, but that is not the case; there is a general representation, by which the bankrupt

No. 139. stands in the shoes of the contravener; he is just the contravener himself. That being the case, it is obvious that he cannot reduce the deed, and, if he cannot, how can his creditors? I do not see how they should be in a better situation than he is. In these circumstances, I have no doubt that the pursuer's title is bad.

June 10, 1845.
Brock v.
Speirs.

LORD FULLERTON.—I am quite of the same opinion. The whole proceedings on the part of the pursuer are contradictory. The summons commences by setting forth his title as trustee on the sequestrated estate of the Culcreuch Cotton Company, and of Alexander Graham Speirs, as an individual partner of the company, and not as heir of entail under the destination of the estate; while the conclusions are directed against the disposition as being a contravention of the entail, and therefore of no effect against the bankrupt or his trustee.

If the action had been brought by the trustee in the right of Alexander Graham Speirs as heir of entail, it would not have done, because the entail was never recorded, and therefore was ineffectual against the onerous deeds of the heir in possession. If it had been brought by Alexander Graham Speirs himself as a substitute heir of entail, who did not represent his father, he might perhaps have had a claim of damages against the granter in the disposition, who was a trustee under the settlement of the first Alexander Speirs, for neglecting his duty in failing to record the entail. But he is the general representative of his father, and the trustee for his creditors cannot sue except through the right of the sequestrated debtor, who is liable for his father's obligations.

LORD JEFFREY.—I am very clearly of the same opinion. This action appears to me to be one of the most extraordinary ever devised. It is founded on the fetters of the entail in order to get rid of it; for it would seem that the real purpose of the pursuer is first to set aside the security which was granted in contravention of the prohibitions, and then to turn round and attack the entail itself as altogether ineffectual.

I have, therefore, no hesitation in thinking that the action is incompetent.

THE COURT accordingly repelled the reasons of reduction, and assoilzied the defenders from the whole conclusions of the action, with expenses.

GIBSON-CRAIGS, DALZIEL, & BRODIE, W.S.—H. G. DICKSON, W.S.—Agents.

JAMES CHALMERS, Pursuer.—*Deas.*
 ELIZABETH, AGNES, JANET, and MARY IRELAND CHALMERS,
 Defenders.—*Cook.*

No. 140.

June 13, 1845.
 Chalmers v.
 Chalmers.

Trust—Proof—Act 1696, c. 25.—A father, who had granted to his daughters a conveyance of heritage *ex facie* absolute, proceeding on an admittedly false narrative of a price paid, raised a declarator to have it found that it was truly one in trust; and averred that its real nature was set forth in a back-letter delivered to him by the grantees, but which had been lost or abstracted by them from his repositories,—Held, that trust could be established only by the production, or a proving of the tenor of the back-letter, or by the writ or oath of the grantees;—Observed, that facts and circumstances admitted on record may be sufficient to prove a trust.

In July 1835, James Chalmers executed two dispositions and assigna- June 13, 1845.
 tions of certain heritable subjects belonging to him, in favour of his four 1ST DIVISION.
 daughters, Elizabeth, Agnes, Janet, and Mary Chalmers. These deeds Ld. Robertson.
 bore to be granted in consideration, the one of £50, and the other of N.
 £200, as the price of the subjects disposed, and contained an *ex facie*
 absolute and irredeemable conveyance to the grantees. The deeds were
 prepared by the granter's agent, and at his own expense. Neither of
 them was ever delivered; but infeftment was taken upon them, and
 the instruments of seisin placed in the hands of Elizabeth Chalmers,
 the eldest daughter. About the same date with the dispositions, a
 writing, or back-letter, was subscribed by the grantees, and delivered to
 their father, explanatory, or declaratory of the nature and conditions of
 the conveyance which had been made to them. Chalmers continued,
 after the execution of the deeds, to possess part of the subjects convey-
 ed personally, and to draw the rents of the rest, one of which was let
 to the defender, Mary Chalmers, and her husband, John Galloway.
 He performed all the acts of ownership with regard to them, such as
 the payment of feu-duties, and other burdens, and expended consider-
 able sums for repairs. Chalmers's first wife, the mother of his daugh-
 ters, died in the summer of 1841; and, in December 1842, he was
 married a second time. In November of that year, he intimated to his
 daughters that he had lost the writing which, as formerly mentioned, had
 been granted and delivered to him by them, and requested that they
 would give him a letter explanatory of the true nature of the *ex facie*
 absolute conveyance which had been made in their favour. Accordingly,
 the following letter was addressed to him:—

“ Kettle, November 1842.

“ DEAR FATHER,

“ Agreeable to your request, I hereby grant you your lifetime of

No. 140. the Properties which jointly belongs to me and my sisters, upon the condition that you not only uphold the properties in a habitable condition ; but not longer than I think that the object of your choice treats you with that kindness which I think you as my father deserves. In addition, I must add that this acknowledg^t is in the hands of John Chalmers, my uncle at Kettle, who is empowered to see my conditions carried into effect. I remain, Dear Father, your affectionate Daughter,

(Signed) " ELIZABETH CHALMERS.

AGNES CHALMERS.

MARY I. CHALMERS.

JANET CHALMERS.

" James Dauskin, Witness."

Chalmers returned no answer to this letter, but retained it in his possession.

In January 1844, he raised an action of declarator and reduction, to have it found and declared that the conveyances above mentioned were in trust only, or at any rate that they were simply *mortis causa* gratuitous and revocable deeds, which were from that time revoked and recalled; and, alternatively, in the event of the parties failing to reconvey the subjects to him, to have the two dispositions, and the instruments of sale following upon them, reduced and set aside.

Defences were given in by his daughters, in which they admitted that no price had been paid for the conveyance contained in the disposition but denied that it was one in trust merely for their father's behoof. They alleged that its true object was to secure an effectual provision to them that the writing, averred by the pursuer to be lost, consisted of an acknowledgment, that, notwithstanding the absolute terms of the dispositions, he was to continue to enjoy the liferent of the property ; and that the action was raised for the purpose of defeating the provision which had been made in their favour.

A record was made up, and a diligence granted to the parties against the havers for the recovery of the back-letter admitted to have been granted explanatory of the true nature of the conveyance. The defenders did not execute their diligence ; and that of the pursuer having failed, he renounced further probation.

The respective averments and pleas of the parties on the record are stated in the following interlocutor and note of the Lord Ordinary, pronounced on the 21st December 1844.

" Finds, 1st, That on the 7th day of July 1835, the pursuer executed two dispositions and assignations conveying his whole heritable property in favour of the defenders, his daughters, one of which bore to be on payment of a price of £50, and the other of £200, and the said deeds were *ex facie* absolute, and without reservation of the grantor's liferent: Finds that the said deeds were prepared by the pursuer's agent, and at

his expense, and that infestment followed thereon, the expense of which was also defrayed by the pursuer : Finds that the term of entry specified in the said deeds was Whitsunday 1835, but that the defenders obtained no possession, and that the pursuer possessed part of the subjects, and drew the rents of the remainder, and expended considerable sums in repairs or improvements : Finds it admitted that no price was paid for the said subjects, or value given, or onerous consideration stipulated, and that the dispositions were not delivered : Finds that the object of granting the said deeds is alleged by the pursuer to have been with the view of placing his property beyond the reach of the claims of a certain Friendly Society, who threatened to prosecute him, but which prosecution never was raised, and that the said deeds were a mere trust for his behoof, and were understood and intended to be revocable at his pleasure : Finds, on the other hand, that the defenders state the real nature of the transaction to have been to make provision for them, his only children, and that he was to enjoy a liferent of the subjects, to which liferent they still consent : Finds that there is no direct written evidence of the constitution of the trust which the pursuer seeks to declare, and that the admissions made by the defenders on this record, which are equivalent to their writ, do not establish the existence of any such trust, and cannot be held to import any thing more than that the narrative of the deed is true in stating that any price was paid, and that the said deeds do not embody the real transaction, in so far as they contain no reservation of a liferent of the pursuer : Finds it averred that, on the 13th July 1835, the defenders subscribed a back-letter, or obligation of relief, declaratory of the said trust, which obligation was delivered to the pursuer, and that the same was afterwards abstracted from the pursuer's repositories by one of the defenders : Finds no evidence of any such letter of relief ever having been in existence or abstracted, and this, notwithstanding diligence having been granted, on the suggestion of the Lord Ordinary, for recovery thereof, and under which the fullest enquiry as to the said abstraction was competent : Finds that the instruments of sasine on the said dispositions were delivered to the defenders, which delivery was wholly unnecessary with the view of protecting the property from the said Friendly Society, or for the constitution of the trust alleged by the pursuer, and that the said instruments of sasine were retained by them and produced in the present action : Finds it averred by the defenders, that the letter granted by them at the time the dispositions were granted, is merely a declaration that the pursuer was to enjoy the liferent of the subjects, and that the letter of relief having been lost by the negligence of the pursuer, and his averment of abstraction thereof not proved, the presumption of law is against his account of the import thereof : Finds that, from the date of the said deeds, no steps appear to have been taken by the pursuer to establish the said trust until in or about the

No. 140.

June 13, 1845.

Chalmers v.
Chalmers.

No. 140.
June 13, 1845.
Chalmers v.
Chalmers.

month of November 1842, and when the pursuer had contracted, or was about to contract, a second marriage : Finds that the defenders then subscribed a letter importing an acknowledgment of the pursuer's liferent of the subjects, but with a condition annexed as to the conduct of their stepmother, on which they do not now insist, and to which the pursuer does not appear to have acceded : Finds that the said letter was retained by the pursuer, and produced by him in this action, which was not instituted until the month of January 1844 ; and, therefore, under all the circumstances of the case, finds that the pursuer has failed to establish the subsistence of the alleged trust, or to prove that the property in which the defenders stand infest, as absolute proprietors, was conveyed to them by deeds revocable at his pleasure, but that the real and true nature of the transaction was as stated by the defenders ; and therefore, under reservation always of the pursuer's full liferent right in the subjects in question, sustains the defences, assoilzies the defenders from this action, and decerns." *

* "NOTE.—This is an action of declarator of trust, founded on the allegation that certain *ex facie* absolute dispositions were qualified by a written letter of relief, granted and delivered at the time. There can be no doubt of the general rule, that, under the Act 1696, c. 25, no such declarator can be sustained except upon the writ or oath of the party ; Duggan v. Wight, 2d March 1797, Moir 12761 ; and as the letter of relief has been lost by the pursuer's own negligence, and his averment of the abstraction thereof is not proved, the competent evidence is wanting.

" But it was contended, on the authority of the cases of Montgomery, February 1811, Fac. Coll., and Miller v. Oliphant, 7th March 1843, Deak Vol. V. 856, that the pursuer was entitled to enquire into the reality of the transaction, the defenders having admitted that no price was paid for the subjects, and therefore that the dispositions proceeded on a false narrative. No proof was tendered by the pursuer ; but, on the contrary, probation was renounced, the diligence granted for the recovery of the back-letter having failed. But, admitting the fullest enquiry into the reality of the transaction, it appears to stand that both parties are agreed that there was a letter actually granted at the time the deeds were granted, and the question is, what was its true import ? The pursuer says it was a simple declaration of trust, the defenders, an acknowledgment that the property should be held in liferent by the pursuer. The pursuer has lost the document, and therefore his account of it cannot be received. The admission of the defenders must be taken with its qualities, and the acceptance by the pursuer of the letter of November 1842, is a strong confirmation of the truth of their statement, although the burden of proof does not lie on them.

" The pursuer pleads alternatively, that, even if there had been no trust, the deeds, being gratuitous, were revocable. But if the defenders were infest as absolute proprietors, as to which there is no doubt, and only granted a back-letter declaring the liferent to be in their father, it is inconsistent with the whole transaction to assume that there was a power of revocation. It does not appear to the Lord Ordinary that there is any evidence of such power having been reserved, and in these cases ' the evidence admitted to such an effect must be carefully weighed.' Hume's Decisions, p. 235, Miller v. Miller, 13th November 1793. See also Braidwood v. Braidwood, 26th November 1835, Shaw, XIV. p. 64."

The pursuer reclaimed, and pleaded ;—

1. That the defenders having admitted that the deeds in question proceeded on a false narrative, they could not be considered as standing upon them ; and, therefore, that the burden of proof as to the true nature of the conveyance was transferred from him to them.¹

June 13, 1845.
Chalmers v.
Chalmers.

2. That, supposing some part of the proof lay on the pursuer, it was competent to prove the trust by facts and circumstances admitted on the record, these being equivalent to the party's writ ;² and that the facts and circumstances admitted by the defenders in this case were sufficient for that purpose.

The defenders pleaded ;—

1. That, as the pursuer had not produced the back-letter which was acknowledged to have been in his possession, and which contained the best evidence of the true nature of the transaction, and had failed to prove its loss in the way which he had averred on the record, he was in the situation of a party withholding evidence, and could not bring proof of an inferior kind ; and that they were, therefore, entitled to a presumption in favour of their statements.

2. That admitted facts and circumstances, in order to constitute a proof of a trust, equal to express declaration by writ or oath, must be inconsistent with any other view of the case than that a trust was truly intended ; but that all the facts in this case were as consistent with the truth of their statement as with that of the pursuer.

LORD PRESIDENT.—The ground of action here is, that whatever may be the appearance of the deeds *ex facie*, they were truly intended to be a trust-conveyance for the pursuer's behoof, and that an acknowledgment of their real nature was returned by his daughters, in whose favour they were granted. This acknowledgment, contained in the back-letter stated to have been written by his daughters, the pursuer says was at one time in his possession, but that it is now lost, or has been abstracted from his repositories by one or other of the defenders. This, however, he has failed to prove.

In these circumstances, was it not necessary for him to instruct the contents of that letter ? And then, observe his conduct after the alleged loss—when he asks or something to supply its place, the answer he receives from one of his daughters is, the property belongs to me and my sisters. Now, if the conveyance had really been one in trust, and had been expressly acknowledged to be so, would he not have expressed his astonishment at receiving an answer so inconsistent with the previous letter ? But he makes no complaint or remonstrance ; and his silence, I think, looks like a virtual admission of the truth of his daughter's statement. I am decidedly of opinion that the Lord Ordinary is right.

¹ Hotson v. Paul, June 7, 1831, (9 S. 685.)

² Stewart's Executors, July 8, 1777, (5 Br. Sup. 63 ;) Duggan v. Wight, Mar. 2, 1797, (M. 12761.)

No. 140. **LORD MACKENZIE.**—This is a case of declarator of trust, and nothing else; and of course the statute applies, and the trust must be proved by the writ or oath of the party. It applies here *a fortiori*, for the alleged trust is constituted by regular, formal, and probative deeds, *ex facie* absolute; and the conveyance is not rashly granted, but is accompanied with a deed declaratory of its nature, in the shape of a back-letter, though the parties differ as to the contents of this writing. This deed is delivered to the granter of the conveyance, and, having got it, he proposes to declare the trust without producing the deed. Now, was it not his business to produce it, and, if he does not, is it not the presumption that he has either destroyed it himself, or, having it in his possession, does not choose to produce it? If the conveyance was truly in trust he has a remedy, for he may prove it by the oath of the other party; but if he does not do that, and does not produce the deed in which, according to his statement, it was acknowledged, can we allow him to do it by a proof of vague circumstances? If there is any case in which the Act applies, this is one.

I don't think the circumstances founded on by the pursuer are in themselves any way satisfactory. Though the deeds were not delivered to the grantees, seisin was taken on them, and that is equivalent to delivery; so that I think there is little in that. The narrative of the conveyance, that it was a sale for a price, is undoubtedly not true; but many gratuitous dispositions proceed on a false narrative of sale; and here both parties admit that that statement was false.

Then, with regard to the letter from his daughter to him, it does not appear what he wanted her to state in it; but she says she is willing to give him a liferent, but that the property is her own and her sisters. Now, if a probative deed had ever been granted, proving that the conveyance was of a different nature altogether, and was merely one in trust, would he have said nothing on getting this letter? Why, he would have replied—I never thought of a liferent at all—the conveyance was only one in trust; but, instead of that, he keeps it in his possession for a long time, without making any reply whatever. That is a strong circumstance against him. On the whole, I am of opinion that the Lord Ordinary's interlocutor should be adhered to.

LORD FULLERTON.—I am of the same opinion. The words of the statute are very strong, but they have been allowed to be modified in practice in some particular cases. And it is reasonable enough, when an action of declarator of trust is brought, if the party admits what would have been sufficient if stated on oath to prove the trust, to allow this to supply the want of oath. But, on this principle, the pursuer here has not made out his case. Here there is an admission on the part of the defenders that no price was paid for the conveyance, and that the granter was entitled to the liferent of the property, notwithstanding the terms of the deed; but then this is coupled with the statement, that the fee was made over absolutely to them.

Now, the pursuer treats this admission in a very convenient way. He says, whenever you admit that the narrative of the deed is false, the burden of proof is shifted, and it lies on you to prove that it was not a conveyance in trust. But what right had he to take the admission without the qualification attached to it? On that view, and as far as it stands on this admission of the defenders, I think the pursuer's case won't stand.

Then it is said the facts and circumstances admitted are sufficient to prove a

trust. Now, I rather think that the cases do bear out this—that admitted facts and circumstances may supply the want of a positive declaration of trust; but then these facts and circumstances must constitute real evidence of the conduct of the party in relation to the matter, not to be explained in any other way than as an admission that he holds in trust. The facts and circumstances in this case, however, I don't think to be of any importance, in the way of proof that the conveyance was truly one in trust. The burden of proving his case lay upon the pursuer, and he has entirely failed to do so.

No. 140.
June 13, 1845.
Chalmers v.
Chalmers.

LORD JEFFREY.—I concur. I have all along thought that this was a very peculiar case, and one that would require much more than the usual amount of proof to show that the conveyance was truly one in trust. The pursuer comes into Court, admitting that what he avers to be a trust was constituted by a deed *ex facie* absolute. This, however, he says, was qualified by a back-letter, which was a probative instrument. He admits that he got delivery of this letter, and I don't see, therefore, how he can be allowed to prove the trust in any other way than by its tenor and contents. The best evidence is that which he acknowledges was once in his possession, but which he now says he has lost. If it be really so, a remedy was open to him—he might have brought a proving of its tenor; but that he has not done, and I think that is sufficient to decide the question. Having admitted that he got the deed, and condescended upon the particular mode in which it was lost, and yet having declined to bring a proving of its tenor, it must be presumed to have disposed of it, or put it away himself.

I quite agree with Lord Fullerton, that some liberty has been taken with the act 1696; for, according to the way in which it has been applied in practice, a trust may be proved by admitted facts and circumstances constituting real evidence. Admissions on record, signed by a procurator, however, just come to be party's writings by procuration. But then the facts and circumstances thus established must be perfectly unequivocal; while here, I think that all the facts and circumstances admitted are more reconcilable with the defenders' than the pursuer's view of the case.

THE COURT adhered.

THOMAS LEBURN, S.S.C.—T. and R. LANDALE, S.S.C.—Agents.

No. 141. JOHN COWAN, (*Curator Bonis* of Thomas Turnbull,) Pursuer.—
Marshall—Moncreiff.

June 13, 1845.
 Cowan v.
 Turnbull's
 Trustees.

TURNBULL'S TRUSTEES, Defenders.—*Sol.-Gen. Anderson—*
G. G. Bell.

Insanity—Curator—Clause—Approbate and Reprobate.—1. Circumstances in which held, that a *curator bonis* to a lunatic was not bound to make, on behalf of his ward, an election between legitim and a testamentary provision. 2. Trustees were directed to realize the truster's personal property, and invest the proceeds in land; and on the recovery or death of the truster's only child—a lunatic—to execute a strict entail thereof, along with the truster's other lands; but no direction was given as to the profits of the personal estate or rents of the heritage prior to the execution of the entail,—Held that these belonged to the lunatic, independently of the trust, as heir-at-law, and that his curator did not approbate the trust by claiming them.

June 13, 1845. WILLIAM TURNBULL died in December 1840, leaving a large fortune. His only child, Thomas Turnbull, was in a state of mental incapacity, and on 11th March 1842, the pursuer, John Cowan, advocate, was appointed his *curator bonis*.
 1st Division.
 Lord Wood.
 W.

By a trust-disposition, executed in February 1826, William Turnbull conveyed to Mrs Alison Turnbull and others, as trustees, all the estate and effects, heritable and moveable, which should belong to him at the time of his death, “with full power to my said trustees, immediately after my decease, to enter to possession of the premises, to output and input tenants, and to manage the same in the like ample manner as I could have done myself, and particularly to liquidate and realize my whole personal property, and, as soon as conveniently they can thereafter, to invest the proceeds in land, as near to my other properties as can be got, and thereafter to hold and entail the same in manner underwritten.” By another clause of the deed, he directed his “said trustees to apply such part and portion of the income of my residuary estate as they shall see useful and proper for the support and comfort of my only child, Thomas Turnbull, during all the days of his lifetime; and, in the event of his recovery or death, then my said trustees are hereby directed to execute a strict entail, according to the law of Scotland, of my whole lands and heritages, as well as of such lands as may be purchased and acquired with my personal property, so directed to be invested as aforesaid, and that to and in favour of the said Thomas Turnbull, my son, if it shall please God to restore him to health, and to the heirs whatsoever of his body; whom failing, to the said William Turnbull, son of my said brother deceased, and the heirs whatsoever of

his body; whom failing, to my own nearest heirs whatsoever, the eldest heir-female always succeeding without division, and excluding heiresses-portioners throughout the whole course of succession." No. 141.

June 13, 1845.
Cowan v.
Turnbull's
Trustees.

No marriage-contract had been entered into between William Turnbull and his wife, and, consequently, his son, Thomas Turnbull, had a right to *legitim* out of the free executry, which amounted to between £80,000 and £100,000.

John Cowan, the *curator bonis* of Thomas Turnbull, raised an action of declarator and count and reckoning, to which he called as defenders William Turnbull's trustees, and the existing parties in whose favour the entail was directed in the trust-deed to be executed.

His summons contained two principal declaratory conclusions:—1st, "That, *hoc statu*, it is not incumbent upon the pursuer, in the exercise of the powers, or in the discharge of the duties of his office of *curator bonis* for the said Thomas Turnbull, to elect on his behalf between his right of *legitim* attaching to the moveable estate and effects of the said deceased William Turnbull, his father, and the rights provided in his favour by the said William Turnbull's deed of settlement; and that, notwithstanding such election shall not be made by the pursuer on behalf of the said Thomas Turnbull, and notwithstanding of the sums necessary for his support and maintenance being supplied from the estate under the charge of the trustees of his father, in terms of the requisition made on them by the pursuer, as before mentioned, the right of the said Thomas Turnbull to make such election, in the event of his recovery, or, in the event of his dying without having recovered, or without having elected, the right of his legal representatives to claim his *legitim*, shall remain entire and unimpaired." And, 2d, "That the trustees of the said William Turnbull, defenders, are not directed or entitled, under the terms of his trust-settlement, to execute an entail of the lands conveyed to them by that deed, and of the lands purchased or to be purchased by them under the directions thereof, until the period of the recovery or death of the said Thomas Turnbull; and that the income and annual produce drawn and to be drawn from the estate, heritable and moveable, of the said William Turnbull, between the period of his death and that of the execution of such entail, whether the same was acquired by him in his lifetime, or has been or shall be acquired by the said trustees, under the direction of the said trust-deed, is undisposed of by the said deed, and now belongs, or, as the same from time to time shall exist and become due, will belong to the said Thomas Turnbull, absolutely and unconditionally, as his own funds; and that the pursuer, as his *curator bonis*, is entitled to demand and recover the same—without prejudice to the right of the said Thomas Turnbull, or of his legal representatives, afterwards to exercise the said right of election, or to claim *legitim*, as before mentioned; and that the same shall so belong to the said Thomas Turnbull, and form

No. 141. part of his funds, whether effect shall ultimately so be given either to the said legal right of *legitim*, or to the foresaid testamentary provision in his favour under his father's said deeds of settlement."

June 13, 1845.
Cowan v
Turnbull's
Trustees.

These declaratory conclusions were followed by a petitory conclusion against the trustees to account for the free income, and to pay the amount of it to the pursuer.

A record was closed on summons and defences; and, after some previous proceedings, which it is unnecessary to mention, the Lord Ordinary ordered cases upon the whole cause.

In support of the first conclusion of the summons, the pursuer pleaded;—

1. That it was not incumbent upon him to deprive either Thomas Turnbull himself, in the event of his convalescence—or his legal representatives, in the event of his dying insane—of the option to accept of the testamentary provision, or claim *legitim*; and that a *curator bonis* was not entitled to change or interfere with the succession of his ward, even although such a proceeding should be for the ward's benefit.¹

2. That this reservation of the option to Thomas Turnbull, or his representatives, would not be affected by the trustees, in the mean while, applying a part of the annual income in alimentering him; because, whether or not that option should ever be exercised, or in whatever manner it might eventually be exercised, Thomas Turnbull was in any event legally entitled to such allowance.

In support of the second conclusion, he pleaded,—

1. That he was entitled to claim the surplus annual income of the estate during the period between the testator's death and the time when the entail was directed to be made, because the truster had not disposed of that income in favour of any third party, and that, therefore, it belonged to Thomas Turnbull, his legal representative.²

2. That it was a settled rule of construction, that in a trust-settlement a direction to employ the trust-funds in purchasing lands to be entailed on a series of heirs, was not held by implication to include the interest or revenue arising from the trust-funds after the testator's death, when such a direction was not expressed;³ and that the specialties which distinguished the provision in the present case, were not only consistent with the general rule, but strongly confirmatory thereof.

¹ Ross, Jan. 31, 1793, (M. 5545;) *Graham v. Lord Hopetoun*, March 6, 1798, (M. 5599;) *Hannay v. Kennedy*, Nov. 15, 1843, (ante, Vol. VI. p. 40.)

² *Soutar*, 22d January 1801, (Mor. App., Implied Will, No. 2.)

³ *Campbell's Trustees*, 17th May 1836, (14 S. 770;) and *Howat's Trustees*, 17th February 1838, (*ib.* XVI. 622;) *Graham v. Templar*, 14th February 1826—affirmed on appeal, 1st April 1828, (3 W. & S. 48.)

With regard to the first conclusions of the summons, the defenders No. 141. pleaded;—

That a guardian was bound to elect for behoof of his ward where a delay in making the election would prejudice others, and this more especially where the guardian was himself making claims connected with the rights of such third parties; and that the pursuer was bound to exercise the option belonging to Thomas Turnbull, because, 1st, Under the second conclusion of the action, he was claiming payment of part of the trust-funds. 2d, If the right of option was not immediately exercised, embarrassment might arise in the management of the trust, and loss consequently result to the heirs of entail; and, 3d, In the event of Thomas Turnbull dying without having declared his election, and without leaving an heir of his body, the right of election would be at an end, because in that event his legal representatives would not be the heirs of entail, and consequently would be entitled to claim the legitim.

June 13, 1845.
Cowan v.
Turnbull's
Trustees.

With regard to the second conclusion, they pleaded,—

1. That it was improbable, in the circumstances of the case, that the truster could have intended to exclude the annual income of the trust estate from his direction as to investing and entailing.

2. That the accruing produce, or income, being merely accessories, followed the destination and application of the stock or principal, out of which they arose, according to the maxim, *accessorium sequitur suum principale*.¹

3. That Thomas Turnbull was barred, upon the principle of approbate and reprobate, from now claiming the accruing income, under any technical defect or imperfection in the words of the trust-deed.²

4. That if Thomas Turnbull or his curator should now, in virtue of his power of election, take the legitim, and thereby repudiate the testamentary provisions in his favour, the defenders would be entitled to anticipate the period when they were authorized and directed to execute the entail, by executing it immediately; and that thus the annual income of the estate would thenceforth belong to the next heir of entail.

The Lord Ordinary made avizandum with the case to the First Division, accompanying his interlocutor with the subjoined note.*

¹ Gillespie, 7th December 1802, (Mor. App., Accessorium, &c., No. 2;) Templear, 14th February 1826, (4 S. 460,) affirmed, 28th March 1828, (Wilson and Shaw's Appeal Cases;) Earl of Stair, 24th May 1826, and 19th June 1827, (Wilson and Shaw's Appeal Cases.)

² Kerr v. Wauchope, (1 Bligh, 21;) Storie's Com., 3d ed., § 1075-1077; Birmingham v. Kirwan, (2 Sch. & Lefr., 449-450.)

* "NOTE.—It having been thought desirable that the argument for the parties should be put into writing, and the case being one in which it is not to be supposed that either party would be satisfied with his judgment, in so far as adverse,

No. 141. LORD PRESIDENT.—As to the first proposition, whether a *curator bonis* can be compelled to make an election such as that in the present case, I think that he

June 13, 1845.
COWAN v.
Turnbull's
Trustees.

the Lord Ordinary has considered that he may with propriety at once report to the Court. He shall, however, state the views he entertains upon the points argued in the revised cases.

"1. It does not appear to the Lord Ordinary that the pursuer, as *curator bonis* of Thomas Turnbull, can, in the circumstances, be compelled to exercise the option which belongs to Thomas Turnbull of taking his legitim, or taking benefit by the testamentary provisions of his father; and he therefore holds that the first declaratory conclusion of the summons is well-founded, and that the pursuer is entitled to decree in terms of it.

"If, indeed, the pursuer, under the second conclusion of the action, had been making an immediate claim to part of the trust-funds, that is, to a part of them which is destined and appropriated by the directions and purposes of the trust-deed, the case might have been different. But, under that conclusion, he is not claiming any thing either in respect of the provisions of the trust-deed, or against its provisions. His claim rests on this, that what he claims has not been disposed of by the truster, and belongs to the pursuer's ward, the truster's legal representative, as being undisposed of residue. If the fund shall be found to have been tested on, then the claim will not be successful. If otherwise, there is nothing in the nature of the claim which can force upon the pursuer now to exercise for his ward the option which it is contended by the defenders he is bound to make.

"If indeed it could be successfully maintained, that were the pursuer to elect for his ward to take the legitim, and along with it such part of the truster's estate as may not be otherwise appropriated, it would be in the power of the defenders to execute the entail, which, by the provisions of the trust, they are directed to make upon the occurrence of Thomas Turnbull's recovery or death, without waiting for either of these events taking place, the defenders might have a stronger case for the plea of the incumbency of immediate election by the pursuer; because in that view the postponement of it would itself be the means of creating the very fund, which, in so far as it shall arise, the pursuer is contending, under the second conclusion of his action, must fall to his ward as undisposed-of residue—the fund thereby claimed being the surplus means of the trust-estate accruing in the intermediate period till the entail of the lands, original and purchased, shall be executed. But the Lord Ordinary conceives that, in the circumstances, the election by the pursuer, if now made, to take the legitim, could not be attended with the supposed effect. The period at which the entail may be executed would not be thereby altered. It would still stand deferred till the recovery or death of Thomas Turnbull. The fund for competition will consequently not be increased by the election being delayed. If the election were to be to take the legitim, there would nevertheless be an accruing income on the trust-estate to be claimed, on the one hand, as unappropriated, and, on the other, as directed to be invested in land and entailed; and if the election were to be to take the benefits conferred by the trust-deed, there again there would be an accruing income to be similarly claimed, because the pursuer contends that he would be entitled to it in fee-simple, as being undisposed of. The only difference is, that in the latter case there would be included the produce of the whole personal property; whereas, in the former, the produce of the portion of it constituting the legitim would be excluded. But in either case the pursuer, if right in his plea, would, and will be entitled to the whole surplus accruing income, either as being the income of what belongs to him as legitim, or the income of the capital of the personal property, or rents of land not appropriated or tested upon.

"Then with regard to the second conclusion of the action.

"The estate conveyed by the truster to the defenders, his trustees, consisted

cannot. The ward can do nothing; and can his guardian then act for him in such a matter? A right of election can only be exercised by a person *sui juris*, and therefore the curator here, I think, is not bound to make the election.

No. 141.

June 13, 1845.
Cowan v.
Turnbull's
Trustees.

partly of land and partly of personal property. The earliest date mentioned for the execution of the entail appointed to be made by the trustees of the land directed to be entailed in favour of Thomas Turnbull, and the heirs whatsoever of his body, whom failing, of William Turnbull, &c., is the recovery or death of Thomas Turnbull. The trust-deed contemplates, that till the occurrence of one or other of these events, the lands to be entailed are to be held by the trustees. It is not disputed that the instruction to entail applies to the original lands conveyed to the trustees, and any lands that may be purchased with the capital of the personal property left by the truster when realized. But the question is, is the surplus income and annual produce—after the payment of certain burdens, which, from the death of the truster till the period of the execution of the entail, may be derived from the personal property, or the original or acquired lands—undisposed of residue, in respect of its not being appropriated by the provisions of the trust-deed, and which, therefore, belongs to the pursuer's ward; or is it, or any part of it, appointed by the provisions of the deed to be invested in land and entailed?

“Although it could be reasonably conjectured or inferred that it was the intention of the truster that this intermediate surplus income or produce of his estate should be invested in lands to be entailed, that would not be sufficient to effectuate the truster's purpose, or to exclude the claim of the legal representative, unless the truster has duly executed his intention. It is true that the words used by him are to be liberally interpreted, so as to carry his intention into effect, but still there must be words which will fairly bear the construction proposed to be put on them, or if not, the Court cannot supply them. It cannot do that for the testator which he has omitted to do *habili modo*. Now it is thought, that in the present instance the testator has not used words which can be construed as importing a direction to his trustees to invest in land the fund which is in controversy, and thereafter to entail it, or so expressed himself as to put his legal representative to his election between his rights, as such, in relation to that fund, and the benefits conferred upon him by the trust-deed, and that there is nothing to support any opinion that may be formed of its having been in the mind and purpose of the testator that the surplus accruing income of his estate should be laid out in land to be entailed, beyond uncertain inferences drawn from the circumstances in which the settlement was executed, and the general scope and character of the instrument.

“It is impossible to read the trust-deed without observing, that—whether as regards the rents of the lands conveyed to the trustees, arising during the intermediate period till the time shall arrive for the execution of the entail, or the rents of the lands to be purchased by the investment of the personal property directed to be realized, (both which acts are pointed out as things not to be deferred, but to be done with all convenient speed)—there is not a single expression in the deed which in the remotest way applies to their disposal, except in so far as they may be burned with the annuities or other bequests directed to be paid, and the sum to be allowed for the maintenance of Thomas Turnbull, and the expenses of management. Accordingly the defenders, in their revised case, have put all their argument upon the terms of the provision for the disposal of the proceeds of the personal property, and have not referred to any words in the deed as amounting to appropriation of the above-mentioned rents.

“After directing the trustees to realize his personal property, and invest the proceeds in land, which they are ‘thereafter to hold and entail in manner underwritten,’ and making provision for the payment of his debts and other matters, the testator goes on, ‘Thirdly, and lastly,’ to direct and appoint his ‘trustees to apply each part and portion of the income of my residuary estate as they shall see useful and proper for the support and comfort of my only child, Thomas Turnbull,

No. 141. As to the second point, that must depend entirely upon the words of the deed. Now, I cannot read it in any other way than as containing a direction merely that

June 13, 1845.

Cowan v.
Turnbull's
Trustees.

during all the days of his lifetime; and in the event of his recovery or death, then my said trustees are hereby directed to execute a strict entail, according to the law of Scotland, of my whole lands and heritages, as well as of such lands as may be purchased and acquired with my personal property, so directed to be invested as aforesaid.'

"Here a part of the income of the residuary estate is expressly appropriated. But with that exception, and the exception also of the annuities and others with which it may be held to be burdened, and the expenses of management, there is not a word which admits of being construed into a direction for the appropriation of the rents of the lands that may be held by the trustees, whether original or acquired. Supposing, therefore, the personal property to have been realized and invested in land shortly after the truster's death, and a surplus income to arise from the rents, the purposes of the trust present a total blank with respect to its disposal; and, consequently, whatever may be thought with respect to the intention of the truster, the Lord Ordinary is unable to discover any ground for the plea, that in the due execution of the trust-deed, according to the sound construction of its terms, any surplus so arising must be invested in land to be entailed. It, on the contrary, appears to him, that such surplus forms an undisposed-of residue.

It has, indeed, been said, that the rents must go along with the lands as an accessory. If the lands could now be entailed, if that were now within the competency of the trustees, and the case were in law to be dealt with (as in that view it would be) as if the lands were all purchased and the entail executed, it might be a clear enough matter, that the intermediate income, till the actual execution of the entail, would fall to the party intended to be benefited by the entail. But the position of things is here quite different. The point does not relate to the disposal of rents and produce so accruing, but of rents and produce accruing during an intermediate period, while no entail can, according to the provisions of the deed, be executed, and while, therefore, no party can be the beneficiary under the entail. The plea, therefore, of the rents and produce going as an accessory with the lands, can have no place. In the circumstances, it is completely misapplied.

"But if the Lord Ordinary be so far correct in the view which he takes of this branch of the case, the question comes to be narrowed to the interest or income accruing from the personal property while remaining personal. Does that interest or income fall under the direction for investment in land to be afterwards entailed?

"It is argued by the defenders, that the direction 'to invest the proceeds' of the personal property in land may, by a large and liberal construction, be held as embracing the income of the personal property till the date at which the entail is afterwards appointed to be executed, in whatever way arising; whether from the personal property before being realized, or after being so, and before investment, or even after investment in land, as being still income derived from what was originally personal property. The income, as derived from rents after investment, has been already adverted to. With regard to the rest, the Lord Ordinary apprehends that the construction contended for is excluded by the context, which appears to him to limit the instruction to invest, to the funds or proceeds produced by the realization of the personal property which the trustees are immediately before empowered and required to make. The trustees are empowered, immediately on the death of the truster, to enter on possession of the premises—that is, the whole estate conveyed—and to manage the same in like manner as the truster could himself have done, and 'particularly, to liquidate and realize my whole personal property, and, as soon as conveniently they can thereafter, to invest the proceeds in land, and thereafter to hold and entail the same in manner underwrit-

the trustees are to realize and invest the truster's personal property in the purchase of land; but I find nothing authorizing them to apply to the same purpose

No. 141.

June 13, 1845.
Cowan v.
Turnbull's
Trustees.

ten.' This plainly contemplates, and indeed, in distinct terms refers to a realization of the personal property left by the truster with all reasonable expedition. That is the act of management enjoined upon the trustees, and then it is the proceeds so obtained which, 'as soon as conveniently they can thereafter,' they are directed to invest in land, and not the income to be derived from the proceeds when realized. It does not appear that, to the latter, the direction can by any liberality of construction be applied. The supposition, indeed, implies that the personal property is either to be retained unrealized, or that the realized fund is to be kept personal as a source of income. But is such a supposition at all consistent with the terms of the deed? Do they not, on the contrary, expressly point at speedy realization, and speedy subsequent investment to be made of the realized fund? The purpose of the trust distinctly was, that his personal estate should not continue personal, but that it should be forthwith realized, in order that, as soon as the trustees could conveniently do so, it might be converted into landed estate; and there is no instruction for the disposal, by investment in land to be entailed, of income arising either from the original personal estate, till it should be realized, or from its produce afterwards while in the hands of the trustees unconverted. It would rather seem that the 'proceeds' appointed to be invested must be taken to be the proceeds of the capital of the personal property left by the truster. According to the decisions—and were this a case where, with a similar instruction otherwise, the direction to entail was given generally, and not on a specified event, the occurrence of which might be for a time postponed—the Lord Ordinary inclines to think that the instruction to invest in land to be entailed, could not be extended beyond the proceeds of the capital; and it does not appear to him, that the possibility that the date, until which the entail of the lands to be purchased cannot be executed, might be postponed, while, at the same time, all restriction as to the period of execution might, by the course of events, be removed immediately after the death of the truster, can alter the import of the instruction as to what is directed to be invested in land to be entailed. The word 'proceeds,' as used in Lord Stair's case, is coupled with 'interest,' and both are additional 'to the residue of the trust-funds.' But even there it was found that the instruction could embrace only the income or interest accruing during one year from the truster's death, being the period allowed for ingathering the estate and ascertaining its liabilities. Whether it can be carried that length in the present case may be matter for consideration; but further than that, the Lord Ordinary conceives, it cannot go. It cannot, it is apprehended, be extended to embrace either the interest or the income of the original personal estate for a longer period if not then realized, or the interest or income accruing on its produce after being realized, and before it shall be invested in land; and still less can it, by any stretch of construction, be held to apply to the rents of land purchased, while in the hands of the trustees, prior to the execution of the entail.

"The defender's plea, founded on the supposition of the pursuer repudiating the deed and electing to take the legitim, has been already adverted to. It is not thought it could produce the effect alleged, of enabling the trustees immediately to execute an entail, and thereby to stop any further accumulation of accruing income which could be open to a claim by the pursuer. There is, therefore, no room for contending that the fund being created by postponing the election, the pursuer or his ward, or his ward's representatives, cannot be allowed, if they shall ultimately take the legitim, also to take a fund which, if such election were now made, would never come to exist. The fund would accrue whether the pursuer elected to take the legitim or the testamentary benefits.

"The Lord Ordinary abstains from entering further upon the grounds upon

No. 141.

June 13, 1845.
Cowan v.
Turnbull's
Trustees.

the income of his heritable estate, nor any reference to the produce of the realized personal estate, till the purchase has been made. It is true, in a subsequent clause, the trustees are directed to execute an entail of the truster's "whole lands and heritages, as well as of such lands as may be purchased with my personal property, so directed to be invested as aforesaid;" but the last words just carry us back to those before used, the direction to realize the personal funds as soon as possible. I find, then, a total omission of any direction to the trustees to apply the income of the heritable estate to the same purpose as the personal funds, so that the rents of it are not provided for at all; and the same is the case with regard both to the interest of the personal property with which lands are directed to be purchased, and to the rents of such lands, from the time of the purchase till the execution of the entail—no direction at all is given for their investment. In these circumstances we must apply the principle established by the recent cases; and therefore hold, along with the Lord Ordinary, that the curator here is entitled to claim for his ward, as heir-at-law, that part of the truster's succession which has been left out of the trust altogether, as intestate succession, without thereby recognising the trust.

LORD MACKENZIE.—The result of my opinion coincides with that of your Lordship, though not rested entirely on the same grounds. I think that the *curator bonis* is not bound to elect, for there is nothing in the case which requires election. The only thing that could render it necessary, would be if the whole money, both the truster's personal property and the income arising from it and the heritable estate, were about to be invested in land. If the curator were to object to this, that would be of the nature of election; but there is no occasion for doing so in the circumstances of the case.

I should hesitate greatly, however, to say, that a *curator bonis* could never make election, for there may be cases in which it would be his obvious duty to do so. For instance, is he not to do it when the choice of the legitium might be most beneficial to his ward, and what he would reject would be a mere trifle? And I doubt whether, in some cases, he might not be obliged to make election, even for the interest of other parties. In this particular case, however, I concur with your Lordship that he is not bound.

As to the second point, whether the curator can claim the rents and profits of the truster's heritable and personal estate until the entail is executed, I agree with your Lordship. I think he is entitled to the excrescence of the rents over what

which he rests the opinion he has formed on this branch of the case, that the surplus income arising from the interest or fruits of the personal property left by the truster, or at least from the interest or fruits of it after a year of the truster's death, and from the rents of the lands conveyed, and of the lands which shall be purchased, constitute undisposed of residue—that, as such, it belongs to Thomas Turnbull, not either under the trust-deed, or in opposition to its provisions, but in virtue of his right, as the truster's legal representative, to whatever part of his estate remains unappropriated by his settlement, and this without prejudice to the right of Thomas Turnbull or his representatives afterwards to elect to take the legitium or testamentary provisions; and that the defenders are, therefore, under the third conclusion of the libel, bound to account accordingly to the pursuer as Thomas Turnbull's *curator bonis*.

is disposed of in the trust-deed, for it does dispose of part of them, inasmuch as it gives the heir a provision out of them for his sustenance; and I cannot say that the curator can claim that part, because that might perhaps be of the nature of an election. I think that the truster here did intend to make a settlement of the whole rents of his heritable estate, but then he forgot it, and has not done it; and as little has he disposed of the interest of his personal property, directed to be invested in land; and these, not being disposed of at all, must go to the heir-at-law.

No. 141.

June 13, 1845.

Cowan v.

Turnbull's

Trustees.

LORD FULLERTON.—On the first point I entirely agree with your Lordships. I do not think that the curator, in an ordinary case of this kind, is bound to make election for his ward. I do not say, however, that there is no case in which a curator would be bound to do so.

As to the second conclusion of the action, I have no difficulty in holding that there is no direction given to the trustees with regard to the application of the interest of the truster's personal property, or the profits of his heritable estate; but then I think it is not so clear that the curator, by coming forward and claiming these for his ward, is not taking benefit under the deed. That portion of the property does not belong to his ward as heir-at-law, but is something created by the intervention of the trust. This raises a nice question, which is not much argued in the papers. There is a sum accumulated by the intervention of the trust-deed, and, if the curator claims it, can it be said that he is not founding on the deed? Suppose Mr Turnbull were to recover, and claim the legitim after he had done so, I think the other parties would have a great deal to say in opposition. I have some hesitation, therefore, in holding that the pursuer is entitled to secure this undisposed of fund for his ward, as it is something quite different from taking it for him in the character of heir-at-law or executor.

LORD JEFFREY.—I concur on both points, and think it unnecessary to say any thing as to the first. Without a plain case for the benefit of the insane individual under his care, no official person, such as a *curator bonis*, can affect his succession by making such an election as that in question; and I doubt whether the Court can look to any thing but the best interests of the insane. Upon that point, therefore, I am quite clear.

With regard to the second point also, I am clear. I own that I am not moved by Lord Fullerton's difficulty; and I think that the solution of it is this.—Is it a legal proposition, that this party takes the surplus of the trust estate in any other character than as heir-at-law? And if it is not, is it relevant to say, that the fund was created by the provisions of the trust-deed? I do not see, if it is clear that it is as heir-at-law that he takes it, that it is more than a mere matter of history how that fund arose; the heir-at-law is the recipient of every thing that has not been otherwise legally appropriated by his ancestor.

It appears to me, then, that there is no inconsistency in claiming both the legitim and the residue, as I do not think that, by asking the latter, he is founding on the trust-deed.

THE COURT accordingly pronounced an interlocutor, decerning in terms of the declaratory conclusions of the libel, and remitting to the Lord Ordinary

No. 141.

to hear parties on its other conclusions, for count and reckoning and payment.

June 14, 1845.
Mark.

HUNTER, BLAIR, and COWAN, W.S.—TODD and ROMANES, W.S.—Agents.

No. 142.

ALEXANDER F. MARK, Petitioner.—*T. Mackenzie.**Judicial Factor—Curator Bonis.*—Judicial factor appointed to a party, who, being both deaf and blind, was incapable of managing his affairs.

June 14, 1845.

2D DIVISION.
R.

ALEXANDER F. MARK had some property left to him under a trust executed by his grandmother. It was provided in the trust-deed, that upon his attaining the age of twenty-three, the trustees should denude in his favour, and execute a conveyance of the trust property to him. In consequence of several paralytic attacks, Mark had been completely deprived of his hearing and of his sight, and was unable to communicate with any one except through the medium of touch, but his mental faculties remained unimpaired. An application having been made to the surviving trustee to denude of the property, he declined to do so, unless he received a discharge, attested by two notaries-public to be in their actual knowledge the deed of Mark, or unless a curator bonis were appointed to him. Being both deaf and blind, the notaries could only ascertain that he understood and approved of the deed, by communicating with him by the finger alphabet.

In these circumstances, Mark presented a petition for the appointment of a curator bonis or a judicial factor. Amongst other certificates appended to the petition, was one from Mr Kinniburgh, of the institution for the deaf and dumb, who stated that he had conversed with the petitioner by means of the finger alphabet, and had found him perfectly intelligent; that he told him that he wished to get his property out of the hands of the trustees, and to have a curator appointed, and that his agent had full authority to act for him in making the application.

THE COURT appointed a judicial factor.

JOHN COURT, S.S.C.—Agent.

— GORDON, Pursuer.—*Ross.*
 — SCOTT, Defender.—*Pattison.*
 Et e contra.

No. 143.

June 17, 1845.
 Gordon v.
 Scott.

Process—Jury-Trial—Act of Sederunt, 16th February 1841, § 46.—Where two parties, who were pursuing actions of damages against one another, had each applied to have the other's action dismissed, in respect that no notice of trial had been given within a year after issues were adjusted,—The Court dismissed both actions, repelling a plea which was stated for one of the pursuers, that the processes being conjoined, and the action by the other party being the first and leading action, he was not in default, as he was not entitled of his own authority to disjoin them, and force his own case to trial.

SCOTT raised an action for debt against Letters, before the Sheriff of Perth, and used arrestments upon the dependence in the hands of Campbell. Upon this, one Gordon raised an action of damages before the Sheriff against Scott, alleging that the latter had wrongously arrested property which belonged to him; and a record was closed, and a proof allowed by the Sheriff. Upon the dependence of this action, Gordon used arrestments against Scott in the hands of Mrs Fisher. During the dependence of the action, Gordon v. Scott, Scott raised an action of damages in the Court of Session against Gordon, and also against Mackenzie, a Sheriff-officer, for alleged wrongous arrestments used on the dependence of Gordon v. Scott, and afterwards advocated that process under the 40th section of the Judicature Act, with the view to trial by jury. Thereafter, two actions of multiplepinding were raised in names of Campbell and of Mrs Fisher, and all these processes were conjoined. The conjoined processes having been remitted to the issue-clerks, issues were adjusted in January 1844, relating separately to the two grounds of damage alleged. After that, no proceedings were taken by either party to bring the cases to trial.

Gordon and Mackenzie presented a note to the Court to have Scott's action of damages dismissed, in respect of no notice of trial having been given within the year.

This motion was opposed by Scott, on the ground that the actions being conjoined, and Gordon being the pursuer of the first and leading action, he (Scott) was not in default, as he was not entitled of his own authority to disjoin the actions, and to force his own case to trial.

On the other hand, Scott applied to have Gordon's action dismissed, in respect of his failure to give notice of trial; to have the whole actions disjoined, and the actions of multiplepinding remitted to the Lord Or-

June 17, 1845.
 2d DIVISION.
 Jury Cause.

No. 143. dinary ; and to be allowed to proceed with his own action, in which he
 June 17, 1845. stated he was ready to give notice of trial immediately.
 Alexander.

THE COURT dismissed both actions.

—JAMES MARSHALL, S.S.C.—Agents.

No. 144. ALEXANDER ALEXANDER, Claiming to be EARL OF STIRLING, Re-
 claimer.—J. A. Wood.

Process—Appeal—Extract—Reclaiming Note—48 Geo. III. c. 151, § 16—

1. Where an appeal had been delayed, with the view of allowing a party to bring up before the House of Lords a subsequent decree which had been pronounced in the process, and which had been allowed to become final and be extracted through inadvertence in allowing the reclaiming days to expire—the Court, holding that the process had been taken out of Court by the extract, refused to entertain a reclaiming note, under the provisions of 48 Geo. III. c. 151, § 16, without a remit being made by the House of Lords. 2. Question, Whether the provisions of the above section are applicable to final extracted decrees ?

June 17, 1845.

SEE former report, of date 9th July 1839, ante, Vol. I. p. 1188.

2d Division.
 Lord Cuning-
 hame.

T.

In this case, which was a reduction by the Officers of State of a service by Alexander Alexander or Humphreys to Sir William Alexander, first Earl of Stirling, the Court, upon 9th July 1839, pronounced a judgment adverse to the defender, which is reported above. Alexander then appealed this judgment to the House of Lords. Some time afterwards, the Officers of State having given in a note, stating that the summons contained conclusions other than those disposed of by the judgment of the 9th July, the Court remitted to the Lord Ordinary, who, of date 2d June 1840, in absence, pronounced decree of reduction conform to the conclusions of the libel. This interlocutor was not reclaimed against, and the decree was extracted.

When the defender's appeal came on for hearing, it was found necessary to bring up before the House of Lords the Lord Ordinary's interlocutor of 2d June 1840, as well as the former interlocutor appealed against. The case having been delayed in the House of Lords with that view, the defender brought a summons of wakening, under which the Lord Ordinary, of consent, wakened the process. The defender then gave in a minute, stating that the interlocutor of 2d June 1840, which had been pronounced in absence, having by inadvertence not been reclaimed against in due time, he was desirous to have it opened up, and with that view craved leave to submit it to the review of the Inner-House. Upon this the Lord Ordinary, the Officers of State not appear-

ing or objecting, "granted leave to the defender to submit the said No. 144. interlocutor, of date 2d June 1840, to the review by reclaiming note of the Second Division of the Court, in terms of the statute 48 Geo. III. c. 151, § 16." June 17, 1845.
Alexander.

Alexander then presented a reclaiming note, praying the Court to review or alter the interlocutor of 2d June 1840.

J. A. Wood, for the reclaimer, contended, that the case came under the operation of the above section of the statute, and that if it were to be held that the remedy was excluded because the decree was extracted, it would have the effect of frustrating the intention of the Act; in respect inadvertence could only arise after the expiry of the reclaiming days—*i. e.* after the decree was extractable. And further, that as the Lord Ordinary had granted leave to submit the interlocutor to the review of the Inner-House, and no reclaiming note had been presented for the Officers of State against his judgment, the question of the competency of the reclaiming note against the interlocutor of 2d June 1840 was no longer open.

LORD JUSTICE-CLERK.—I doubt greatly the competency of this wakening. The proceeding seems to be altogether irregular and incompetent. But without going back on that, we must be satisfied of the competency of the proposal now made to us. I think we cannot entertain any application. There are many interlocutors in which there is no decerniture, and which are not extractable; and it is to provide against inadvertency in allowing these to become final that the statute applies. In this case the decree has been extracted, and the process is at an end. Whether a reduction is competent we need not enquire, for there is no such process. Besides, the process must be in this Court. I do not say that this remedy would be incompetent in regard to a final decree, were the process here. We will do any thing that the House of Lords wish us to do, but the process has been taken out of this Court by extract. I believe that the House of Lords hold that an appeal does not carry the process away as a writ of error in England, and hold it to be still with us; but, as far as Scotch practice goes, the point is fixed in this Court.

LORD COCKBURN.—The Lord Ordinary has granted leave to submit this interlocutor to review; are we not then resisting his judgment? Ought there not to have been a reclaiming note for the Officers of State? We are just reversing the Lord Ordinary's judgment without a reclaiming note.

LORD MONCREIFF.—The Lord Ordinary does nothing more than give leave to reclaim; we are still to judge.

LORD JUSTICE-CLERK.—The leave of the Lord Ordinary is merely a condition precedent. It does not rest with him to say that the Court has jurisdiction.

LORD MEDWYN.—I think the only remedy is going to the House of Lords, and sending back the process; or their making a special remit to us.

LORD JUSTICE-CLERK.—It may do if they remit the process in any way that will supersede the difficulty as to extract.

THE COURT accordingly superseded the reclaiming note till further order.

E. LOCKHART, W.S.—Agent.

No. 145.

JAMES WHITE, Pursuer.—*Marshall*.PETER FORBES, Defender.—*Penney*.

June 19, 1845.

White v.
Forbes.

Myers.

Process—Res Noviter—Expenses—Statute 6 Geo. IV. c. 120, § 10.—Held, that the Lord Ordinary is imperatively required by the Judicature Act, on permitting an addition to be made to a record, after it has been closed, as *res noviter*, to find the party liable in “such expenses as he may deem reasonable.”

June 19, 1845.

1st Division.
Lord Wood.
W.

IN this case, after the record had been closed, the defender was allowed to add certain statements to it, as *res noviter veniens ad notitiam*. The interlocutor of the Lord Ordinary, allowing the addition to be made, did not contain any finding as to expenses.

The pursuer reclaimed, but the Court, without hearing the counsel for the defender, adhered to the Lord Ordinary's interlocutor on the merits.

The pursuer then pleaded, that as by the 10th section of the Judicature Act, it was provided, that an addition to the record, as *res noviter*, could be made only on the payment of “such expenses as may be deemed reasonable by the Lord Ordinary,” he was entitled to the expenses occasioned by the addition, but that the Lord Ordinary had not pronounced any finding to that effect.

The Court held that it was imperative under the statute, that the Lord Ordinary should pronounce a finding as to expenses, though these should be modified to one shilling.

THE following interlocutor was accordingly pronounced :—“ Adhere to the interlocutor reclaimed against, with this qualification, that the case is hereby remitted to the Lord Ordinary to award to the pursuer such expenses as his Lordship shall deem reasonable, in terms of the statute 6 Geo. IV. c. 120, § 10.”

JOHN GILMOUR, S.S.C.—THOMAS JOHNSTONE, S.S.C.—Agents.

No. 146.

G. C. MYERS, Petitioner.—*Currie*.

Lunatic.—Where the annual income of a lunatic's estate amounted to £150 and the rate of board paid for him at the asylum where he was kept to £40, the Court, considering this allowance to be too small, directed that it should be increased to £70, so as to provide him with additional luxuries and comforts.

June 19, 1845.

2d Division.
Ld. Robertson.
T.

IN this case, which was an application by the curator bonis of a lunatic for approval of his accounts and intromissions, the Lord Ordinary stated,

in making his report to the Court, that he had observed that the rate of No. 146. board paid for the lunatic was small in proportion to the value of his estate; that it appeared upon enquiry, that the board paid (£40 a-year) ^{June 19, 1845.} ^{Myers.} was the highest rate at the Montrose Lunatic Asylum, where he was placed; and he proposed that an arrangement should be made with the medical officers of the establishment, that the patient should be supplied with some additional luxuries and comforts. The lunatic's estate was stated to amount to about £7000 or £8000.

LORD JUSTICE-CLERK.—I do not know if that is the proper course. If the lunatic's estate is so valuable, I am not sure that he ought to be sent to a public asylum. I see it is laid down in English cases, that the primary object should be to apply the lunatic's estate to the fullest extent, for his own proper maintenance; and there are cases where the Courts have ordered a carriage, and other luxuries, to be provided for him.

The Court accordingly directed enquiries to be made as to the manner in which the lunatic was kept, and as to the amount of the proceeds of his estate.

Of this date, the Lord Ordinary again reported the case, stating that it might not, in the circumstances, be advisable to remove the lunatic from Montrose Asylum. That his income amounted to about £150 per annum, and that, according to a report from the medical officers of the institution, if the rate of board were increased from £40 to £70, he might have an attendant to himself, the benefit of occasional carriage airings, and the use of wine when it was thought expedient.

THE COURT remitted to the Lord Ordinary to give directions that this should be done.

GRAHAM BINNY, W.S.—Agent.

No. 147. DAVID MILN and OTHERS, Pursuers.—*Sol.-Gen. Anderson—Cowan—Patton.*

June 19, 1845.
Miln v. Boyack.

WILLIAM BOYACK and OTHERS, Defendants.—*Rutherford—Marshall—Inglis—Macfarlane.*

Bankruptcy—Discharge—Stat. 2 and 3 Vict. c. 41, §§ 113, 114, 115, 116.—At the second meeting of the creditors in a sequestration, held for the purpose of deciding upon an offer of composition made by the bankrupt, an offer different from that which had been made and entertained at the first meeting was accepted, and the bankrupt was discharged by the Sheriff, whose deliverance was confirmed by the Lord Ordinary, without objections being stated by any of the creditors: the offer, as adopted by the second meeting, contained a provision, not entertained at the first, that the funds (which were inadequate for payment of the whole composition) should be paid by the trustee to the creditors, *primis venientibus*, till they were exhausted: no notice whatever of the provision was given to the creditors, nor were certain other alterations which had been made upon the offer originally entertained intimated to them in the Gazette notice calling the second meeting, although specified in circular letters by the trustee: in a reduction of the discharge, which certain of the creditors who had not received their share of the composition instituted, upon the proceedings of the second meeting coming to their knowledge—Held (repelling a plea that the deliverance of the Sheriff and Lord Ordinary constituted *res judicata* against them) that the proceedings at the second meeting were irregular and incompetent under the statute, and decree of reduction of the discharge pronounced. Observed, that concealment, or defective representations, in the “abstract of the state of the affairs and valuation of the estate,” required by § 115 of the Bankrupt Statute to be sent by the trustee to the creditors, in order to enable them to judge of an offer of composition, was a relevant ground of reduction of a discharge, where it could be shown that the creditors had been thereby misled, and induced to form an erroneous view of their interests in regard to the offer.

Process—Expenses.—Observed, (subsequent to advising,) that a correspondence which had taken place between the agents after the cause of action had arisen, extending to about 100 pages, and which had been boxed to the Court, ought not to have been printed, and the expense thereof ought to be disallowed by the auditor.

June 19, 1845.

2D DIVISION.
Lord Wood.
R.

THE estates of William Boyack, flax-spinner and merchant in Dundee, were sequestrated in September 1841, and Mr William Christie was appointed trustee.

Upon the 5th of January 1842, a general meeting of Mr Boyack's creditors was held, pursuant to notice inserted in the Edinburgh Gazette, “for the purpose of receiving an offer of composition, which the said William Boyack will then make to his creditors.” At this meeting a report by the trustee, prepared with the view of exhibiting a state of the affairs, in order to enable the meeting to judge as to the offer of composition, was laid before the meeting. The bankrupt then made offer of a composition of 2s. 6d. per pound, payable by three instalments, viz. 2s. in the pound on the expiration of four months after the composition was finally approved of by the Court; threepence in the pound at the expiration of twelve, and threepence at the expiration of eighteen months from the same period. He also offered to pay the trustee's commission, and expenses of the sequestration; and proposed Peter Davie, merchant in Dundee,

as his cautioner for the due fulfilment of that offer. The minutes of the meeting bear, that, having deliberated upon this offer, the meeting "resolved that the offer and security be entertained for consideration, and authorized the trustee to call another meeting of the creditors, for the purpose of deciding thereon, with or without amendment." No. 147.
June 19, 1845.
MILN v. BOYACK.

The trustee accordingly, upon the 6th of January, inserted in the Edinburgh Gazette a notice of a meeting to be held on the 27th of January. This notice recited the offer which the bankrupt had made at the meeting of the 5th of January, and the security proposed by him, and stated "that the meeting entertained the said offer;" and gave notice that a meeting of his creditors would be held, of the above date, "for the purpose of finally deciding on the bankrupt's offer of composition, and the security proposed." The notice did not state, as the minutes of the meeting of the 5th of January bore, that the offer would be decided upon at the meeting "with or without amendment." The trustee also, of the same date (6th of January,) addressed to each of the creditors a circular, in which he detailed the above offer and security proposed at the meeting of 5th January; the circular proceeding further in these terms:—"I have also to intimate to you that the meeting entertained that offer, and authorized the trustee to call another meeting of the creditors, for the purpose of deciding thereon with or without amendment, and that the meeting for deciding upon the said offer of composition will be held within the British Hotel, Dundee, upon Thursday the 27th of January current." The trustee further, in compliance with the provisions of the 115th section of the Sequestration Act, annexed an abstract of the bankrupt's affairs, and of what the estate was expected to yield, in order to enable the creditors to judge of the offer of composition. Upon the 13th of January, the trustee addressed a second circular to the creditors, in which, referring to the circular of the 6th, he intimated that the bankrupt, with the view of affording additional security to his creditors, intended to amend the offer of composition which he had made on the 5th of January to this extent, viz. that all the funds belonging to his estate then held by, or under the control of the trustee, should not be paid or delivered over to him upon the composition being approved of by the Court, but should be allowed to remain in the trustee's custody, and under his management, until the first instalment of the composition should fall due; and that these funds should then be applied by the trustee, or at his sight, towards payment of that instalment.

The meeting of creditors took place upon the 27th of January; the bankrupt appeared at the meeting, and renewed the offer of composition and proposal of security which he had made at the meeting of 5th January; and further, with a view to the additional security of his creditors, as well as for the relief of the said Peter Davie, he proposed that it should be a condition of the composition-contract, that all the moveable funds belonging to his estate which were then held by and were under the control

No. 147. of the trustee, (and which consisted of the assets mentioned in the abstract of affairs annexed to the circular giving notice of the meeting,) should not be paid or delivered over to him (the bankrupt) upon the composition being approved of by the Court, but should be allowed to remain in the custody of the trustee, and under his management, until the first instalment of the composition should fall due; and that these funds, or the free proceeds thereof, "shall then be applied by the trustee, or at his sight, towards payment of the first instalment of the composition, it being specially understood that the said trustee shall apply the said funds towards payment of the first instalment of the said composition due to such of the said creditors as shall first make application to him for payment of the same, and he shall continue so to make payment of the said first instalment of composition to the creditors who shall apply to him therefor, *primo venienti*, until the said funds, or the said free proceeds thereof, shall be exhausted."

June 19, 1845.
Mila v. Boyack.

The meeting having deliberated upon this offer of composition, it was approved of by a majority of the creditors in number, and by more than four-fifths in value, and it was accepted of, "all in terms of the offer, as above specially set forth."

At a meeting held on the 31st of January, the trustee's accounts were audited and approved of by the commissioner, and the amount of his commission fixed.

The trustee then presented his report to the Sheriff of Forfarshire, who, having considered the report upon the 1st of February, found that the offer of composition had been duly made and was reasonable, and had been assented to by the requisite majority of creditors, and he approved of the composition and security; and the bankrupt having appeared, and made the declaration required by statute, he found the same satisfactory, and discharged the bankrupt of all debts and obligations contracted, or for which he was liable at the date of the sequestration, and declared the sequestration to be at an end, and the bankrupt to be reinvested in his estate, reserving always the claims of the creditors for the composition, and under the reservation and conditions for the further security of the creditors and cautioner for the composition, all as stipulated in the minutes of the above meeting. An extract of this deliverance was issued upon the 2d of February, and upon the day following, the 3d of February, the Lord Ordinary "confirms the said deliverance in terms of the statute 2 and 3 Victoria, c. 41, § 116." Upon the 4th of February, a certified copy of the discharge and deliverance of the Lord Ordinary was issued by the Bill-Chamber clerk.

The first instalment of the composition, being 2s. in the pound, became payable by the terms of the offer upon the 3d—6th of June—days of grace being allowed as in the case of a bill. On the morning of the 6th, certain of the creditors applied at the trustee's office, and received payment of their shares of this instalment. The payments to these creditors,

who were nine in number, exhausted the whole realized funds in the trustee's hands, and none of the other creditors, to the number of upwards of 160, received any payment to account of the composition. It was alleged that the nine creditors who had thus received payment of the instalment, were all officially connected with the sequestration, or connected or related to one another, conjunct and confident.

Upon the 13th of January, Mr Christopher Kerr, the law-agent in the sequestration, had addressed a letter with regard to the composition to Mr Garth, who acted for a creditor in London. In answer to some enquiries upon the subject, he had stated that the only doubt was as to the security of the proposed cautioner, adding—"Practically, however, if your friends take care of their own interest, to the extent of calling for their money on the stipulated day, they are quite safe for the 2s. per pound; for it is part of the arrangement, though, in consequence of difficulties in form, we have not yet put it in shape, that all the available assets are to remain with the trustee, not to be given over to Mr Boyack, until the time stipulated for payment of the 2s., and that they are then to be applied at the sight of the trustee to the payment of the instalment. There will not be assets equal to all that is payable, but many will give indulgence; and so, if your friends send down their papers to their correspondent here a week before the appointed day, and cause their demand be laid before Mr Christie, they may, I think, rely on payment."

Upon 1st November 1842, David Miln and certain others of Boyack's creditors, who had not been present at the second meeting, and had not received payment of the composition, raised an action against the bankrupt, his trustee, and commissioners, and the other creditors, concluding for reduction of the deliverance, or act and warrant of the Sheriff, approving of the composition, and discharging the bankrupt, the interlocutor of the Lord Ordinary confirming the same, with the minutes of the meetings of the creditors deciding on, and approving of, the offer of composition; and also of the receipts for the payments made by the trustee to the creditors who had obtained payment of the composition. The summons also contained conclusions against these creditors for repetition of these sums.

The first and second grounds of reduction libelled, proceeded on the allegation, that in the "abstract of the state of the affairs and valuation of the estate," which the 115th section of the statute requires the trustee to give in the circular calling the second meeting to decide upon the bankrupt's offer of composition, "to enable the creditors to judge of the said offer," he had unduly withheld and concealed facts of importance from the knowledge of the creditors. These facts which were alleged to have been withheld, were an opinion obtained from counsel as to the invalidity of the security held by certain parties claiming preferences to a large amount over the estate; and further, certain valuations which the trustee had obtained of the heritable and movable property of the bankrupt,

No. 147,

June 19, 1845.

Miln v. Boyack.

No. 147. and according to which a large reversion would have accrued to the general creditors after satisfying the preferable claims. The third reason
 June 19, 1845. *Miln v. Boyack.* of reduction was—"The offer submitted to, and approved of by, the second meeting of creditors, held on 27th January 1842, was essentially different from the original offer made and entertained at the previous meeting, held on the 5th of that month. It was irregular and incompetent to make any alteration or amendment on the offer so entertained, which behoved to be decided on as it was originally made, and simply accepted or rejected. In other words, the offer ultimately agreed to had not been entertained and sanctioned by a previous meeting, as required by the statute. 4th, The alteration or amendment actually agreed to by a majority of the second meeting, and afterwards approved of by the Sheriff of Forfarshire, and confirmed by the Lord Ordinary on the bills, had not been previously notified to the creditors, as required by the statute. The proposal to amend or alter the offer was not noticed in the advertisement calling the second meeting, which appeared in the Gazette. A material part of the proposal—viz. the stipulation to make payment to the creditors, *primis venientibus*, of the amounts of their respective compositions out of the funds in the trustee's hands, until the same should be exhausted—was not previously notified to the creditors, either in the circular letters addressed to them, or in any other way whatever. 5th, The alterations or pretended amendments thus made on the original offer of composition, were—contrary to the provision of the statute—calculated to produce inequality and injustice among the creditors, by enabling those resident on the spot, and acquainted with what had taken place, and those by whom the resolution had been concocted and carried through the meeting, to obtain full payment, while the creditors at a distance, and those ignorant of the resolution and its object, might be postponed and deprived of what should become due to them; and in consequence of these irregularities, and of the concealment of the actual state of the proceedings in the sequestration, certain favoured creditors have obtained an undue and unfair preference; while those creditors who, like the pursuers, were kept in ignorance, have been deprived of the composition promised to them."

The pursuers pleaded ; *—

1. The proceedings in the sequestration terminating in the discharge upon composition contract under challenge, are reducible, in respect that those proceedings were carried through in violation of the provisions of the Bankrupt Act.

In particular, (1.) While the statute requires that the offer of composition shall be proposed at one meeting of creditors and notified to all the

* The cause was argued both in cases and orally.

creditors by Gazette notice, and finally considered at another meeting No. 147. without alteration or amendment of the offer originally made, the offer as ^{June 19, 1845.} agreed to, and acted on, had not been made at any former meeting, and ^{Mila v. Boyack.} had not been notified in the Gazette, but was an altered and modified proposal, professing to be an amendment of the offer as made, and alone referred to, in the Gazette notice, and was an offer with which the second meeting had no power under the statute to deal. The whole proceedings being beyond the statute, the plea urged by the defenders, that the objection should have been taken before the Sheriff, and that it was now competent and omitted, was inapplicable.

(2.) The new provision introduced in the offer, by which the effects realised in the sequestration were directed to remain in the hands of the trustee, and to be by him paid *primo venienti*, was calculated, as it proved, to be eminently injurious to distant creditors, and effectually prevented that equal distribution which it is the object of the bankrupt statute to secure.

2. The proceedings terminating in the composition contract and discharge, are separately reducible, because these proceedings were carried through with undue concealment of facts, material to have been communicated to the creditors in judging of the offer of composition, for objects and purposes opposed to the interests of the creditors; and further, because the whole arrangement was framed and carried through for the purpose of securing an undue preference to a few favoured creditors out of the general body.

3. The pursuers are entitled to insist that the sums paid under the operation of the provision as to payment *primo venienti* shall be repaid, and that proceedings in the sequestration shall be resumed, with a view to the realization and fair distribution of the estate among the creditors.

The defenders pleaded;—

The pursuers' objection to the regularity of the proceedings under reduction, was barred *re judicata*. It was open to the pursuers to have appeared before the Sheriff and to have stated the objections now insisted in; but having failed to do so, and the Sheriff, and afterwards the Lord Ordinary, having found that the offer of composition had been duly made and accepted of, it must be held that the decree of approval and discharge had the force of *res judicata* against them, and that the objections now urged were competent and omitted. Having lodged claims in the sequestration, they were to be dealt with in the same manner as parties who had entered appearance in a process. The pursuers endeavoured to get the better of the statutory finality of the discharge, and of its being a decree pronounced in *foro*, and supported their claim to be still permitted to challenge the proceedings by reduction, on the ground of want of due notice, and on the further ground that the alleged irregularities had thrown the proceedings without the statute. It was admitted that no notice was required by statute of the application to the Sheriff and Lord

No. 147. Ordinary, but it was said, that as this application was usually presented immediately after the second meeting, the notice of the meeting was truly also the notice of the application. Each creditor received a notice that a meeting was to be held for deciding upon an offer of composition. Under the present bankrupt statute, very extensive powers were given to the meetings of creditors; they had the power of binding absent creditors, and had authority given to them almost of a judicial character. This was peculiarly the case as to the meeting for the approval of an offer of composition. Creditors were not entitled, under the statute, to remain absent from meetings, and subsequently to take advantage of irregularities that might have occurred. Further, the pursuers had received notice, that at the second meeting the bankrupt's offer of composition was to be disposed of "with or without amendment." If it were the case that an irregularity had been committed at that meeting in entertaining an amended offer, the pursuers could not at least allege that they had not received notice of it; and after having been thus warned, it was peculiarly their duty to have attended the meeting and guarded against it. The plea of want of notice, therefore, was insufficient to take off the effect of the defenders' objection of competent and omitted. Nor could the irregularities alleged have that effect. A distinction was to be drawn between irregularities within and outwith the statute—the former, when not objected to at the proper time, affording no ground for subsequently setting aside a discharge. The irregularities libelled on were all within the statute. To sanction the principle, that reduction of a discharge was competent at any time within the years of prescription, upon the ground of a slight statutory irregularity, would be productive of the greatest hardship and confusion.

In reference to the pursuers' plea, founded on the alleged concealment, on the part of the trustee, of facts which it was material that the creditors should have been made aware of in judging of the offer of composition, the defenders alleged that the abstract, which he communicated to the creditors, contained a true and correct view of the state of affairs.

The Lord Ordinary reported the case.*

* **NOTE.**—Involving, as this case does, questions of considerable general importance with reference to the winding up of a sequestration, and the discharge of the bankrupt on a composition, and in order that the whole cause may be at once before the Court, for the disposal of their Lordships as they shall see fit, instead of partially by a reclaiming note, in reference to the points which an interlocutor may decide, the Lord Ordinary has thought it better to report it without a judgment; and he has been the more inclined to adopt that course, from being satisfied, that whatever his judgment might be, it would be brought under review by the unsuccessful party, preparatory to which the record, revised cases, and documents have been already printed.

"Important changes have, by the present Bankrupt Act, been made upon the provisions relative to the settling the bankruptcy by a composition-contract.

LORD JUSTICE-CLERK.—The Court are fully impressed with the great importance of this case, and with the delicacy of questions which involve the right

No. 147.

June 19, 1845.
MILN v. BOYACK.

“Looking, 1st, to the express words in the 59th section of the former Act, declaring that the offer of composition to be submitted to the decision of the second meeting called for the purpose; may either be the offer originally entertained by the first meeting, or that offer with ‘amendment;’ whereas, in the existing Act, the whole provisions (sections 113 and 114) appear to relate to ‘the offer and security’ as submitted to and entertained by the first meeting, it being that ‘offer and security’ of which notice is to be sent to the creditors previous to the second meeting, and it being upon the acceptance of ‘said offer and security’ that the further proceedings for winding up are to be had, all mention of amendment upon the offer being entirely omitted; 2d, to the more limited amount of final concurrences by the creditors which is now, in the case of a first proposal for a settlement by composition, requisite to enable it to be carried through; and, 3d, to the manner in which the subsequent proceedings for the discharge of the bankrupt are provided for, and in practice carried through, there being no intimation made or notice given by advertisement in the Gazette to the creditors generally, before the whole is closed by the approval of the Sheriff and the Lord Ordinary, or the latter only as the case may be—the Lord Ordinary has doubts whether it must not be held to be alike the provision and the policy of the Act, that the offer of composition and security to be laid before the second meeting must be in the precise terms in which it was submitted to the first meeting, and afterwards communicated to the creditors generally by the statutory notice, and be then either simpliciter accepted or rejected, and that the offer does not admit of being modified or changed, even although the modification or change may to all appearance be an improvement upon, or a beneficial addition to it. He has doubts whether it was not meant that absent creditors were to be entitled to rely that nothing was to be done at the second meeting but the bare consideration of the offer and security, as communicated to them, and that all inducements to creditors present—who might not have sanctioned the offer as it stood—to accede to it, in the shape of suggested amendments proposed at the meeting, by which, in the hurry of the moment, they might be influenced without due consideration, should be excluded. But he has still greater doubts whether it can be taken to be competent, under the present statute, to introduce upon the original offer and security any thing that materially changes its character, however apparently beneficially, with reference to the security which, as first entertained and notified to all the creditors, it would have afforded; and he has not been able to satisfy himself that the alteration which, in the present instance, was made at the second meeting upon the manner in which the bankrupt’s estate was to be disposed of, by being allowed to remain in the custody of the trustee, and the special stipulations in regard to the way the trustee was to apply it to the payment of the creditors, thereby completely tying up his hands as to the mode of distribution—all which became an integral part of the contract—was of that unimportant kind, or if important, of that clearly equally just and advantageous description in its probable—or it may rather be said, certain operation to all the creditors interested in the estate, which the defenders would represent it to be. The Lord Ordinary avoids going into the remarks which occur to him upon this part of the case, which would occupy too much space. He shall only observe, that it appears to him to involve very grave matter in the law of sequestration under the present statute, and that (apart from any question of fraud) he considers this to be abundantly illustrated by the evidence in process, of the manner in which the proposed amendment upon the offer was used to influence the minds of a certain creditor or creditors, (Documents, p. 108,) and its ultimate working out, when adopted, by which the entire fund realized from the bankrupt’s estate, when the first instalment of the composition fell due, was distributed among nine creditors whose particular situation and connexion with

No. 147. to set aside the discharge of a sequestration carried through according to the forms of the statute, whether that discharge proceeds on a composition-contract or not.

June 19, 1845.

Miln v. Boyack.

those more immediately conversant with the bankrupt's affairs, is pointed out in the papers.

"If it shall be held that the alteration or amendment upon the offer of composition was not competent in terms of the Act, then it follows that it was a composition carried through without that notice to the creditors, which is expressly required by the Act, to give validity to the proceedings, and in complete violation of its provisions in the matter of the settlement of a sequestration by composition-contract. While the whole thing is statutory, standing entirely on statutory powers and regulations, (one of the most important regulations, and which lies at the foundation of the power to discharge, being the notice to be given to the whole creditors of the offer and security proposed by the bankrupt,) the contract was not made and agreed to in terms of the statute, but outwith the Act altogether. True, the notice (Documents, p. 52) sent to the creditors, bears that the meeting to be called was for the purpose of deciding upon the offer which had been entertained 'with or without amendment.' But for this there was no authority in the words of the Act; and if it was incompetent to amend the offer, a notice so conceived could not render it competent, or in any way affect the rights of creditors, which must depend upon the provisions of the Act, unaffected by attempted deviation from them. It is also true that a second notice (Documents, p. 53) was sent, signifying the bankrupt's intention to amend his offer, and disclosing in part the amendment to be proposed. This may prove that the bankrupt and trustee were sensible that the change contemplated required to be intimated to the creditors, but it cannot improve the condition of the defenders. For, 1st, The statute contains no provision for such supplementary notice, and it was therefore not a statutory notice. 2d, It gives notice of what had not been before the prior meeting of creditors, and sanctioned by it; so that if an amendment be not competent, the objection could not be removed by such a course. And 3d, The notice did not reveal the whole change, but kept back a most material part of it.

"Then if the alteration or amendment on the original offer was not competent—if the provisions of the statute were violated by the change which was made, and if the composition was carried through without the statutory notice, the question remains, Are the pursuers entitled to redress, by obtaining, on these grounds, the composition-contract to be set aside, and the sequestration to be revived? Various cases under the old statute, and a passage from Mr Bell's Commentaries, have been appealed to by the defenders, as establishing it to be law, that the objections not having been stated before the sequestration was closed, and the bankrupt discharged, it is now too late to insist in them. It is not clear to the Lord Ordinary, upon any of these authorities, that it would have been so ruled even under the late Act, in a case of recent challenge, where the prescribed statutory notices had not been given. But, at all events, such material alterations have, as he conceives, been made by the present Act, upon the provisions in relation to a composition settlement; and the course of procedure for its final approval, is so different from that observed in practice under the prior Act, (in the present case the offer was approved of by the creditors on the 27th January 1842, and without further notice of any kind to absent creditors, the final deliverance of the Lord Ordinary was pronounced on the 3d of February,) that it is rather thought, that whatever might be the law under that Act, as settled by the cases, they cannot be considered to be decisive now; and the inclination of his opinion is, that there is nothing in the objections pleaded not having been previously brought forward, to bar their being urged in the form of a reduction of the composition-contract, and of the interlocutors or deliverances of the Sheriff and Lord Ordinary following thereupon.

"The pursuers, among other alleged irregularities, have founded on the abstract of the state of affairs, and of the valuation of the estate communicated to the cre-

No. 147.

It is very satisfactory to the Court to find that there is not the least shade of difference of opinion as to the view to be taken of this case, or as to the precise ground on which judgment should be given; and, on that account, I have been desired to prepare the opinion of the Court.

June 19, 1845.
Miln v. Boyack.

The sequestration of the bankrupt Boyack was brought to a close, and his discharge obtained, in consequence of the alleged acceptance of an offer of composition, reported by the trustee to the Sheriff as duly made and as regularly accepted of by the creditors; on which report the usual deliverances from the Sheriff and Lord Ordinary were obtained; and the summons, after a full narrative, concludes for production of the act and warrant of the Sheriff approving of the composition, of the interlocutor of the Ordinary confirming the same, and of the minutes of the meetings of the creditors deciding on the said offer; and concludes for reduction of the same on various grounds. I believe I cannot state the grounds on which the judgment of the Court is to proceed more satisfactorily, than by taking the reasons of reduction in the summons, and the documents referred to in support of the same. There is really not much aid to be derived in coming to a conclusion from any other parts of the record or productions. The first and second reasons substantially relate to the same matters, viz. alleged concealment or defective representations in the abstract of the state of affairs and valuation of the estate, required by the statute to be transmitted by the trustee to the creditors, in order to enable the creditors to judge of the offer of composition made by the bankrupt, and entertained at the first meeting for consideration.

The Court do not proceed at all on these reasons of reduction. But I believe we are all anxious, on the other hand, that it may be understood that we do not intend to indicate any doubts of the relevancy of such reasons of reduction, provided it shall in any particular case be made out that the creditors were not fully and properly informed, but, on the contrary, practically misled as to the state of the affairs and valuation of the estate, so as to be led to form an erroneous view of their own interests in regard to the offer of composition. Whether the statements in the trustee's circular were of this character in this case, it is unnecessary to consider, as we do not proceed on those reasons of reduction.

The third, fourth, and fifth reasons of reduction may be combined and consi-

ditions prior to the second meeting not having embraced the subjects over which the securities of the Royal Bank of Scotland, and Messrs Molison and Hackney extended. But, when the proceedings at the different preceding meetings of the creditors and commissioners (Documents, pp. 40, 41, 46, 47, and 50) are attended to, the Lord Ordinary would have great hesitation in holding that, by that omission, (and assuming all to have been done bona fide,) there was such a defect in the information appointed to be transmitted to the creditors to enable them to judge of the offer of composition by the bankrupt, as can have the effect of vitiating the contract eventually entered into.

"With respect to the relevancy of the summons, as regards its conclusions, in so far as they are to be supported on the ground of fraud, on the part of one or more parties connected with the sequestration, the note issued by the Lord Ordinary before the cases were prepared, indicates the difficulties that then pressed upon his mind; and he shall only say, that by the additional argument for the pursuers, these difficulties, if in some respects diminished, have not been entirely removed."

No. 147.

June 19, 1845.
Mill v. Boyack.

dered together, as they relate to the same matters, and involve the consideration of the same facts and of the same provisions in the statute. The sixth reason of reduction probably applies also to the same matters; but as it seems to be intended also to cover a case of a discharge obtained by fraudulent contrivances, it may be laid aside, and the opinion of the Court may be given in reference to the third, fourth, and fifth reasons—taking the fifth as a summary of the other two, and without reference to the allegations of fraud mixed up with the same. The actual judgment may be founded, I think, on the third and fourth alone.

These reasons of reduction may, in substance, be thus stated, viz. that a certain offer of composition was proposed at *one* meeting, by which it was to be considered whether it should be entertained, for the *judgment* and *decision* of the creditors at *another* meeting *to be called for that purpose*—that that particular offer was so considered, and deemed proper to be entertained for the decision of another meeting—that no alteration or amendment of that offer could competently be entertained at the second meeting so called—that the meeting was specially called to consider the offer so made at the first meeting, and that notice was given of that offer, and of no other—that the creditors received intimation of the offer made at the first meeting, for the very purpose of enabling them to judge of it, and were, under the statute, entitled, if any saw no necessity for attending, to rely on the proceedings of the second meeting being confined to the approval or rejection of the same—that another offer, or the offer with such alterations to make it a totally different offer, most injurious to creditors ignorant of the same was proposed to the second meeting, and incompetently and irregularly adopted by that meeting—that the approval of the Sheriff and confirmation of the Lord Ordinary was instantly obtained, before the creditors were aware of what was done, and that no notice or information of these proceedings being given or required, their validity depends wholly on the *competency of the proceedings* themselves so approved of—and that the creditors remained in ignorance of what was done until the period when the first instalment of the composition fell due, when they immediately complained and challenged.

The latter fact, that the creditors instituted their challenge *as soon as the facts were ascertained*, is, in the opinion of the Court, of the utmost importance. We give no opinion that can be applied to a different state of the facts. Many irregularities may be committed, which, if not timeously challenged, may not, in the circumstances, afford ground for entitling the complainers to have very solemn and important proceedings reduced. Much may have been done on the faith of the acquiescence of all parties in the actual results, whatever might have been originally stated against the regularity of the proceedings ending in these results. Parties not cognizant of the same may have acted on the faith of such long and general acquiescence. The length of time which may have elapsed may prove even the substantial acquiescence of the complaining creditors themselves, and may show that the challenge is an after-thought—the result of pique or caprice, or unreasonable change of opinion. The matters involved in such transactions relate to the private interests of the creditors themselves, as to which, by their own conduct, they may effectually bar themselves from coming forward after a long interval, or after allowing much to be done on the faith of their acquiescence, with a challenge which no immediate sense of enquiry had prompted, and which may originate in subsequent pique or intrigues. The Court wish to be understood distinctly to intimate, that their opinion on the present case takes as the

first and leading fact, that the creditors were at the time ignorant of the irregularities and injury to themselves with which the resolution of the second meeting was truly chargeable, and brought their challenge without any loss of time, as soon as the tenor, character, and effect of these proceedings became known to them.

No. 147.

June 19, 1845.
Mills v. Boyack.

Our opinion being so guarded and explained, we are not apprehensive that any uncertainty will be thrown as to the character of this case, or that our judgment will be quoted as at all inconsistent with *Dixon v. Edington*, or in support of an unreasonable challenge instituted after the lapse of long acquiescence, and here many bona fide and serious arrangements would be thereby injuriously disturbed.

The material consideration for the Court is the true construction of the clauses of the statute applicable to composition-contracts, and to the requisites, in point of form, for their adoption by the creditors present at the meeting, so as to make a resolution of those creditors binding on the whole body.

The provisions are contained in the 113th, 114th, and 115th sections of the statute. The composition in this case was under the 115th; but the latter section refers to the 114th, and it is plain that there was no intention of making any distinction between the offer when proposed at the meeting for election of a trustee, or at any subsequent meeting. It may be right, therefore, to notice the terms of the first of these sections, 113th. (Reads.) This section provides, that if the meeting resolve that the offer and security shall be entertained for consideration—” Now, that can only mean the offer *then* made—that is, made at the first meeting. And all that this meeting can do is to resolve that the offer shall be entertained for consideration—that is, to be further considered by the creditors at a future meeting. Then it is plain that it is on *that* offer that the vote and further deliberation is to take place. If they resolve that it shall be entertained for consideration, then the trustee is to advertise in the Gazette a notice that “an offer of composition has been so made and entertained”—that is necessarily the offer which was before the first meeting, for to none other can the notice refer—and “that it will be decided upon at the second meeting.” Now, this is perfectly distinct—that *it*—that is, the offer which was so made to be entertained by the first meeting—is to be decided upon at the second meeting. When he is to transmit to each creditor “a notice of such resolution.” Now, it can be the only resolution which the creditors at the first meeting could come to—viz. to entertain the offer then before them. Then this letter is to “specify the offer and security proposed, giving an abstract of the state of the affairs, and the valuation of the estate, so far as the same can be done, to enable the creditors to judge of the *said* offer and security.” Here then *the* offer is to be specified—that is, of course, the offer made to the first meeting—it says the offer proposed—the only offer entertained—and the offer to be decided upon at the second meeting—which is to be held for *that* purpose; and it is of the *said* offer merely that the creditors are to judge.

There is no authority for the trustee to intimate any offer not previously entertained by the creditors at the first meeting for consideration: to *that* the notice and the letters are to be directed, and there is no warrant to advertise or transmit any thing else with the authority and effect of a statutory notice, by which the creditors can be bound. On this section, we are clearly of opinion that the offer to be taken up and decided upon at the second meeting must be the pre-

No. 147. *cise offer entertained at the first, and referred over by that meeting for decision at a future meeting to be called for that special purpose, with full information to enable the creditors to judge of that particular offer. Under this section, we think alteration, or amendment, or variance, not of the nature of a trivial and wholly accidental correction, is incompetent at the second meeting, on the offer to be then taken up and considered; and, still more, that no such alteration can be assented to and decided upon at that second meeting. We think amendment or alteration in the offer, after it has been entertained by the first meeting, and referred over to the second for decision, incompetent under that section.*

June 19, 1845.
Mila v. Boyack.

Then the 114th, which provides for what shall follow if the offer is approved of at the second meeting, and which equally applies to an offer made under the 115th, seems to make the matter still clearer. It declares, that if the meeting shall "accept the *said* offer and security;"—that is, *the offer entertained by the first meeting for the consideration of the second. Then the matter is to be brought by the trustee before the Sheriff or Ordinary; and if either, after hearing any objections by creditors, shall find that "the offer with the security has been duly made"—that is, the same offer made at one meeting, and to be decided on at the second—and "has been assented to" at the second meeting by the requisite proportion, it may be confirmed. Observe the term, assented to, which clearly refers to something formerly entertained, and to be ratified and assented to at the second meeting—but a term not applicable to any new proposition originating with the second meeting itself, and not previously entertained for consideration by the first meeting. It is plain that one and the same offer is the subject of all the procedure—proposed at one meeting—entertained then so far for consideration, that it is resolved that it is to be decided on at the second meeting, and if assented to, then to be brought before the Sheriff or Ordinary.*

It is material to keep in view, that the provision for approval, by the Sheriff or Ordinary, in this the 114th section, is referred to in the 115th, as the mode equally of giving effect to the offer, if made at a later period in the sequestration than the meeting for the election of the trustee. Hence the fact that this 114th section is common to both the 113th and 115th sections, seems to afford fair ground for holding that the provision in the 115th was to be the same as in the 113th. It is true that the words are varied somewhat without any object, as unhappily occurs in many other clauses where the very same matter is noticed oftener than once. But it appears to us that the words of the whole of the 115th clause are as clear, and admit only of one construction; in one or two particulars, the variance is only to make the construction more stringent against the plea of the defenders as to the competency of the second meeting taking up any offer not proposed to, and entertained by, the first meeting.

The 115th clause provides, that "in like manner," at any other meeting specially called for the purpose, an offer of a composition may be made; and if a certain majority shall resolve that the offer and security shall be entertained for consideration, (this is the same emphatic expression as in the 113th section, and shows that the offer to be afterwards considered must have been entertained by the first meeting,) then the trustee shall call another meeting. The language of the section is then absurdly varied from the 113th; and some important words are omitted which are in the 113th section. But still I hold that the use of the term *notice*, really imports that it must be a notice such as was before described—viz. stating that an offer had been made, and that it was to be decided upon at the next meeting. No

ther construction seems reasonable. The clauses profess to be the same. And No. 147. do not see that the notice can really give the creditors any information at all, unless it does contain that which the 113th section directly requires. The June 19, 1845. *Mitlu v. Boyack.* remainder of the clause is, however, even more explicit than the 113th. The trustee is to send letters by post, which letters shall contain a notice of such resolution; that clearly requires that they must be made aware that an offer has been entertained for consideration—that is, to be considered and decided upon by the meeting so to be called—and the letters must state the *purpose* of the meeting; as was not in the 113th. How can that be complied with, except by stating at the meeting is called to take up and decide upon the offer, which, by the resolution of the first meeting, is to be submitted to the second meeting? And then the letters must specify the offer and security proposed—that is, most clearly, proposed to the first meeting, and contain the same sort of abstract as in the 113th section, to enable the creditors “to judge of the said offer;” which words, “said offer,” can only refer to the offer entertained for consideration at the first meeting, which is the offer which the trustee was to specify. Then, if they accept the offer and security, the same proceeding is to follow as in the 114th section. Manifestly the 113th and 115th sections contain exactly the same provision, and receive only the same construction and effect.

It is thus clear that the offer must first be proposed at one meeting, and can go further, if that meeting do not resolve to entertain it for consideration. Further, no offer can be submitted to another meeting for adoption, unless by virtue of the resolution of the first meeting entertaining it for future consideration. That is the only manner in which it can competently come before a final meeting for decision. There is no warrant for submitting any other proposition to the second meeting. The trustee has no warrant for his notice of the second meeting and its purpose, except the resolution of the first meeting; and that first meeting can do nothing but, when an offer is made, either to reject it or to entertain it for consideration and decision at a future meeting. To this specific purpose the notice by letter must be limited; there is no warrant for any other. And to that specific purpose the second meeting is limited and restricted as a special meeting, by provisions as clear, distinct, and restrictive, as can occur. Their powers are defined from the resolution of the first meeting entertaining for their consideration a particular offer; and if they take up and decide on any other offer, or on one substantially altered, they have no authority for their meeting, and there is therefore no competency in their act. A meeting called under the provisions of a statute for a special purpose, defined and specified, by being only the reconsideration of what was previously before another meeting, and of which purpose notice given, has no authority to bind any of the absent body, by taking up and deciding upon a totally different matter.

This is the security and the protection of the creditors. It is true that very few powers are given by the last statute to the meeting of creditors so to be decided, and that the resolution of a certain majority of those present may finally reject the offer, and that no application is now necessary to absent creditors, in order to obtain the personal consent of any particular majority of the whole creditors; and hence it is contended, that the creditors are required by the provisions of the statute, and bound to be present, if they mean to protect their interests, cannot have redress, as I understand the argument, against any thing done at the meeting, and approved of by the Sheriff or Ordinary, however incompetent

No. 147. and extravagant, (the argument must go that length, else it fails in legal effect;):—
 — that the procedure before the Sheriff or Ordinary comes to be a decree entitling
 June 19, 1846. those who committed any irregularity, to plead that the matter is *res judicata*, and
 Miln v. Boyack. the objection competent and omitted.

I think the answer to this argument is perfectly satisfactory. It occurs out of the provisions of the statute on which the plea of the defenders is founded. The statute requires full and special information of what is to be proposed to the second meeting to be previously communicated to the creditors, for the very purpose, as expressly stated, *that they may judge of the said offer*—of that matter, to decide on which alone the meeting so called is competent; and the powers of the second meeting are only to reject or assent to the offer entertained by the first. If the creditors are satisfied, or if they think those on the spot can judge best, they are safe in not attending. They have been informed of what is to be considered; and the provisions of the statute exclude the taking up of any other offer than that entertained by the first meeting for the consideration of the second meeting. Hence the powers given to the meeting of the creditors are truly restricted and special, and the protection to the creditors, who do not attend, is complete in the very precautions taken to limit the second meeting to what has been entertained by the first meeting, and duly communicated to the creditors at large by the notices and letters prescribed.

It is with reference to and under these precautions that power is given to the second meeting to bind the absent creditors—that is, to bind them only to what all the creditors have had the means of judging of.

The statute assumes all these precautions to be taken; that the second meeting decides only upon the said offer and security, as the only matter which, by the statute, they are authorized to decide upon; and assuming that, it allows the application for approval of that offer to be made to the Sheriff or Ordinary at once, without further notice or opportunity to absent creditors to appear. This provision, admitting of very rapid procedure after the second meeting, appears to me to have been introduced, precisely because, under the statute, it was safe to allow immediate application to be made for approval of that which two meetings of the creditors had thus sanctioned; and because no other offer could possibly be accepted or decided upon, except that of which the creditors had got full notice, with information to enable them individually to judge of it, and to which they assent, if absent, might safely be presumed. And no other offer can, by the express terms of the 114th section, be reported by the trustee, or approved of and confirmed by the Sheriff or Lord Ordinary, except the said offer and security.

But to suppose that this rapid procedure could be intended to apply to an offer never heard of except at the second meeting—of which the body of creditors had received no notice—and yet of which the adoption, and then the approval, with the force of a final decree, could be obtained next day from the Sheriff, is to ascribe to the statute an injustice and a contrivance to protect, it may be, gross iniquity to the absent creditors, which there is not one word in the clauses to warrant. On the contrary, the application can only be to approve of the said offer and security, and that said offer is the one proposed to, and entertained by, the first meeting, and followed out as one subject-matter for consideration and disposal throughout all the procedure. Hence an application for the approval of any other offer, although adopted by the second meeting, is incompetent—has no authority whatever, or warrant, under the terms of the statute, which expressly exclude any application for ap-

proof of any other offer than that proposed to the first meeting, and restrain the trustee, Sheriff, or Ordinary, in terms as clear as those which restrain the second meeting. Hence, so far from the application to, and act and warrant of, the Sheriff or Ordinary in this case having any force or effect, they are in themselves directly contrary to the statute, without any warrant in the statute, and cannot have the form or effect of a competent judicial act. That the Sheriff or Lord Ordinary may not detect the irregularity when the report of the trustee states all to be right, is very likely to occur in an *ex-parte* proceeding, and when reliance is placed on the faithful and correct discharge of his duty by the trustee. But the fact that such irregularities are likely to escape judicial detection, only renders it the more necessary to hold that the deliverances are obtained *periculo petentis*.

Whatever plausibility, therefore, at first sight, may attach to the defence of the proceedings before the Sheriff or Ordinary, as having the force of a decree, and while we concur in the decisions under the former statute, it is plain that under the express terms of the present statute, the proceedings were in this case incompetent and without warrant, and that that was done by the Sheriff and Ordinary on an improper report of the trustee, which they had not the power to do.

The clauses of the present statute are so explicit, that it is perhaps unnecessary to compare this portion of the statute with the provisions in the former sequestration statute (54 Geo. III. c. 137, § 591) as to the procedure respecting offers of composition. But still the Court do attach great weight to the change made by the omission of the provision in the former statute, which authorized the trustee to appoint the second meeting to decide on the offer *with or without amendment*. These words are omitted in the present statute. An amendment was very harmless under the provisions of the former Act, when the actual concurrence of a certain majority of the whole creditors was required by future personal applications, unless they were present at the meeting, and when they received notice of the trustee's report to the Court. The defenders contend that the omission makes no change. We think it makes this change—that there is now no authority whatever or any amendment of the offer being proposed at the second meeting. The defenders further say, that even if incompetent, their procedure is as good and effectual in law, as if the alteration had been competent; and that, first, because the creditors ought to have been present; and second, because the resolution of the second meeting has been approved by the Sheriff and Ordinary under the statute. These defences have been already considered, and are utterly groundless. Hence we hold that the omission of these words takes away the warrant for the powers attempted to be executed by the second meeting. There are many other important differences between the provisions of the two statutes, which all originate in the change in the policy and objects of the new statute. According to Mr Bell, no alteration in the offer is competent by the law of England, and the change may have been introduced with a view to conformity. But, at all events, it was a change which the provisions for information to the creditors, and the powers bestowed on the second meeting, required; for the creditors present could not in justice be entrusted with the power to bind absent creditors in such a matter, except in regard to offers proposed to the former meeting, and duly communicated to all the creditors as the subject-matter on which the second meeting was to deliberate and decide.

I have only in addition to refer to Mr Bell's valuable remarks, at p. 69 of his

No. 147.

June 19, 1845.
Miln v. Boyack.

No. 147. Commentaries on this statute, which prove to my satisfaction that he took exactly the same view of the construction and effect of these claims, and of the perfect protection to creditors in the provisions of the statute. I refer particularly to paragraph fifth on p. 78.

June 19, 1845.
Miln v. Boyack.

It is unnecessary to occupy time in detailing the proceedings in the minutes of the first and second meeting, and the intermediate notices and letters.

In the opinion of the Court, they establish that an offer was taken up and decided upon at the second meeting substantially different from that proposed to and entertained by the first for consideration, and notified to the creditors, and for the decision upon which the second meeting was specially called, and to which alone it was competent.

The case of violation of the statute—of fundamental irregularity and incompetency in the acts of the second meeting—and of incompetency in the procedure before the Sheriff and Ordinary, as not warranted by the statute, is completely made out to the satisfaction of the Court. To three matters only in these proceedings it is necessary to advert.

1. It is urged that the first meeting, by its minute, authorized the trustee to call the second, for the purpose of deciding on the offer with or without amendment. We hold this of no avail, as the authority of the first meeting is restrained by statute, and they can give the second meeting no power except what the statute gives. This part of the resolution was incompetent. But it was not duly notified. This part of the resolution is not in the Gazette notice, and hence it would be useless, even if competent. The Gazette notice is exclusive of the notion of such a matter as alteration, for, after specifying the offer and security, it calls the meeting specially “for the purpose of *finally* deciding on the *said* offer and security.”

This Gazette notice effectually restrained the competency of the second meeting, even if the clauses in the statute had been less explicit. But the attempt to authorize alteration in the minute of the first meeting was wholly incompetent, and could bestow no authority on the second meeting to adopt any offer whatever that might be made to them. It is said that the letter to the creditors repeated this phrase, with or without amendment, but that could not give competency to the second meeting. The creditors were entitled to rely on the observance of the statute, and can be bound only by what is done in compliance with and in terms of the statute; and if the notice was in itself irregular, and intimated an irregularity, they were not to be equally bound as if the notice had been regular, and the thing competent.

We cannot admit, however, that the letter can go beyond the Gazette notice. The letter may or may not be received. Its terms may be loose and unprecise. There are often at the outset of the sequestration many creditors who have not yet claimed, and who cannot receive the letters. Such creditors are waiting to see the probable course of the sequestration, and are in time if they claim before the first dividend, or the composition is paid. They rely on the notices in the Gazette. And we know that such creditors are often a very large body at the outset of important sequestrations. The Gazette notice is a public official act, which must decide the purpose for which the second meeting is called, and to which its powers are thereby restrained.

2. Then it is said it was unnecessary to specify the offer and security, proposed at the first meeting, in the Gazette notice, and that it would have been sufficient

simply to say that an offer had been proposed without specifying it; and hence that a Gazette notice does not necessarily exclude amendment. We need not decide in *this* case, whether a Gazette notice, in such general and indefinite terms, giving no information of the nature of the offer and security proposed, would be competent; for surely it cannot be doubted that it was competent to insert in the Gazette notice the actual fact for the better information of creditors, by specifying the offer actually proposed to the first meeting; and, when so inserted, the notice necessarily limited the competency of the meeting so called to the consideration of that offer so stated as the subject-matter to be decided upon.

No. 147.

June 19, 1845.
Mila v. Boyack.

3. It is said that the trustee, by a second letter to the creditors, intimated that the bankrupt was to propose an amendment, and stated an amendment which was to be proposed; and an attempt was made to represent the offer actually adopted as substantially included in that letter.

I believe we are agreed in holding that the second letter from the trustee was an act wholly unauthorized by the statute, and that it can have no effect as a statutory notice binding against the creditors. The trustee had no authority to intimate as matter for the consideration and decision of the second meeting, any offer which the first meeting had not entertained as proper for the consideration of a second meeting; and had not, by their resolution, devolved over to the second meeting. Hence this second letter had not the effect of a statutory notice. It was issued without authority; it could have no effect in giving powers to the second meeting. Further, the trustee's power and duty was exhausted. The Gazette notice fixed the purpose of the meeting specifically and conclusively. He could not intimate, by letter, matter to be taken up different from, and inconsistent with, what the public Gazette notice had stated and defined to be the subject to be disposed of by the second meeting. Hence this second letter was of no authority or force as a notice binding on the creditors. But in no view could this letter avail the defenders, as notice of what the second meeting actually did, for it was calculated to mislead. The material and injurious parts of the proposal made to the second meeting, and adopted by them, are not stated in this second letter at all, although it professed to intimate the alternative which the bankrupt proposed to make at the second meeting. So far from aiding the case of the defenders, this second letter makes materially against them, and so Mr Marshall seemed to feel, as he wished to throw it aside entirely. I concur in thinking it must be thrown out of view; for no notice in that letter of what the bankrupt proposed, although in exact conformity with the offer he did submit at the second meeting, could have made the proceedings of that meeting competent. The trustee had no authority to intimate, with the effect of a statutory notice, any proposal from the bankrupt himself. He could only intimate what the first meeting had entertained for consideration. He could bestow no authority on the second meeting by any such supplementary letter, beyond what the resolution of the first meeting, *as notified in the Gazette*, gave them. This supplementary letter, therefore, was of no authority. The creditors were to judge of the offer and security entertained by the first meeting, intimated to them in the Gazette notice, and relative letter and abstract of the state of the affairs, and were entitled to throw into the fire any statement of any intention of the bankrupt to make at the second meeting other offers, whether such intimation came from the trustee or the bankrupt. I think the trustee ought not, in the discharge of his duty, to have written any such letter, for he had no authority to do so; and the purpose for which the second meeting

No. 147. was called was conclusively fixed and defined by the previous Gazette notice. But in one point of view, the terms of this supplementary letter are very material, for June 19, 1845. it proves that the more important and injurious alterations in the offer were not *Miln v. Boyack.* in any form intimated to the creditors, or made known to any except those present at the second meeting, and their friends; and hence this reduction is clearly brought in perfect good faith by parties actually misled and deceived, and as soon as they knew the facts.

I believe the Court do not think that it is at all necessary to point out the extent to which the altered offer was injurious to the creditors. Of course we must be satisfied that the alteration really makes a difference, and is not wholly verbal and immaterial; but if there is really a difference, of which the creditors were entitled to judge, then the precise extent of the materiality and injury is not matter for the Court. The offer of composition and security is a matter in which the pecuniary interests of the creditors are concerned, *of which they are entitled to judge for themselves*; and if they have been, by incompetent and irregular proceedings at the second meeting, and by the adoption then of an offer not previously heard of, deprived of the opportunity and legal right of judging of what they are so deeply interested in, that is a sufficient reason why they should not be bound by that of which they had no opportunity of judging. The Court are not to decide on what is or is not injurious to them, further than to see that there is a difference, one not trivial, critical, or unsubstantial, but a difference in the offer adopted, which reasonable men, in attending to their own interests, *might* naturally view as a material alteration: whether really material or injurious, I think we cannot take on ourselves to decide without depriving the creditors of their rights, under the statute, to judge of the offer—to oppose it if they object to it, both at the meeting and before the Sheriff or Ordinary—and to challenge the adoption of any other offer than that communicated to them.

But the Court must add, that they think the plain facts demonstrate the effect if not the object, of the alteration; and the letter from Mr Ker to Mr Garth completely proves the benefit to those who knew of the alteration, over those who were ignorant thereof. That benefit to those present, and who knew of the alteration, just led them to take an insufficient cautioner; for, by quick and timely measures, they knew that *they* could get payment, which they saw that others could not do. Mr Ker's letter is the best practical commentary on the whole case. The resolution of the second meeting being known only to a few, came not to be the adoption of an offer of composition, but a skilful way of dividing among a few creditors the effects in the hands of the trustee; and we are satisfied that the plain substantial justice of the case can only be secured by the decision we have come to.

As this is the first case of reduction on any such grounds under this statute of the discharge under a sequestration, it was right fully to explain the grounds on which I understand the judgment of the Court to rest, in order that the judgment may not be misunderstood, or its effect strained to cases to which it ought to be inapplicable. Of course it is very obvious, that on the view taken of the construction and effect of the provisions in the present sequestration statute, the decisions of Buchanan and others referred to have no application whatever.

Many points have been raised in argument on which we give no opinion. Mr Marshall has stated very serious and difficult questions as to the right of the creditors to complain to the Court of the resolution of the creditors at the second

meeting, in the same way as against any other resolution, even although the Sheriff's approval had been given; and also as to the right to reclaim against the Ordinary's confirmation of the approval by the Sheriff; and as to the regularity of the present procedure of entering in the register the discharge of the sequestration as soon as the Ordinary's deliverance is pronounced. We give no opinion on these points, on which Mr Marshall has, I see, in favour of his argument, the authority of Mr Bell, in his Commentaries on this statute; because, in the view we take of the case, the right to reduce on the ground of incompetency, and entire want of notice, is clear, notwithstanding the lapse of these opportunities of reclaiming, supposing that such exist. Various other points are pleaded, on which also we intimate no opinion.

No. 147.

June 19, 1845.
MILN v. BOYACK.

As to the form of the judgment, I would propose to sustain the third and fourth reasons of reduction, and then to reduce and decern in terms of the reductive conclusion; to authorize and ordain the keeper of the register to delete the entry in the register of sequestrations of the deliverance and confirmation of the Lord Ordinary; discharging the defender, William Boyack, from all debts contracted prior to the sequestration, and declaring the same to be at an end; to find and declare, in terms of the declaratory conclusion, p. 20; and to decree for repayment of the sums drawn by the creditors specially called as defenders.

LORD MEDWYN.—I concur.

LORD MONCREIFF.—I have attended carefully to your Lordship's opinion, and am satisfied with the grounds on which it proceeds. With regard to the point of notice, the circular letters by the trustee only go to the creditors who have claimed in the sequestration, so that the other creditors get no notice but that in the Gazette.

LORD COCKBURN concurred.

THE COURT pronounced this interlocutor:—"Sustain the third and fourth reasons of reduction, and reduce, retreat, rescind, cass, annul, decern, and declare, in terms of the reductive conclusions of the libel; restore and repose the pursuers against the whole proceedings so reduced and annulled; and ordain the proceedings in the sequestration to be resumed and carried on in terms of the statute; further authorize and ordain the keeper of the register to delete the entry, in the register of sequestrations, of the deliverance and confirmation of the Lord Ordinary discharging the defender, William Boyack, from all debts contracted prior to the sequestration, and declaring the same to be at an end; and further decern and ordain the creditors named in the summons, who have received payment of the composition on their respective claims in manner therein mentioned, to repeat and pay back the same to the trustee under the sequestration as follows, &c., with legal interest of the said several sums respectively, from and after the 18th day of June 1842, until payment: Find the pursuers entitled to the expenses incurred by them."

WILLIAM MILLER, S.S.C.—WALTER DICKSON, W.S.—LOCKHART, HUNTER, and WHITEHEAD, W.S.—Agents.

Pursuers' Authorities.—2 and 3 Vict. c. 41, §§ 113, 114, 115, 116; 54 Geo. III. c. 137, § 59; Bell's Com. II. 467-8; Brown v. Richmond, 11 Shaw, 407; Young v. Milne, 28th June 1841, (F. C.); Campbell v. Anderson, February 9,

No. 147. and March 16, 1818, (5 Dow, 412;) Macara, December 15, 1821, (1 S. 216;) Brown v. Heritors of Kilberry, June 12, 1829, (3 W. & S. 441;) Ross, March 2, 1826, (4 S. & D. 514;) Grant, December 5, 1833, (12 S. & D. 167;) McDonald, November 21, 1829, (8 S. & D. 113;) Seller, November 28, 1829, (8 S. & D. 145;) Johnston and Company, January 15, 1834, (12 S. & D. 293;) Wylie, February 3, 1830, (2 S. & D. 434; Bell's Com., 2, 476;) Gray v. Cockburn, February 2, 1844, (ante, Vol. VI. p. 569;) Wilson Elliott, May 2, 1828, (3 W. & S. p. 60.)

June 19, 1845.
Allan v.
Fleming.

Defenders' Authorities.—Dixon v. Edington & Sons, June 12, 1822, (1 Shaw, p. 480;) Buchanan v. Dunlop and King, December 8, 1829, (8 Shaw, p. 201;) Robinson v. Scott, July 3, 1834, (12 S. & D. p. 875; Bell's Com., Vol. II. p. 476;) 54 Geo. III. c. 137, § 59; and 2 & 3 Vict. c. 41, §§ 114, 115; Reid, Irving, and Company v. Buchanan, February 15, 1838, (16 S. & D. p. 549;) Stair, IV. 1, 50; Stat. 1672, c. 16, art. 19; Napier v. Carson, February 7, 1828, (6 S. & D. p. 860; Ewing v. Wallace, August 13, 1832, (W. & S. app. p. 222;) 2 & 3 Vict. c. 41, § 127.

In the above case, at advising, it was observed by the Court, that a correspondence which had taken place between the agents after the cause of action had arisen, extending to about 100 pages, and which had been boxed to the Court, ought not to have been printed, and the expense thereof ought to be disallowed by the auditor.

No. 148. WILLIAM and ROBERT ALLAN, Claimants.—*Marshall—Forbes.*
ROBERT FLEMING, Claimant.—*G. G. Bell—Horn.*
Competing.

Succession—Clause—Conditional Institution—Trust.—Terms of a clause of destination in a settlement which was held to be a conditional institution, and not a substitution.

Expenses—Multiplepointing—Trust.—In a multiplepointing as to a trust-fund, expenses, in the particular case, refused to be allowed out of the fund; and Observed, that it was a common conception that all parties who attack a trust-fund were to get their expenses out of it, but that they do so at their own risk.

June 20, 1845. THE deceased Robert Allan executed a trust-disposition and settlement, whereby he conveyed his whole real and personal property to trustees. By the third purpose of the trust, Robert Allan appointed his trustees to account for and make payment to Isabella Allan, his natural daughter, in liferent, and for her liferent use alienably, after she should have attained the age of majority or marriage, of the one just and equal half, pro indiviso, of the whole free produce of the residue of his said real and personal estate, as the same might be then accumulated; directing them, with this view, as far as possible to invest his movable means and estate on good heritable security; and also declaring that it should be in their option, either to sell, dispose of, and convert into cash the one half of the heritable subjects disposed, and to invest the proceeds thereof on heritable security, or to retain the said heritable subjects in their own persons in trust. The fourth purpose of the trust was:—
“Upon the death of the said Isabella Allan, and leaving lawful issue, I,

2D DIVISION.
Lord Wood.
R.

with consent foresaid, appoint my trustees, and survivors or survivor of them accepting, and their said quorum, to convey and make over to and in favour of such child or children; and in case of the death of either of them, without lawful issue, to the survivor or survivors of them, equally among them, share and share alike, in fee and property; and all whom failing, to John Allan, presently residing with me, my natural son, and the heirs of his body; whom also failing, to the said William Allan, my brother, and his heirs whomsoever, in fee, all and whole the said one equal half, pro indiviso, of said heritable and movable property which shall then be belonging to my said trust-estate—that is to say, the entire estate and property appropriated for the liferent of the said Isabella Allan; or should said heritable estate be disposed of and converted into cash, the one half of the said price or produce thereof, after deduction of all necessary expenses; declaring that, in case of the death of either of the children of the said Isabella Allan before the period arrives for the said division of the one half of my estate as aforesaid, and leaving lawful issue, the child or children of such deceiver shall have right to succeed equally to their father or mother's share." By the fifth purpose of the trust, the testator appointed his trustees, upon John Allan, his natural son, attaining majority, to make over to him, and the heirs of his body, and failing his attaining majority or leaving issue, to Isabella Allan, and the heirs of her body, and failing her attaining majority or leaving issue, then to his brother, William Allan, and his heirs whomsoever, one fourth part, pro indiviso, of his whole estate, as the same might be then accumulated, or the one fourth share of the price thereof if sold: As also, to make payment to the said John Allan, in liferent, after he should attain the age of twenty-one, of the produce of the remaining fourth share, pro indiviso, of his estate, or of the price thereof, as the same might have been then accumulated. By a subsequent clause, the trustees were appointed, upon the death of John Allan, to convey the fourth share liferented by him to his child or children; and, in case of the death of either of them without lawful issue, to the survivor or survivors equally among them; failing all whom, to Isabella Allan, and the heirs of her body; and whom failing, to William Allan, the testator's brother, and his heirs whomsoever, in fee. The deed further declared, that the trustees should have full power to sell, and convert into cash, the whole, or such parts of the heritable and movable estate as they should deem proper for carrying the trust into execution, and to invest the price of such parts as might be so disposed of in good heritable security, with power to uplift and discharge these sums, and reinvest them as often, and in such manner, as to them might appear proper; but with a recommendation to the trustees to dispose of as little of the heritable property as might be consistent with the proper execution of the trust, until John and Isabella Allan should have attained the age of twenty-one, so that the trustees might, if possible, apportion it,

No. 148.

June 20, 1845.
Allan v.
Fleming.

No. 148. or such parts as might be unsold, with their approbation, on the principles of, and according to the before-mentioned destination. This settlement was executed with the special advice and consent of William Allan, the brother and heir-at-law of the testator.

June 20, 1845
Allan v.
Fleming.

The truster, Robert Allan, died, and was survived by his daughter, Isabella Allan, who was afterwards married to Mr Robert Fleming. Mrs Fleming died, leaving two daughters, Elizabeth and Isabella Fleming; and also a son, who died during the dependence of the present action.

Upon Mrs Fleming's death, a question arose with regard to that half of the residue of the trust-estate appointed to be liferented by her, and which was disposed of by the fourth purpose of the trust, between Mr Fleming, as administrator-in-law for her children, and William and Robert Allan, the children of William Allan, the testator's brother. It was contended by the former, that the trustees were bound to execute a conveyance of this fund to Mrs Fleming's children in fee-simple, without any ulterior destination; while it was contended by the Messrs Allan, that a destination should be inserted in their favour, as the heirs whomsoever of William Allan, failing the children of Mrs Fleming, in terms of the trust-deed.

A process of multiplepointing having been raised by the trustees, claims to the above effect were lodged by the parties.

The Lord Ordinary pronounced the following interlocutor:—"Finds that the fund or estate in medio, in this multiplepointing, consists of that portion of the trust-estate of the deceased Robert Allan, which, in terms of the trust-disposition and settlement, was liferented by his natural daughter, Isabella Allan, afterwards married to the foresaid Robert Fleming; and which, 'upon the death of the said Isabella Allan, and leaving lawful issue,' he, by the fourth purpose of the said deed, directed the raisers, his trustees, 'to convey and make over to, and in favour of, such child or children, and in case of the death of either of them without lawful issue, to the survivors or survivor of them, equally among them, share and share alike, in fee and property; and all whom failing, to John Allan, presently residing with me, my natural son, and the heirs of his body; whom also failing, to the said William Allan, my brother, and his heirs whomsoever in fee:' Finds, that the said Isabella Allan or Fleming died on the 15th September 1843, leaving two daughters, the said Elizabeth and Isabella Fleming, and one son, Robert Allan Fleming, who died after the record was closed, and is represented by his said sisters; for whom, both in their own right, and as representatives foresaid, the said Robert Fleming, their father, is now a party claimant in this action, as their administrator in law: Finds, that all that portion of the foresaid instructions to the said trustees, in reference to that part of the trust-estate which was appointed to be liferented by Isabella Allan or Fleming, which follows the direction, 'upon the death of the said Isabella Allan,

and leaving lawful issue, to convey and make over the same to such child No. 148.
 or children, and in case of the death of either of them, without lawful
 issue, to the survivors or survivor, equally among them, share and share
 alike, in fee and property,' is conditional institution, which was only to
 have effect in the event of the death of the said Isabella Allan without
 leaving lawful issue : Finds, that the said Isabella Allan or Fleming hav-
 ing died, leaving lawful issue, and the period having consequently arri-
 ved when it is provided that the trustees shall convey and make over the
 said part of the trust-estate, the said conditional institution was evacua-
 ted, and ceased any longer to endure, the event not having taken place
 on the occurrence of which alone it was to come into operation : There-
 fore finds that the trustees, the raisers, are bound to convey and make
 over the said part of the trust-estate to the said Elizabeth and Isabella
 Fleming, in their own right, and as representing their said deceased bro-
 ther, equally, share and share alike, in fee and property, by the deed or
 deeds requisite for that purpose, without inserting therein any destination
 in the terms of the said fourth purpose of the said trust-disposition and
 settlement ; and, to that effect, ranks and prefers the said Robert Fleming
 as their administrator in law upon the fund in medio, but subject to de-
 duction of any expenses of trust management chargeable against the
 same, and of the expense of the deeds to be executed by the said trust-
 ees ; and also the expenses of both parties incurred in the present pro-
 cess, which are hereby directed to be paid out of the said fund ; and de-
 cerns and appoints the cause to be enrolled, that such further order may
 be made as may be necessary for carrying the above finding into effect, and
 disposing of the conclusions for exoneration contained in the summons."

The Messrs Allan reclaimed, and argued,—That they were entitled
 to have the destination in their favour inserted in the conveyance to be
 granted by the trustees. It was the clear intention of the testator that
 this part of his estate should consist of a pro indiviso share of heritage ;
 and the legal presumption was therefore in favour of substitution, and
 not conditional institution. From the terms of the settlement and the
 situation of the parties, it was evidently the testator's intention that his
 succession should devolve upon a line of substitutes ; the testator had two
 natural children, who were the primary objects of his care ; but after
 them he had a brother, with whom he was on the best terms, as was
 shown by his being a party consenter to the settlement, and in whose
 favour it was natural that he should insert a destination to prevent the
 contingency of his property falling to the Crown ; and who, moreover,
 could not readily be supposed to have assented to a destination which
 was to have the effect contended for by the opposing claimants.¹

¹ 3 Ersk. 8, 54 ; Ramsay, (ante, Vol. I. p. 83 ;) Anderson v. Reid, (13 S. & D. p. 450 ;) Campbell, (M. 14875 ;) Duncan v. Myles, June 27, 1809 ; Mowbray, July 9, 1834, (12 S. & D. p. 910 ;) Wardlaw Ramsay, Nov. 23, 1838, (ante, Vol. I. p. 83 ;) Mackenzie v. Reid, (noticed S. & D. Feb. 11, 1835.)

No. 148. Mr Fleming answered,—The destination to ulterior parties, with the words “all whom failing,” was clearly conditional institution, intended merely to provide for the case of Isabella Allan dying without leaving issue. Although John and Isabella’s liferent rights were at first pro indiviso shares, yet so soon as they attained majority, their respective shares were to be apportioned “as then accumulated;” and the directions to the trustees gave them full power to sell and reinvest at pleasure, the only limitation being a recommendation to refrain from selling until John and Isabella should attain majority, after which the trustees were to be guided by their wishes, as the parties solely interested. In reference to the argument, that it was the intention of the testator that his property should consist of heritage—a large amount of it consisted of cash at the date of the settlement and his death. The part which consisted of heritage was house property and building ground, used merely as an investment for his money; and his directions in the third clause, as to lending out upon heritable security, was merely for the purpose of investment. The deed further gave the trustees power of sale, and expressly contemplated the case of the whole or a part of the residue being in cash. In this case no deed of conveyance would be necessary, but a mere payment over to the children—a case which would admittedly render the substitution nugatory. Further, in the fourth clause, the trustees were directed to denude immediately to Isabella’s children, without any further keeping up of the trust.

A reclaiming note was also presented by Mr Fleming against the finding, directing the expenses of the parties to be paid out of the fund in medio.

LORD JUSTICE-CLERK.—This case lies in a nutshell. The trust-deed, after providing for the liferent of one-half of the general trust-estate in favour of the truster’s natural daughter, contains the direction—(4.) “Upon the death of the said Isabella Allan, and leaving lawful issue, I appoint my trustees to convey and make over to, and in favour of, such child or children; and in case of either without lawful issue, to the survivor or survivors of them, equally among them, share and share alike, in fee and property; and all whom failing,” then to other parties, all and whole the half of the trust-estate so liferented by Isabella Allan.

I apprehend it to be a point perfectly clear and settled, that in such an appointment as to the *division* of the estate *at the period of denuding* of the trust, the words “whom all failing” mean, that on the death of Isabella Allan, if she leaves no issue, then the trustees are to convey and make over to the other parties. I never heard that construction seriously disputed, when the question relates to the meaning of such terms in a clause providing for the period of division, unless there is some express declaration in the deed which requires another result. These parties, therefore, so called in, provided Isabella Allan left no children, are only conditional institutes. I think it as clear a case of conditional institution as I ever met with. The first rule in such a direction as to the conveyance and division of a trust-estate, is to make the benefit as large as possible to the favoured donees.

and that is done by the above construction. The second rule is, that when trust-funds are to be divided and paid over, (and this half might have been wholly in money,) no substitution or destination is to be presumed after the trust is at an end, and when there are no means of protecting such destination. Cases relating to the relative interest of parties successively called during the subsistence of the trust, have no application to the present case. The arguments, or conjectures rather, as to the probable wishes of the testator, cannot be relevantly considered in a case in which he has used proper technical terms, having, when so used, a fixed legal meaning.

LORD MONCREIFF.—I am of the same opinion. This is a deed under which the whole of this share might have been cash. Neither does it affect my mind that the consent of the brother was taken; it was so, probably, because the testator was in bad health, and to guard against deathbed.

The other Judges concurred.

Upon the point of expenses,—

LORD COCKBURN.—It is a very common conception, that all parties attacking a trust fund are to get their expenses out of it. I hold that they must do so at their own risk. This is the clearest possible case; and were we to give expenses against the fund here, I cannot suppose a case where we could refuse them.

THE COURT accordingly pronounced this interlocutor:—"Refuse the reclaiming note for William Allan and others, and adhere to the interlocutor reclaimed against on the merits; and on the reclaiming note for Robert Fleming on the question of expenses, recall the interlocutor, in so far as it finds William and Robert Allan entitled to expenses out of the fund in medio: Of consent, find neither party entitled to the expenses incurred previous to the date of the Lord Ordinary's interlocutor; but find the said William Allan and others liable in the expenses incurred by the other claimer since the date of the Lord Ordinary's interlocutor."

J. & DARLING, W.S.—D. ALLESTREE, W.S.—JOHN FORRESTER, W.S.—Agents.

DAVID ANDERSON and COMPANY, Pursuers.—Macfarlane.
JAMES M. TAYLOR, Defender.—Sol.-Gen. Anderson—Henderson.

No. 149.

Process—Minute—Abandonment of Action—Expenses.—Where the pursuers of an action had given in a minute consenting to decree of absolvitor with expenses, on the footing that the expenses should be imputed in extinction of certain liquid claims which they held against the defender, and the Lord Ordinary had assented in terms of the minute, the Court, on a reclaiming note, recalled the interlocutor, in respect the minute had not been agreed to by the defender.

June 20, 1845.

DAVID ANDERSON and COMPANY were pursuers of an action for payment of a sum of money against Taylor. In the course of the process

2D DIVISION.
L. I. ROBERTSON.
T.

No. 149. the pursuers gave in a minute, stating, in reference to a motion by the defender for proceeding with the case, "that as the pursuers held ultimate diligence against the defender upon a bill for £11, 5s., and also held a decree against him for £119, 11s., of which sums they had been unable, and had no prospect of ever being able, to recover any part, they had now no interest to seek to constitute their further claims against the defender; that in these circumstances, and to avoid the expense of fruitless litigation, they were willing, and offered to agree to absolvitor from the action, on the footing that the costs hitherto incurred should be held to compensate pro tanto the pursuers' liquid claims against the defender above referred to; or they were willing that the action should be sisted until those sums should be paid."

June 20, 1845.
Anderson v.
Taylor.

The Lord Ordinary pronounced this interlocutor:—"In respect of the terms of the minute, No. 76 of process, assoilzies the defender from the conclusions of the action; finds expenses due to the defender up to the date of the said minute; allows an account thereof to be given in, and, when lodged, remits the same to the auditor to tax and report; finds that the amount of the said expenses, when ascertained, must be imputed pro tanto in extinction of the liquid claims of the pursuers; and as the defender does not dispute the validity of these claims, finds that he has no legitimate interest to seek for any decree for payment otherwise of the expenses, and that there is no valid interest in his agent, for whom no appearance has been made in this process, under which decree for the said expenses could have been sought in the name of such agent: And, separatim, finds that, excepting for the consent given in the said minute, the Lord Ordinary would have found expenses due to the defender, only under great modification, which he considers the state of the proceedings would have justly required: But finds no expenses due to either party incurred subsequently to the date of the said minute, and decerns."

Taylor reclaimed against this interlocutor, contending that the pursuers were not entitled to abandon their action in a conditional form, and that no effect could be given to the minute, as it had never been agreed to, or allowed to be answered. It was further contended, that the circumstances of the case did not admit of compensation, and that there was no proper concursus debiti et crediti, as the decree referred to by the pursuers was not in their own favour, but in that of their agents.

LORD JUSTICE-CLERK.—This minute has never been consented to. We must, therefore, hold it to be at an end, and must throw it aside. The question remains, whether these expenses are to be compensated, and whether it can be said that the reclamer has no legitimate interest to protect the interests of his agent, for this is just an indirect way of defeating the agent's rights. The Lord Ordinary has proceeded in an irregular manner, and I think the proper course would be to recal his interlocutor, and remit to him to proceed further with the cause.

The other Judges concurred.

THE COURT pronounced this interlocutor:—"Recal the interlocutor complained of; and, in respect that the minute given in by the pursuers has not been accepted, find that it must be regarded as of no effect in the cause, and remit the process with this finding to the Lord Ordinary to proceed further therein as to his Lordship shall seem just; reserving all questions of expenses." No. 149.
June 24, 1845.
Alexander v. M'Gregor.

GREGG and MORTON, W.S.—JAMES BELL, S.S.C.—Agents.

ROBERT ALEXANDER, Pursuer and Respondent.—*G. G. Bell*— No. 150.
Horn.

JAMES M'GREGOR, Defender and Advocate.—*Rutherford—Inglis.*

Pactum Illicitum—Statute 5 Geo. IV. c. 74, § 15—Process.—A brought an action for the price of potatoes, alleged in the summons to have purchased from him "at the agreed on price of £20, 10s. per Scots acre, or 8s. per imperial acre:" on record the pursuer averred that the potatoes purchased "at the agreed on price per acre, which, upon a strict construction means the imperial acre," but that he restricted his claim to the price mentioned per Scots acre: on a proof he failed to establish either that the bargain had been made according to the imperial acre, or that any reference had been made to the standard measure;—Held that the bargain as libelled was legal under Act 5 Geo. IV. c. 74, § 15, but that it had not been established.

ROBERT ALEXANDER raised an action in the Sheriff-court of Lanark- June 24, 1845.
against James M'Gregor, for the balance of the price of a quantity of potatoes, which he averred M'Gregor had bought from him. His summons proceeded on the narrative, "that the said defender did purchase from the said pursuer two lots of growing potatoes, at the agreed on price of £20, 10s. per Scots acre, or £16, 8s. per imperial acre." In his replies, stated that "the defender purchased from the pursuer two lots of growing potatoes, at the agreed on price of £20, 10s. per acre, which, upon a strict construction, means the imperial acre; but the pursuer having no wish to avail himself of this advantage, restricts his claim to the price of £20, 10s. per Scotch acre, or £16, 8s. per imperial acre."

In defence, M'Gregor denied that any balance remained due, and averred that, in the transaction, no reference whatever was made to the imperial acre. He pleaded;—

That any agreement to purchase potatoes in the manner libelled, that so much the Scotch acre, where no reference was made in the agreement to the ratio or proportion between the Scots acre and the standard acre, was null and void, under the statute 5 Geo. IV. c. 74, § 15, which enacted, "That from and after the 1st day of May 1825, all con-

1st Division.
Lord Wood.
W.

No. 150.

June 24, 1845.
 Alexander v.
 M'Gregor.

tracts, bargains, sales, and dealings which shall be made and had within any part of the United Kingdom of Great Britain and Ireland, for any work to be done, or for any goods, wares, merchandise, or other thing, to be sold, delivered, done, or agreed for, by weight or measure, where no special agreement shall be made to the contrary, shall be deemed, taken, and construed, to be made, and had, according to the standard weights and measures ascertained by this Act; and in all cases where any special agreement shall be made with reference to any weight or measure established by local custom, the ratio or proportion which every such local weight or measure shall bear to any of the said standard weights or measures shall be expressed, declared, and specified in such agreement, or otherwise, such agreement shall be void and null."

A proof was allowed the parties of their respective averments as to the terms of the bargain, but the pursuer failed to prove either that the sale was by the imperial acre, or that any reference had been made to it as the ratio of measurement, by which the price was to be estimated.

The Sheriff repelled the defence founded on the statute.

M'Gregor advocated.

The Lord Ordinary pronounced an interlocutor advocating the cause, recalling the judgments complained of, and assoilzieing with expenses.*

* "NOTE.—The contract libelled on in the summons at the respondent's instance against the complainer is, that the complainer, on the day mentioned, purchased from the respondent two lots of growing potatoes on the respondent's farm, at the agreed on price of £20, 10s. per Scots acre, or £16, 8s. per imperial acre. The contract, therefore, is a sale of potatoes at so much per acre. If the contract libelled had been, that the potatoes were sold and purchased at so much per Scots acre simply, it did not appear to be disputed that it would be a null bargain under the 5th Geo. IV. c. 74. But, in the summons, there is added the ratio or proportion which the Scotch or local measure bears to the standard or imperial measure. This is set forth as a part of the contract. Unless the summons be so read, a null contract is libelled, under one of the provisions of the 15th section of the Act. Taking the summons upon the latter footing, which is apparently the only one on which the action, as libelled, could be entertained, it is not enough for the respondent's case that his summons states the ratio or proportion of the one measure to the other; but it was upon the respondent to prove that the contract was made as there set forth—that is, although the contract was made with reference to a local measure, there was, at the time specified, as a part of the agreement, the ratio or proportion which it bore to the standard measure: And, accordingly, proceeding on this view of the matter, the complainer, while he denied, on the record, the purchase of the potatoes at all, (giving his own explanation of the nature of his transaction with the respondent,) further denied, that in any bargain he might have made, there was any thing said of the standard or imperial acre, and averred that the parties dealt by the Scotch acre exclusively.

"Then, what is the statement made by the respondent in his replies in the inferior court? In article 1, he states, that the complainer purchased from him two lots of potatoes 'at the agreed on price of £20, 10s. per acre, which, upon a strict construction, means the imperial acre; but the pursuer having no wish to

Alexander reclaimed.

No. 150.

LORD MACKENZIE.—The statute was meant to be severe and ill-natured—
 June 24, 1845.
 Alexander v.
 M'Gregor.

avail himself of this advantage, restricts his claim to the price of £20, 10s. per Scotch acre, or £16, 8s. per imperial acre.' Now, this may or may not be a true statement of the bargain between the parties, and of the views which the respondent had in limiting his claim against the complainer; but, holding the statement to be true, (to which the respondent cannot object,) the Lord Ordinary apprehends that it amounts to a plain contradiction of the statement of the bargain as libelled in the summons, because, while the latter is an averment of a bargain at so much by the Scotch acre, in making which, the proportion the local measure bears to the standard measure was expressed; the former is an averment of a bargain by the acre generally, which, in terms of the statute, must be deemed and construed to be a bargain by the standard measure, so that the respondent's statement in the replies of what he alleges actually took place, contradicts the statement in the summons, both as to the parties having bargained by the Scotch acre, and the ratio and proportion of the one acre to the other having been expressed at the time; or if the statement in the replies could be read as meaning, that while nothing was said at the time of the bargain as to the kind of measure, it was the understanding of the parties that they were dealing by the Scotch acre, still it negatives that part of the statement in the summons which relates to the ratio or proportion, without which, and without taking it as a part of the bargain, the summons would have libelled on a null agreement.

"It was said at the debate, (as the Lord Ordinary understood it,) that the agreement was made without mention of any measure, which, in terms of the statute, was not an unlawful agreement, and that in libelling the summons as it is framed, the respondent libelled the contract according to what was the understanding and meaning of the parties when they made it. This, as it would seem, is only saying, that while the contract, as made, was a contract which the statute overrides shall be deemed and taken, and construed to be made, according to the measure ascertained by the Act, the understood contract was different, that contract being the one set forth in the summons, and that therefore the understanding of parties of the import of the contract, as made, is to be adopted against and in reference to what the statute has declared shall be held to be the legal meaning and import of such a contract. But the Lord Ordinary does not see how this gets over the difficulty, or removes the objection to the decree pronounced in favour of the respondent. For, in the first place, whatever the parties might understand as to the contract, still, according to the respondent's explanation of the matter, the contract was by acres generally, and nothing was either said of local measures, or of the proportion between the local and the standard measure. And, in the second place, the summons as libelled can only be read as stating what actually were the terms of the contract as entered into, and not as stating what was understood to be the meaning and result of a contract entered into in different terms.

"Whether, when a contract of sale is entered into in general terms as to the measure or weight, the seller, moved by what he considers to be the true understanding between him and the purchaser, might, without laying his claim open to any objection under the statute, libel a summons for enforcing the contract, to the effect of enabling him to recover the amount which would be due according to the local measure or weight, need not be enquired into. As the libel, and the statements in the record of the present case stands, they are inconsistent with each other. According to the latter, the summons does not libel the contract which was made, for it is explained that it was a contract by acres generally, but holds as the contract made, what is said to have been the understanding of parties in reference to that which, by law, was a different contract. If the contract was by acres generally, then, by law, it was a contract by imperial acres. If it was

No. 150. so that, if persons will be dull or obstinate enough to resort to these old inconvenient measures, they must just suffer for it.

June 24, 1845.
Alexander v.
McGregor.

I don't think the bargain as libelled is illegal; for I think the sale of so many Scotch acres at so much the imperial acre would be legal. But I think the bargain libelled is not proved.

LORD JEFFREY.—I think the bargain legal as libelled, but it has not been proved. The foolish and unnecessary mention of the old measure, might have been corrected by subsequent explanation on record, or in proof that the rate was calculated by the standard measure.

The other Judges concurred.

THE COURT unanimously adhered to the judgment of the Lord Ordinary, and accordingly pronounced an interlocutor refusing the reclaiming note, but “reserving to Robert Alexander to bring any action against the advocator that may be competent in relation to the potatoes in question.”

LACHLAN MACKINTOSH, S.S.C.—JOHN RONALD, S.S.C.—Agents.

simply by Scotch acres, the contract was null. The first, while it is said to have been the contract, but subject to an understanding, is not libelled, and therefore could not be the contract to be proved. Nor is the second libelled; and if it had, it also could not have been the subject of proof. But there is libelled a contract by the Scotch acre, with an addition of the proportion or ratio which it bears to the imperial acre—a lawful contract it may be, but one which is stated not to have been the contract as made, and of which, although allowed a proof, no proof, as may be supposed, has been adduced. The proof, so far as it goes to establish a sale of the potatoes, is either a proof of sale by the acre generally, without mention of any particular measure, or a proof that the sale was actually made by the Scotch acre, but simply by the Scotch acre, and without any evidence of the ratio or proportion of the local to the standard measure having been expressed at the time.

“It is with reluctance that the Lord Ordinary has taken this view of the case, upon the objection on the statute, which he has perhaps gone into at unnecessary length, but he has been unable to satisfy himself that it has been satisfactorily answered; and, if it be well founded, it follows that the interlocutor complained of must be altered, the statements in the record being contradictory of the summons, and the contract, as libelled, not having been proved.

“It is, of course, reserved to the respondent to bring any other action against the complainer that may be competent in reference to the transaction with the complainer in relation to the potatoes in question.”

JOHN RUSSELL, Pursuer.—*Penney—E. S. Gordon.*
JOHN LANG, Defender.—*Sol.-Gen. Anderson—Pyper.*

No. 151.

June 25, 1845.
Russell v.
Lang.

Process—Reparation—Statute 1 and 2 Will. IV. c. 68, §§ 15 and 17.—A procurator-fiscal obtained the conviction of a party before a Justice of Peace Court, under the Act, 1 and 2 Will. IV. c. 68: the party was imprisoned in terms of the sentence pronounced by the Justices, but, on presenting a bill of suspension and liberation to the Court of Justiciary, the sentence was set aside, and he was liberated from prison: he then raised an action of damages against the procurator-fiscal, but neglected to give him notice of the action a month before its commencement, in terms of § 17 of the Act;—Held that the action was incompetent.

JOHN LANG, procurator-fiscal of the Justice of Peace Court, Glasgow, June 25, 1845. presented a petition and complaint to the Justices of the Peace for the county of Lanark, in terms of Act 2 and 3 Will. IV. c. 68, against Robert Russell, for a trespass in pursuit of game. Russell was cited to appear before the Justices, and when he attended, on the day named for compareance, he stated, as an objection to the relevancy of the petition and complaint, that the *locus delicti* was too vaguely described.

1st Division.
Lord Ivory.
N.

Only one Justice was present at the diet, and he made *avizandum* with the objection, and the answers to it, and adjourned the court to another diet, when parties were ordered to attend. On the day appointed, another Justice attended along with the one who had formerly been present, when they again made *avizandum* with the objection and answers, and adjourned the diet. At the next diet three different Justices, who had not been present at any of the previous proceedings, appeared, and pronounced a deliverance repelling the objection, and allowing a proof to be taken.

Evidence was led by the procurator-fiscal in support of the complaint, and the Justices then made *avizandum* with the case, and appointed parties to attend again on a certain day. On that day a conviction and sentence was passed, imposing a fine upon Russell of £2, with £3 : 12 : 6 of expenses; and, in default, ordaining him to be imprisoned for twenty days. This sentence was signed by two Justices, only one of whom had been present at, and heard the evidence, when *avizandum* was made with it. Russell having failed to pay the fine, he was given into custody by Lang, and imprisoned in the prison of Glasgow, on the 8th of March 1844, in terms of the sentence. On the 11th of March, he presented a bill of suspension and liberation to the Court of Justiciary, and on the same day was liberated from prison, on finding caution to pay the penalty and expenses, or return to prison and fulfil the remainder of his sentence, in the event of the bill being refused.

No. 151. On 1st June 1844, the Court of Justiciary passed the bill, and suspended the sentence complained of *simpliciter*.

June 25, 1845.
Russell v.
Lang.

Russell then raised an action of damages against Lang, as the party at whose instance the conviction had been obtained, and his imprisonment had taken place. He narrated in his summons the facts above stated, and concluded for damages, on the ground that the conviction and sentence was incompetent, irregular, contrary to law, and disconform to the provisions of the statute, and the imprisonment following upon it wrongful and illegal; for the reasons, *inter alia*, chiefly, that as the Justices who had made *avizandum* with the objection to the relevancy, had not pronounced any interlocutor disposing of it, no other Justices had power or jurisdiction to judge in the complaint, or pronounce sentence upon it; and that the conviction and sentence was not pronounced by the Justices who had been present at the proof, but bore the signature of one of them only who had heard it.

Lang gave in defences, in which, while he maintained that his procedure in the prosecution was regular and conform to the statute, he pleaded, as a preliminary defence, that the 17th section of the Act contained the following clause:—"And for the protection of persons acting in the execution of this Act, be it enacted, That all actions and prosecutions to be commenced against any person for any thing done in pursuance of this Act, shall be commenced within six calendar months after the fact committed, and not otherwise; and notice in writing of such action, and of the cause thereof, shall be given to the defender one calendar month at least before the commencement of the action." No such written notice as was here provided had been given him, although, as a party acting in execution of the Act, he was entitled to it, and therefore the action was incompetent.

The Lord Ordinary pronounced the following interlocutor:—"Having heard counsel for the parties upon the first (preliminary) defence, and considered the process, in respect that the defender, in reference to the various proceedings imputed to him, falls within the protection of the statute, as 'a person acting in the execution thereof,' while all that he is alleged to have done, falls, in like manner, to be regarded as being done by him *bona fide*, and with a reasonable ground for his supposing that the same was in the pursuance of the said Act: Finds that he was entitled to notice of action in terms of the statute; and therefore, and in respect that no such notice was given, sustains the said defence, dismisses the action and decerns: Finds the defender entitled to expenses." *

* "NOTE.—1. The 'Procurator Fiscal' being one of the parties at whose instance the statute authorizes the prosecution of offenders against its provisions, there seems to be no doubt that in instituting and following out such prosecutions, he falls within the statutory description of persons 'acting in the execution of the Act,' and as such, therefore, entitled to plead the protection of the statute, (§ 17.)

Russell reclaimed and pleaded,—That as the conviction by the Justices had been set aside by the Court of Justiciary, the whole proceedings
 No. 151.
 June 25, 1845.
 Russell v.
 Lang.

The case of Beechy (9 B. & C. 806) shows, that had the prosecution been libelled 'at the instance of the owner' or 'occupier of the land,' such owner or occupier would have come within the protection. There is no room for distinguishing the case of the fiscal.

"2. There appears to be just as little doubt that the things done by the fiscal are (so far as the plain intentment of the statute requires for entitling to protection) to be held as things done 'in pursuance of this Act;' for these words do not imply that the proceedings must, in all points, have been regular and correct. Otherwise, as has been frequently observed, 'the notice which is directed to be given to justices and other officers, before actions are brought against them, would be of no use to them in cases where they have acted within the strict line of their duty, where they need no protection, but was only required for the purpose of protecting them in those cases where they intended to act within it, but by mistake exceeded it.'—(Per Lord Kenyon in *Greenway*, 4 T. R. 555.)

"It is chiefly in England that cases of this kind have occurred. And the rule as resulting from all the authorities seems to be accurately collected and laid down in a recent publication, in the propositions about to be quoted. These propositions, it is true, are expressed with reference more immediately to the case of justices or other magistrates; but the principle applies equally to whatever statutory officer the protection extends to.

"(1.) 'The statute supposes a wrong to have been done in consequence of some excess or want of authority.'—'Hence, if the subject matter be within the jurisdiction of the magistrate, and he intended to act as a magistrate at the time, and he had reasonable ground for supposing that the thing done by him was in execution of his authority, he is within the protection of the statute, although he act erroneously.'—'The statute applies, unless the Act be wholly *aliene* to the jurisdiction, and done *diverso intuitu*.'—(6 Chitty's *Burn's Justice*, 28th edit. p. 587, and authorities, *ibi cit.*)

"(2.) 'On the other hand, where there is no colour whatever for supposing that the act done is authorized, then notice of action is not necessary; for where an Act says, that in the case of an action brought against any person for any thing done in pursuance or in execution of the Act, the defendant shall be entitled to certain privileges—the meaning is, that the act done must be of that nature and description, that the party doing it may reasonably have supposed that the Act gave him authority to do it.' (Ibid. p. 588, citing Bayley J. in *Cook*, 6 B. and C. 355, &c.)

"Applying those rules to the present case, the fiscal's right to notice can hardly be disputed. See further, *Cann. 10, Ad. and El. 582.*

"It was, indeed, strenuously urged for the pursuer, that the conviction having here been quashed by sentence of the Justiciary Court, it must now be regarded as having from the first been a nullity, and therefore incompetent to be pleaded, or even looked at as a thing done 'in pursuance of the statute.' But, 1. Unless the conviction had been quashed, there could have been no ground for any such proceeding as the present action. 2. The statute itself implies, that there is to be protection for something more than mere formal irregularity; for it expressly excludes 'want of form' as a ground for quashing the conviction, (§ 15,) and therefore the further protection given by section 17 to parties acting 'in the execution or pursuance of the Act,' must necessarily have reference to errors in the substance of the case. 3. That the statutory protection, besides, is not forfeited by any quashing of the conviction, is clear from this, that notice has been found necessary where the conviction had been held bad; in one case as having been pronounced by a single Justice, where the statute required two, (*Weller*, 9 East, 364.) And, in another, as having been pronounced by a magistrate, where the offence on which

No. 151. were null and incompetent, and therefore could not be considered as having been in pursuance of the Act. That it was only when a party had acted in pursuance of the statute, that he was entitled to its protection; and when he had not done so, no notice of action was requisite.¹ That a conviction might be wrong, but yet might have been obtained and pronounced in pursuance of the Act, and that, in such a case, notice would have been necessary; but that here, the fact of the Court of Justiciary having interfered and quashed the conviction, proved that it had not been in pursuance of the Act, because it was provided by the 15th section, "That no conviction, in pursuance of this Act, shall be quashed for want of form, or be removed by advocacy, suspension, or reduction, into any superior court of law."

June 25, 1845.
Russell v.
Lang.

LORD PRESIDENT.—Attending to the provisions of the Act 2 & 3 Will IV. c. 68, under which the original complaint was brought by the respondent, the procurator-fiscal of the Justice of Peace Court of Lanarkshire, against the pursuer, I have formed an opinion in favour of the interlocutor of the Lord Ordinary.

There can be no doubt that the procurator-fiscal is expressly authorized, by the second section of the Act, as well as the owner or occupier of any land, to prosecute for any trespass in search of game thereon; and I have as little doubt, that in so prosecuting and insisting against the pursuer as guilty of a violation of its provisions, the respondent was acting in execution of the Act, and in pursuance of it. His complaint was expressly founded on the Act, and, consequently, in following it up before the Justices, he was manifestly acting in pursuance of it. The Justices, before whom the case was brought, dealt with it as falling under the Act, and proceeded ultimately to decide by convicting the pursuer, and pronouncing their conviction according to the form prescribed in the Act itself; and the fine not having immediately been paid, the pursuer, in terms of the conviction, was sent to prison.

True it is, that founding on alleged illegalities in the procedure, he applied by suspension and liberation to the Court of Justiciary, and, though other grounds were no doubt pleaded, that Court suspended the judgment, on the single ground

it proceeded arose altogether out of his territory, (Prestidge, 1 B. and C. 12.) 4. Had the present action accordingly, instead of being brought against the fiscal, been brought against the Justices, there could have been no question, on the strength of these and other similar authorities, as to their being entitled to plead the statutory protection. Now the fiscal really stands here in a more favourable situation than even the Justices; for any error or irregularity libelled appears wholly to have been the act of the latter. So far as the fiscal's own proceedings are concerned, nothing is alleged against him; the ground of liability sought to be enforced in his case, being merely that he did not sit in judgment upon the proceedings of the Justices, and, in respect of their supposed irregularity, interfere to prevent the conviction which they had pronounced from being followed out, in the way and manner which they had expressly and in *terminis* directed."

¹ Bush v. Green, (4 Bingham, N. S. p. 41;) Lidster v. Borrow, (9 Adolphus and Ellis, p. 654.)

that, after different adjournments, more than one Justice took part in the proceedings; and that, besides the Justice who took the proof, another was present, and joined in pronouncing and issuing the conviction, contrary to the true meaning of the Act.

No. 151.

June 25, 1845.
Russell v.
Lang.

The pursuer having subsequently instituted an action of damages against the procurator-fiscal, on account of his alleged illegal conviction and imprisonment, he has in defence pleaded, that the 17th section of the statute affords him full protection against it; and this has been sustained by the Lord Ordinary.

Now, the 17th section is in these words :—" And for the protection of persons acting in the execution of this Act, be it enacted, That all actions and prosecutions to be commenced against any person for any thing done in pursuance of this Act, shall be commenced within six calendar months after the fact committed, and not otherwise; and notice, in writing, of such action, and of the cause thereof, shall be given to the defender one calendar month at least before the commencement of the action; and no prosecutor shall recover in any such action, if tender of sufficient amends shall have been made before such action brought, or if a sufficient sum of money shall have been paid into Court after such action brought by or on behalf of the defenders."

Now looking at this enactment, declaredly for protecting those acting in execution of the Act, full effect must be given to its provisions, both in regard to the time within which any action must be raised, and that important provision, that at least one month's notice shall be given before commencing any action or prosecution.

It would be quite enough that the legislature has declared, that such form of protection of due notice, shall precede the action; but the purpose is made manifest by what immediately follows, that in order to discourage such prosecutions, no prosecutor shall recover, if sufficient amends have been tendered, and for which being done, the notice of one month seems plainly provided.

The defender's case is hard enough, resting, as the action against him does, on the errors of the Justices, over whom he has no control, and whose assessor (not the defender's) the clerk in reality is, if they require such assistance. But as the pursuer insists that the Act has been violated in regard to him, the fiscal is equally entitled to the protection which it has provided for every person who has done any thing in pursuance of that Act.

There can be no doubt, that though the Act does contemplate that prosecutions may be instituted against persons acting in pursuance of it, but who have occasioned wrongs, yet it has prescribed the way and manner in which such prosecutions shall be contested, and has fixed the time within which they can only be brought; and has, besides, required it as an indispensable preliminary, that one month's notice at least shall be given to the defender before commencing it.

But the 14th section of this same Act, while it provides for the right of any person aggrieved by any conviction in pursuance of this Act, to appeal to the Quarter Sessions, to be holden not less than twelve days after such conviction, makes it an express provision that such person shall give to the complainant "a notice in writing of such appeal, and of the cause and matter thereof, within three days after such conviction," &c.

Now surely this notice, if neglected, would afford a complete bar to any appeal,

No. 151. however otherwise well founded it might be, against any conviction. In like manner, the neglect of notice on the part of this pursuer may be stated in defence in this Court against his action of damages.

June 25, 1845.
Russell v.
Lang

LORD MACKENZIE.—I concur in the opinion which has been given by your Lordship. This is a question whether notice of the intended action should have been given to the defender, in terms of the 17th section of the statute. In a question of this kind, as to a notice which may afford an opportunity of settling the matter, I do not think a strict, but rather a liberal interpretation of the provision of the statute ought to be adopted. It is an encouragement to parties to act upon the statute, and it is easy to give notice, so that there is little risk of hardship by requiring it. Now, looking to this, and indeed to any fair interpretation of the Act, I cannot say that the things done by the defender were not done in pursuance of it. The statute gives an express right to the procurator-fiscal to prosecute for the offence, and the defender did prosecute expressly and regularly, as procurator-fiscal before the court having jurisdiction by the statute. This was undeniably in pursuance of the statute, and the procurator-fiscal could have no other object whatever than to follow it out. That court convicted, and it is true, as it turned out, that it did not do so regularly; but it did convict, and that judgment was not the act of the procurator-fiscal at all. But it is said that he proceeded to carry the conviction into execution. Can that be said to be a thing not done by him in pursuance of the statute? Was he bound to quash the conviction by his own authority, and give entire immunity to the person convicted? Or was he bound or entitled to appeal against the sentence; or so bound to do this, that his not doing so, but going on upon it, must be regarded as a thing not done in pursuance of the statute? I cannot think so. He was, in fact, endeavouring to follow out his part of the duty prescribed by the statute, to the best of his ability, and nothing else.

I therefore think he ought to have had the statutory notice.

The question in the Court of Justiciary, whether the conviction was to be held to be in pursuance of the statute, so as to be exempted from review, was not the same. That question looked not to the mind of the prosecutor, and the things done by him, but to the proceedings themselves, and whether they were to be regarded as proceedings fairly under the special and unappealable jurisdiction given to the Justices.

LORD FULLERTON.—The Lord Ordinary's interlocutor appears to be quite right, and to be fully borne out by the cases referred to in the note. The only point is, whether this is an action, in regard to which it was necessary to give the notice prescribed by the statute?

The words are very general and comprehensive. Notice is required to be given "in all actions and prosecutions to be commenced against any person, for any thing done in pursuance of the Act." Now, there is no doubt that the defender falls under the description of a person contemplated by the Act. He is the procurator-fiscal, an officer expressly empowered by the Act to carry it into effect; and this consideration takes the present case out of the rule laid down in the English cases referred to in argument on the part of the pursuer. In those cases certain persons had, in the character of gamekeepers, done certain things, for which action was raised, and it was found that notice was not necessary, be-

cause the commission being invalid, they were not "persons" who could act in pursuance of the Act, and consequently did not fall within the description of the persons protected by the statute. If the pursuer could have invalidated the sender's title as procurator-fiscal, he might have raised such a question, and might have availed himself of the authority of those decisions. Here no such question does or could arise.

No. 151.
June 25, 1845.
Russell v.
Lang.

The only question is, Whether what the defender did, was in pursuance of the statute?

Now, on reading the summons, and taking it in its most obvious sense, it seems to admit of no doubt, that the whole series of facts charged against the defender are nothing but acts done by him in pursuance of the statute—i. e. acts of the nature described and authorized by the statute, done by a person contemplated by the statute as one of the instruments for carrying it into effect.

But the pursuer maintains a more nice and critical construction, founded on the circumstance of the conviction having been quashed by the Court of Justiciary, and the particular sense of the term "in pursuance" held to be implied by that decision.

By the 19th section it is provided, that no "conviction, in pursuance of the Act," &c., shall be quashed for "want of form, or removed by advocacy, suspension, or reduction, into any superior court of law."

Now, it is said, this conviction was removed by suspension into the Court of Justiciary, and there quashed; so that it must have been held to be a conviction not "in pursuance of the Act;" from which the inference is drawn, that the acts done by the defender were not in pursuance of the statute, and consequently the prosecution not one which required notice.

I doubt the soundness of the reasoning, though it is impossible to deny its plausibility.

In the first place, I am inclined to think, that though the words used in the 15th and 17th sections are the same, "in pursuance of this Act," we must construe them in the sense justified and required by the expressions to which they are attached.

In the 15th section, the expression "conviction" is a legal term, importing a certain legal result; and therefore when the words, "in pursuance of this Act," are added, a court may, as I presume the Court of Justiciary did, construe these words as meaning "a conviction under the forms and conditions pointed out by the statute," and therefore entertained the suspension, on its being admitted that the conviction was by certain Justices who had not heard the evidence. But in the 17th section, the words neither demand nor warrant any such nicety of construction. Every prosecution, for any thing done in pursuance of the Act, must be intimated a month previously to the defender.

The fair and even necessary construction of the words in this clause is, that they denote things done, not *de jure*, but *de facto*, in carrying out the statute. Indeed, but for this construction, the protection would be nugatory, as there is hardly a conceivable case in which things done *de jure*, in terms of the statute, could be even made the subject of prosecution at all. But really we, sitting here, are not called upon to decide upon the meaning of the words, "in pursuance of the statute," in the 15th section. Our only object is to deal with these words in

No. 151. the 17th section ; and as occurring in that section, I have no doubt that they have been rightly construed by the Lord Ordinary. Indeed some of the English cases are quite conclusive.

June 25, 1845.
Russell v.
Lang.

In the case of Weller, the statute had authorized conviction for certain offences to take place before two Justices. One Justice took upon him to act ; and on conviction committed the alleged offender. On finding his error, he did not await the quashing of the conviction, but liberated the party. There could be little doubt that this proceeding was, to say the least, as much out of the statute as any thing which occurred here ; yet, in a prosecution for damages, it was found that notice was necessary. The same was held in the case of Prestidge, in which the Justice had acted beyond his territory.

On the authority of these cases, I think it clear, that if the action had been brought against the Justices who pronounced the conviction, notice would have been indispensable. And, in this particular, there seems no distinction between judges and inferior officers, whose actings are expressly contemplated by the statute. It is no question as to liability, but merely whether certain things, not certainly in terms of the statute, can be held to be acts done "in pursuance of the statute," in reference to the enactment requiring notice of action.

But there is another, and I think a more conclusive, answer to the pursuer's argument. It may be true that the conviction was not a thing done "in pursuance of the statute ;" but in regard to the defender, that, of itself, will not take the case out of the protection of the 17th clause, because the incompetent conviction is not the ground of action against the defender. That could not be said to be a thing done by him at all. Accordingly the things done by him, and so stated in the summons, are the apprehension of the defender, and the various steps taken for carrying the conviction into effect.

Now it appears to me, that all those matters, forming in truth the only ground of action against the defender, were, in so far as regards him, things done in pursuance of the Act. They were the very things which the defender, the procurator-fiscal, was authorized and directed to do. And though they may possibly be the foundation of an action, as done on an erroneous or incompetent conviction, they are clearly *de facto* things done by him in pursuance of the Act, and so falling under the protection of the 17th section.

According to any other view, the subsequent quashing of the conviction would take every act of every subordinate official, the officer who took the party to jail, the jailer who received him, out of the protection of the statute. All these matters, though taking place ostensibly under the authority of the statute, would be held to be acts out of the statute altogether.

I cannot adopt such a construction. On the contrary, I think it quite clear, that while the conviction stood unquashed, all these parties carrying it into effect must be held to have been acting in pursuance of the Act, at least to the extent of requiring notice, under the 17th section, if action is brought against them. The pursuer's own summons states nothing against the defender but facts which I must consider to be things done in pursuance of the Act ; and therefore I hold notice to have been indispensable.

LORD JEFFREY.—I concur in the views which have been taken by your Lordships of this question ; and, after the full explanation of the law applicable to it

which has been given—an explanation which was due to the important nature of the case, as one directly affecting the liberty of the subject—and especially after the opinion of Lord Fullerton, who has anticipated what I should have stated as the grounds of my own, it is unnecessary for me to say much. We are here construing the 17th section of the statute, and are asked to say, whether the acts of the defender were performed in pursuance of it. The expression, “in pursuance of the statute,” according to the interpretation of the English cases, does not mean that there must always be a legal and correct observance of all its provisions; but it means that you are not to apply it to any other matter or proceeding than that intended by it. Now, here an action is brought, in terms of the statute, before the proper court authorized by it, and a conviction is issued by persons holding the judicial authority required; there is an action brought in the proper court, by the proper officer, and a regular conviction is issued. Is it possible, then, to doubt that the proceedings were in pursuance of the Act, whatever might be the ultimate result of the prosecution? A flaw was, no doubt, afterwards discovered in the sentence, but still there was, *ex facie*, a regular sentence, pronounced by a proper court; and, therefore, I think that the defender here was entitled to the statutory protection of a month’s notice of the intended action.

No. 152.
June 25, 1845.
Duke of
Buccleuch v.
M’Turk.

THE COURT adhered to the Lord Ordinary’s interlocutor, with additional expenses.

CHARLES FISHER, S.S.C.—ALEX. HAMILTON, W.S.—Agents.

DUKE OF BUCCLEUCH, Claimant.—*Sol. Gen. Anderson—Baillie.*
JOHN M’TURK, Claimant.—*Rutherford—Macfarlane.*

No. 152.

Discharge—Lease—Mora—Proof.—A party who had become liable for arrears of rent due by a tenant, having, in answer to a demand by the landlord for a certain half-year’s rent as in arrear, produced a receipt for the rent claimed, and a series of consecutive receipts for each term for the thirteen succeeding years, during which time no intimation had been made to him by the landlord that this portion of the rent remained unpaid;—Held, that the landlord was not entitled to object to his own receipt, and to prove *habili modo* that the rent claimed had been paid by a bank draft which had been dishonoured, and that it was still resting-owing; the delay in giving intimation of non-payment being taken into consideration as a material element.

In 1826, the Duke of Buccleuch let upon lease to Robert M’Turk the farm of Pennershaugh and Sandbed, at the rent of £450. Robert M’Turk having fallen into arrear of rent, was removed from the farm, and his brother, John M’Turk, entered into possession as tenant in 1831, under an engagement to pay up the arrears due by Robert as at Whitsunday of that year. John M’Turk possessed the farm down till 1843, when, having also fallen into arrear, he agreed to renounce it.

June 25, 1845.
2D DIVISION.
Ld. Robertson.
T.

No. 152.

June 25, 1845.
Duke of
Buccleuch v.
M'Turk.

In the same year, certain sums of money, realized by the sale of John M'Turk's crop and stocking, were made the subject of a process of multiplepoinding, in which a claim was lodged by the Duke of Buccleuch for, inter alia, the arrears of rent. One item of the Duke's claim consisted of the sum of £225, (under the deduction aftermentioned,) being the first half-year's rent payable by Robert M'Turk, the original tenant, under his lease, at Martinmas 1826.

John M'Turk objected to this part of the Duke's claim, on the ground that this portion of the rent had been already paid by Robert upon the 22d February 1827, and never formed an article of debt against him. In support of this averment, he produced a stamped receipt by the Duke's factor in his (John's) favour, of the above date, for the sum in question.

The Duke of Buccleuch admitted that the receipt had been granted, and that the sum had been of that date nominally paid, by Robert M'Turk's granting a bank order for the amount, which however had been dishonoured when presented at the bank.

In the factor's farm-accounts the £225 had been placed at the tenant's credit as at 22d February 1827; but a subsequent counter-entry had been made in the account between the years 1829 and 1830, debiting him with that sum as the amount of the dishonoured draft. Along with the receipt above referred to, John M'Turk produced a continuous series of stamped receipts for the rent of each term from Martinmas 1826 down to Martinmas 1839. These receipts appeared not to have been always granted at the date at which payment was made, many of them bearing a subsequent date; eleven of them, being receipts for rent from Whitsunday 1829 to Martinmas 1836, were granted of one date—the 8th December 1838. The receipts were all conceived in favour of John M'Turk, even those prior to 1831, when he became tenant. None of them contained any reservation of the arrear of rent for the term in question. About twelve years after the arrear became due, the Duke of Buccleuch received a dividend of £60 from Robert M'Turk's sequestrated estate on account of this debt, which was credited to John M'Turk. The effect of the receipt of 22d February 1827, did not appear ever to have been disputed as with John M'Turk till the process of multiplepoinding was raised in 1843. When, upon the renunciation of the lease in 1842, a general payment to account of arrears was made by him to the Duke, this sum was not then claimed as due and unpaid.

The Lord Ordinary pronounced this interlocutor:—"1st, With respect to the half-year's rent, amounting to £225, being the first half-year's rent, and payable under the lease at Martinmas 1826, Finds that, in the State of Rents, No. 45 of process, lodged on the part of the Duke of Buccleuch, as betwixt his Grace and the common debtor John M'Turk, the whole of the first year's rent to Whitsunday 1827 is, on the one hand, placed to the debit of the said John M'Turk, and that, on

the other hand, credit is given, as applicable to the said year 1827, in the following terms :—‘ 1827, February 22, By Cash, £225. August 28, By Cash, £225.—£450 :’ Finds that by the Receipt, No. 53 of process, dated the 22d day of February 1827, the factor for the Duke of Buccleuch acknowledges to have received from the said John M‘Turk the said sum of £225, being the half-year’s rent due at Martinmas 1826 ; and, consequently, finds that both by the said state and terms of the said receipt, the foresaid half-year’s rent stands discharged, and is proved to have been paid by the said John M‘Turk : Finds that the half-year’s rent due at Whitsunday 1827, is also proved by the receipt, No. 66 of process, to have been paid by the said John M‘Turk, and that consecutive receipts are further produced from Martinmas 1827 down to Martinmas 1839, inclusive : Finds that, in the foresaid state, No. 45, there is, after the year 1829, a sum entered to the debit of the said John M‘Turk, in the following terms :—‘ To amount of Robert M‘Turk’s draft on Bank of Scotland, dated 22d February 1827, not paid, £225.’ Finds it alleged, on the part of the said Duke, in support of this charge, that the sum of £225, which was acknowledged by the receipt, No. 53 of process, to have been paid by John M‘Turk on the 22d of February 1827, was truly not so paid, but, instead of such payment, a bank order was delivered by Robert M‘Turk, which order was dishonoured ; and, further, that the said Duke was ranked to the extent of £60 for the said half-year’s rent, on the estate of the said Robert M‘Turk ; and for a sum of £60, as a composition, credit is given in the said state, No. 45, under date 16th November 1839 : Finds it is not alleged that any notice was given to the said John M‘Turk of the alleged circumstances connected with the said draft, and that the statement thereanent is contradicted by the terms of the said receipt, No. 53 of process : Finds that, in none of the receipts, from the said 22d day of February 1827 until the year 1839 inclusive, is there any reservation of any claim competent to the Duke of Buccleuch for the said half-year’s rent, payable at Martinmas 1826, and discharged in manner foresaid : Finds that the draft, alleged to have been dishonoured, is not produced ; and, separatim, finds that any proof of the allegations on the part of the Duke of Buccleuch on this head, is barred by the terms of the said receipt, No. 53, and consecutive discharges of rent : Therefore finds, that the foresaid sum of £225, charged against the said John M‘Turk on the one hand, and the said sum of £60 credited to him on the other, in the foresaid state, No. 45 of process, must be struck out of the said state, and that the Duke of Buccleuch is not entitled, in this accounting, to make any charge against the said John M‘Turk, in respect of the said half-year’s rent payable at Martinmas 1826, the same having been discharged, as proved by the foresaid receipt of 22d February 1827, which is not impugned ; and decerns : 2d, Finds that the common debtor further claims deduction of the following sums :—

No. 152.

June 25, 1845.

Duke of
Buccleuch v.
M‘Turk.

No. 152.	1st, Ploughing and dung,	£58 9 2
June 25, 1845.	2d, Grass seeds,	75 2 9
Duke of	3d, Value of drains,	176 12 8
Buccleuch v.	4th, Claims for ground taken up by plantations,	42 0 0
M'Turk.		
		<hr/> £352 4 7:

Finds it admitted, on the part of the Duke of Buccleuch, that the tenant is entitled to deductions generally of the nature here stated; but that his Grace is not satisfied with respect to the amount of the said claims, and therefore, of consent of parties, remits to

to examine into the same, and to report, with power to the said reporters to specify any objection either as to the principle or detail which may be brought forward by either of the parties: 3d, Finds that the Duke of Buccleuch is not entitled to the expenses in regard to the processes of sequestration, irritancy, and interdict, in so far as the same were not included in or reserved by the arrangement and adjustment of these processes made among the parties concerned, and decerns: And appoints the said report to be lodged *quam primum*; and supersedes, *hoc statu*, further procedure as between the said parties."

The Duke of Buccleuch reclaimed, praying the Court to alter the interlocutor, in so far as it repelled his claim to this sum of £165; to find that, in the accounting between him and John M'Turk, he was entitled to receive credit for this sum, or at least that he was entitled to prove *habili modo* that the same was still resting-owing.

LORD JUSTICE-CLERK.—This case is one of the greatest importance, and of as wide an application to the business of life as any I have ever seen. I view with great alarm the plea contended for on the part of the Duke of Buccleuch. Of course I shall assume that he could prove what he avers, as that is really assumed in argument or principle in every case in which a receipt or discharge is founded on as barring enquiry, and as proving payment.

1. The fact is now admitted, that the dispute before us, as to the amount of the Duke's claim, turns on the question as to the rent for the half year, Martinmas 1826, decided by the Lord Ordinary.

2. The facts are, that the tenant has an unqualified stamped receipt, specifically for the payment of this half-year's rent, dated in February 1827.

3. That until 1843 no attempt was made in any way to dispute the effect of this receipt with the party holding it, and those interested in the protection afforded by it. Nay, at a general payment of £300 in 1842, as the price of the renunciation of the lease by John M'Turk, it was not claimed as due and unpaid.

4. That there are receipts for all the years and half-years' rents subsequently to Martinmas 1826, down to 1839—thirteen years—not granted regularly when the rents were paid; I suppose other vouchers having been taken for the payments. Receipts were granted for nine years apparently at one time, 8th December 1838. This adds to the importance of the receipts covering the whole rents;

for, of course, granting so many receipts at one time, implies examination and settlement. No. 152.

5. That a number were so granted at once does not deprive the tenant of the full benefit of the presumption arising from consecutive receipts. That does not depend on the time when receipts are dated, but that the receipts cover consecutively and regularly all the rents due under the lease. June 25, 1845.
Duke of
Buccleuch v.
M'Turk.

6. John M'Turk, the tenant since 1831 by arrangement, and the holder of the receipt—the party in whose favour, nominatim, it is granted—never received any intimation that there had been a mistake in the matter, or that this receipt was not an effectual protection to him. This is not averred.

7. Further, it is not explained in averment by the Duke, which I hold to be important, how or when this receipt was granted, whether really at the date it bears, or afterwards when John M'Turk became tenant. He gives no explanation as to it at all.

8. The only averment is, that Robert M'Turk gave for the rent in question a bank check which was not paid. But even if proved, that fact is in no degree inconsistent with payment by John, after he became liable in 1831 for the arrears; and as all the receipts prior to 1831 are in favour of John, (who was not tenant until 1831,) this may very likely be the fact. But as I hold all enquiry to be excluded, I only mention this very probable state of the facts, as showing how dangerous it will be to take the statement of the person granting the receipt, as to the mode and time of payment, and then throw on the holder of the receipt the proof of that which the receipt acknowledges—for such is the plea of the Duke.

9. In judging of the effect of this receipt under the decisions, I lay aside all cases of fraud as having no bearing on the present case; and also all cases in which the party admitted that the money was not paid in terms of the receipt, or at the time of granting it.

10. I hold the rule of the cases of *Gordon v. Trotter*, June 11, 1836—*Clark v. Glen*, June 14, 1836—*M'Farlane v. Watt*, Feb. 15, 1828—to be directly in point. These related to the effect of a single receipt or acknowledgment of payment. The case of *Lord Kinnaird's trustees v. Hunter*, March 5, 1829, is directly on the effect of consecutive receipts to a tenant to exclude a claim for arrears anterior to the period for which receipts were produced. That the receipts themselves were perfectly conclusive, for the years to which they applied, was assumed as too clear to be disputed. The rule is stated by Lord Balgray as to the benefit arising from receipts to exclude other arrears for which there are no receipts. It would be strange if this presumption were not to hold, when, for the actual rent claimed at the distance of sixteen years, a distinct receipt is produced, in addition to the benefit of regular receipts for the whole intermediate period.

11. The rule, as stated by Erskine, as to a series of receipts, (4, 4, 4,) is in express terms. Here, then, are receipts for thirteen subsequent years sufficient to bar the claim, even if there was not a receipt for the half-year in question.

12. I apprehend it to be clear, therefore, on principle, that the Duke cannot challenge his own receipt. It is one of the most important documents which can pass in business, on the faith of which all the transactions of life depend; and I know of no case in which, when there is a receipt distinctly for a particular half-year's rent, and still more, when, for thirteen years and a half after, receipts are granted expressly for all the subsequent termly rents, the party granting the receipt

No. 152.

June 25, 1845.

Duke of

Buccleuch v.

M'Turk.

can be allowed to disprove it by any means whatever except the oath of the debtor, if he also is the holder of the receipt.

13. What are the special facts of this case? They seem to me all to be against the landlord. I take his own statement: The farm was let to Robert M'Turk in 1826, the first half-year's rent being due at Martinmas 1826, being the half-year's rent in question. Robert was removed in 1831. He was then succeeded as tenant by his brother John, on an agreement not extended until 1834, but bearing distinct reference to an agreement of the entry of John in 1831. By this agreement John M'Turk became bound to pay up the whole arrears of rent due at Whitsunday 1831. Now, then, this receipt for the first half-year's rent, due at Martinmas 1826, was either granted at the date it bears, February 1827, or subsequently. I take either case.

(1.) It is granted in favour of John then, on the first supposition, when Robert was tenant. Thus it was a receipt that John knew of, though Robert had paid the money, and John produces it. Now then, when John entered into this agreement to pay arrears, there was this regular receipt discharging that half-year's rent. I apprehend, as against the Duke, John was entitled to rely on and use that receipt, and that as an onerous third party no allegation that the sum therein discharged still remained due. This seems to me the very point raised before me in Glasgow at a trial against the Forth Marine Insurance Company, and decided unanimously by bill of exceptions by the First Division, 16th January 1845. I think the Duke, on the supposition that the receipt was really granted before the agreement, and of the date it bears, is barred from claiming from John, under the agreement, rent for which there is a regular receipt, whether John knew of the receipt or not, but, *multo magis*, when John knew of the receipt.

(2.) Take the other supposition, that the receipt was granted to John after 1831: will that avail the Duke? Seeing that all the receipts from 1827 are in name of John, though before 1831, and though some are dated in 1838, it looks very like as if they were being granted to John for rents either paid by Robert or by himself. On this supposition, then, came there to be an adjustment of what was really due as arrears. All that Robert paid, if any, was acknowledged and discharged in favour of John—all that John paid was also discharged. On that supposition, if this was then due, it was paid by John. On either supposition, I think John is completely protected.

LORD MONCREIFF.—I have had some difficulties, but I have come to the same opinion, that no safe judgment can be pronounced except one standing by the receipts.

LORD MEDWYN.—I should be sorry if my opinion in this case should affect any important principle of our law, especially in settlements between landlord and tenant. Now, I find no fault with the first part of the Lord Ordinary's interlocutor, but I object to the *separatim* finding, which excludes the Duke from proving the amount of the arrears due by Robert M'Turk, for which I think the present common debtor is liable. The Duke claims to be ranked for a *cursum* sum on the fund *in medio*. John M'Turk objects that the claimant's brother having paid his first half-year's rent (£225) on 22d February 1827, that sum was then placed to his credit of the same date, and the Duke's then factor, Mr Crichton's receipt of that date is produced. Accordingly the receipt is produced, bearing that date, granted as received from Mr John M'Turk. The claim by the

Duke, as in the record, bears that Robert entered to the farm at Whitsunday No. 152. 1826; that he fell into arrear, and was removed from the farm as at Whitsunday 1831. He was then succeeded as tenant by his brother, John M'Turk, by a minute under which he undertook to pay up the whole arrears of rent due at the said term of Whitsunday 1831. This is admitted; and indeed this first agreement is narrated and confirmed in the more formal one subscribed by the parties in 1834 and 1837.

June 25, 1846.
Duke of
Buccleuch v.
M'Turk.

It is alleged by the Duke, that although the receipt of 22d February 1837 was granted, cash was not paid, but only a check was given by Robert M'Turk on his cash-account with the Bank of Scotland, and that this check was not honoured by the bank; that, accordingly, Robert M'Turk's account, which had been formerly credited for the sum as if it had been paid, was now debited with the same. It was just written back, and this prior to Whitsunday 1830, as appears from the state taken from the factor's books, and while Robert was still tenant in the farm. It is further stated, that Robert M'Turk was sequestrated, and that a claim was entered on his estate for the amount contained in this check, which was just equivalent to an intimated assignation in favour of the Duke, as of the date at which it was presented to the bank, when payment was refused.

Now, when John M'Turk undertook to pay the arrears due by Robert as at Whitsunday 1831, are we not bound to enquire into the amount of these arrears? and if it can be shown that this receipt was given for what was expected to produce cash, but did not produce it, must it not be competent to prove this? Is it sufficient for any man to produce a regular receipt containing a discharge for money, and if the receipt has been granted through inadvertency, or through an expectation which has not been fulfilled, is it impossible to bring a proof of such being the case?—I grant not by witnesses, but by other writings, or by oath, or a train of circumstances, fully established, to satisfy the Court that the money was not paid in the way that the receipt professes; in fact, that the sum is still due?

If a man writes out a receipt for payment of interest due by a debtor, and happens to drop it in the road when going to get payment, and the receipt is found, and any how gets into the hands of the debtor, when the creditor claims payment, is it sufficient for the other simply to produce the receipt, and maintain that that is all that is required; that the creditor has no right to establish the circumstances under which it found its way into the pocket of the debtor; and that it was not given by him in exchange for payment? I should think proof could not be excluded merely by production of the receipt.

I cannot assume—for there is no allegation of the kind on the record, and there is no probability in the circumstances of the case—that Mr Crichton granted this receipt at a period subsequent to John's entry at Whitsunday 1831, and as a discharge of that half-year's rent. I observe that there was great irregularity in granting receipts; but I will not believe without evidence, more especially without any allegation on this record, that this receipt was granted at a subsequent period, and not of the date it bears, when I observe that there are no less than eleven separate receipts granted the same day, (8th December 1838,) for payments of sums between August 1830 and December 1838, and yet all of these are dated of the day they are written out. In truth, to antedate this first receipt, and to make it out in John's name as the tenant after 1831, as a discharge to him of

No. 152.
June 25, 1845.
Duke of
Buccleuch v.
M'Turk.

that first half-year's rent, is a most unlikely supposition, when the Duke was actually claiming on Robert's estate for the amount at the time, and John M'Turk does not seem ever to have nearly paid up the arrears, so as to warrant any such favour to him. But he makes no such allegation; and I hold, when the receipts are made out in his own name, it was merely to him as the bearer of the money—in this instance, of the draft or order for payment.

It was said that a draft or order on a man's cash account is not a legal voucher or document of debt, except to the bank that pays it. That to me was a very startling proposition. Of course, it will not prove that any particular person received payment of it, unless his name be indorsed on it; but surely, if one gives such an order for payment to a debtor, and he can show that that debtor received payment, the order, with that proof, will be a very good voucher of payment. In like manner, if, on receiving such an order, the party believing that it would be paid at once by the bank, grants a receipt as if for cash, and the order on being presented is not paid, I cannot understand why he cannot prove that fact, and that he should be excluded by simply producing his receipt. It appears that this order was ranked for on Robert M'Turk's estate, and a dividend of 5s. 4d. was received on it, amounting to £60, in November 1839. And I cannot doubt that production of the proceedings in the sequestration, the claim and vouchers, and scheme of ranking, will be good evidence of the amount of the arrear due by Robert at Whitsunday 1831, and that John, who has undertaken to pay them arrears, must be accountable, unless he has some defence which Robert had not. It seems to be thought that the dishonour of the order should have been notified to him. I cannot say I see any necessity for doing so. He could not be ignorant that his brother was bankrupt and sequestrated. He undertook expressly to pay the arrears, without limiting the amount, or specifying them. He cannot be supposed to have undertaken this obligation without enquiry at his brother. I cannot believe that he was ignorant of the dishonour of the check, and that it formed a portion of the arrears.

But then it is said—at this distance of time, is this claim to be made? and there are at least discharges for three years' rent produced to cut off this claim. But I always understood that such discharges only afforded a presumption of payment, throwing the burden of proof on the party alleging non-payment.¹ The Duke certainly is bound to prove. Neither do I think it of any consequence that the claim is now insisted in at this distance of time. It arises from the course of the dealings of the parties, where there was no settlement of accounts, no regular payment of the rents as they became due. Look to the state of payments, as given in by the tenant even. There is always a large arrear due; and he now, in stating accounts with his Lordship, produces this receipt, and claims credit for it. He does not allege that there were any previous states of accounts which admitted this payment, or any receipt in full of arrears as at Whitsunday 1831. He now claims it; and is there any thing which has occurred to cut off the right of the landlord to show that, instead of receiving £225 for that first half-year's rent, he only received £60 out of Robert M'Turk's estate? Why was this payment, if not on account of the dishonoured order for this rent?

¹ Ersk. 3, 4, § 10.

I am for allowing the proof, in order to adjust the sum which is due by John No. 152.
McTurk to his landlord.

LORD COCKBURN.—I concur with your Lordships. What is it that is said here? That a draft on the bank is given, and the receipt is then granted on the faith of its being paid. It is said that the order was never paid. But when is it, that this is first said? Not for twelve years afterwards. A delay of twelve days would have been too long. I take the want of notice of not payment into consideration as a very material element.

June 25, 1845.
Fleming v. Campbell.

THE COURT accordingly adhered.

GIBSON and HOME, W.S.—ALEX. CASSELL, W.S.—Agents.

J. P. FLEMING, Complainer.—*Rutherford—Cowan.*

No. 153.

SIR JAMES CAMPBELL and OTHERS, Respondents.—*G. G. Bell—
T. Mackenzie.*

Partnership—Joint-Stock Company.—The directors of a cemetery company, after they had made a purchase of certain lands for the objects of the company, having come to be of opinion that they were not well adapted for the purpose, sold them with the concurrence of a majority of the shareholders: a shareholder, who alleged that he had purchased his shares on the faith of these lands being retained and used for the purposes of the company, having brought a suspension of the sale, on the ground that there was no power to sell under the contract of copartnery of the company;—Held, that the directors had power, and note of suspension refused.

A JOINT-STOCK COMPANY was formed in Glasgow, called the Western Cemetery Company, for the purpose of providing burying-ground in the west end of Glasgow. The capital stock of the Company was at first fixed at £40,000, divided into shares of £2 each. Shortly after the formation of the Company, an advertisement appeared in several of the Glasgow newspapers, in which the board of trustees of the Company announced that they had concluded the purchase of the lands of Gilmorehill on very advantageous terms, and describing the lands as being peculiarly well adapted for the purposes of the Company. After the purchase of Gilmorehill, (at the price of £35,000,) the Directors exercised their power of creating additional stock to the extent of £20,000, thus raising the capital stock of the Company to £60,000.

June 25, 1845.
2D DIVISION.
Ld. Robertson.
Bill-Chamber.
T.

In the contract of copartnery, or deed of constitution of the Company, it was inter alia provided, § 20,* that the Directors should have power to select and purchase ground adapted for the purposes of the Company;

* These clauses will be found quoted at length in the Lord Ordinary's note.

No. 153. to fix on plans for laying out and ornamenting the grounds, &c.; to make regulations and by-laws for the management of the Cemetery or the affairs of the Company; and, in general, to manage the whole concerns of the Company, subject always to any special orders, instructions, or resolutions, which might be adopted at any general meeting of the shareholders to be held, as therein after mentioned. The 38th section provided, *inter alia*, that it should be in the power of the shareholders to dissolve the Company at any time, but that only upon the vote of two-thirds in value of the whole shareholders, at a meeting called for the purpose, in a specified manner; and declaring, that it should be competent to, and in the power of the Company, to sell from time to time, during the subsistence of the contract, or on the dissolution thereof, any part of the lands which might have been acquired by them, no part of which had been used for interments or monuments, or sold for that purpose, and that without restriction, and for purposes other than a cemetery—provision being always made for convenience of access to the lands in which interments had taken place, and provided that no buildings that might prove hurtful or nauseous should be erected on any of the ground sold.

June 25, 1845.
Fleming v.
Campbell.

Mr John Park Fleming became a shareholder in the Western Cemetery Company to the extent of twenty-one shares. Mr Fleming purchased his stock after the Company had acquired the lands of Gilmorehill.

It appeared that, after Gilmorehill had been purchased, a feeling was evinced by the public, and a large body of the shareholders, that the locality was ill chosen, as being directly in the way of the progress of the city to the westward, and likely in a few years to be surrounded with houses, and also that the lands were too extensive, and their price too high, to afford a prospect of profit to the Company. About this time, and before the Cemetery Company had entered upon the occupation of the lands, an offer was received from a joint-stock feuing company which had been established in Glasgow, to purchase Gilmorehill at a price of £39,000, being an advance of £4000 upon the price paid for the lands by the Cemetery Company; and at the same time, a requisition was addressed to the Directors, by a large majority of the shareholders, requesting them to accept the offer, without the delay of calling the shareholders together. This offer and requisition having been laid before a meeting of the Directors, they, after taking steps to ascertain from the books that a majority of the shareholders consented to the sale, accepted the offer, subject to a more formal approval by the trustees or shareholders, should such appear necessary.

Mr Fleming then presented a note of suspension and interdict against the Directors and Trustees of the Cemetery Company, praying that they should be interdicted from selling or disposing of the lands of Gilmorehill.

After this note had been presented, a meeting of the shareholders took place, when the proceedings of the Directors, relative to the sale of Gilmorehill, was sanctioned by a large majority. No. 153.
June 25, 1845.
Fleming v.
Campbell.

Mr Fleming pleaded, that the proposed sale was illegal, and ultra vires; and that having once purchased land for the purposes of the cemetery, there was no power in the trustees or directors, or under the deed of constitution, again to sell it: that even although the matter were submitted to a general meeting of the shareholders, it would not be competent, by a bare majority, to sanction the sale, in opposition to the wishes of any portion of the shareholders, all of whom, and more especially those in the situation of the complainer, who had acquired their interest in the Company subsequent to the purchase of Gilmorehill, were entitled to rely on these lands being retained for, and devoted to, the purposes of the Company.

The respondents, on the other hand, maintained, that the sale of Gilmorehill was an act within their power, and had been sanctioned and approved of by the shareholders in a regular manner, and was a judicious and proper act of administration. They also alleged, that Mr Fleming's opposition to the sale was not dictated by a regard to the interests of the Company, but for the purpose of preventing Gilmorehill coming into competition with a feuing speculation of his own.

The Lord Ordinary on the bills granted interim interdict; and thereafter reported the case.*

* "NOTE.—By the contract of copartnery of the Glasgow Western Cemetery Company, it is provided, that the capital stock shall, in the first instance, be £40,000, divided into shares of £2 each, and capable of being enlarged to £60,000. The general powers conferred on the Directors of the Company are described under Article 20 of that contract, as follows:—'The Directors shall have power to call for and receive payment of the shares subscribed by the shareholders, to select and purchase grounds adapted for the purposes of the Company, to fix on plans for laying out and enclosing, draining, and ornamenting the said ground, and for the erection of a chapel, and of other houses and buildings, and of tombs, vaults, or other places of sepulture, to contract with parties in regard to the same, fix the prices of burial-places, lairs, tombs, graves, or sites for monuments, make regulations or by-laws for the management of the Cemetery or the affairs of the Company, and in general to manage the whole concerns of the Company, subject always to any special orders, instructions, or resolutions which may be adopted at any general meeting of the shareholders to be held as after mentioned.' There is power given to the Directors to borrow money to the extent of £20,000, and by the 30th article it is provided:—'So soon as ground shall be acquired for the purpose of a Cemetery, and plans agreed upon by the Directors for laying out the same, and the requisite buildings erected, it shall be in the power of the Directors to sell and dispose of pieces of ground or places in such ground or buildings for burial-places, lairs, tombs, or graves therein, and also pieces of ground as sites for monuments to deceased individuals, to any person or persons who may desire to purchase the same, at such prices as the Directors may think proper to fix, and that either in perpetuity, or with the exclusive use of burial, or interment therein, for a limited period, or for single interments, and also to grant the privilege of enclosing the same, or of building, or erecting any monument, or tablet there-

No. 153. LORD JUSTICE-CLERK.—I am not able to concur in the particular view of the question expressed by the Lord Ordinary. He takes up the question in dispute
 June 25, 1845.
Fleming v. Campbell.

on, but always under such conditions and limitations as the Directors may judge expedient, and particularly under the condition, that the ground purchased shall not be used for any other purpose save that of burial, or of erecting monuments, and that the purchasers in the use thereof shall conform to such rules and regulations as the Directors or the Company from time to time may make.

“By the 38th article, power is given to the shareholders to dissolve the Company upon the vote of two-thirds in value of the whole, at a meeting specially called for the purpose, and in the event of such dissolution it is declared, that the Cemetery may be sold under certain conditions; and it is further provided by the above article—‘But declaring, notwithstanding what is before written, that it shall be competent to, and in the power of the Company to sell, from time to time, during the subsistence of this contract, or on the dissolution thereof as aforesaid, any part of the lands which may have been acquired by them as aforesaid, no part of which has been used for interments or monuments, or sold for that purpose, and that without restriction, and for purposes other than a Cemetery; provided always that full provision is made for convenience of access to, and for the use of the remainder of said lands in which any interments have taken place, or any part of which has been sold for interments, or for the erection of monuments; and provided also, that such sales shall be made only under the express condition that no nuisances or buildings of any kind that shall be hurtful or noxious, or render the Cemetery offensive and disagreeable, shall be erected on any part of the grounds sold for other purposes than a Cemetery.’ This power of sale conferred on the Company is plainly of a limited character, and contemplates that some portion of the ground had been already appropriated to the purposes of the Cemetery, and was to be so continued. There is no power of sale conferred on the Company, and far less on the Directors, to sell the whole ground at a profit, by way of speculation, for feuing or the like, the Company being truly a Cemetery Company, and the ground bought being destined to be laid out for and disposed of as burying-ground only. It is settled law, that the Directors of a Company are not entitled to conduct the concern in a manner and for purposes different from that which the contract provides, of which rule a very strong example occurred in the case of the Australian Company.—*Maxton and Others v. Brown and Others*, 16th January 1839, (Dunlop, Vol. I. p. 367.)

“In the present case, the lands of Gilmorehill, which are described in the advertisements as peculiarly well situated for the purposes of the Company, were purchased at the price of £35,000, prior to the 1st of March 1845. Upon the power of increasing the stock by £20,000 was exercised, and on the 8th of March, after the purchase had been made, the complainer became a holder of stock to the extent of twenty-one shares, or £42. It appears that without calling any meeting of shareholders, but under a requisition said to have been signed by a great many of their number, the Directors, on the 16th of April, entered into an arrangement for selling the lands of Gilmorehill at the price of £39,000, of which sale they gave notice by advertisement on the 24th of April. The complainer on the same day objected to the sale, and on the 30th of that month he presented this note of suspension and interdict, and obtained from Lord Fullerton an interdict against the sale. The requisition of the shareholders, under the authority of which the sale was said to have been made, does not appear to be produced; and, at any rate, this is not a mode of expressing consent on the part of the shareholders contemplated by the contract.

“After the interdict had been granted, however, a meeting of the shareholders was held on the 28th of May, and the sale appears to have been approved of by parties holding 7608 shares, or stock to the amount of L.15,216, and disapproved of to the extent of 662, or £1324. The balance of £13,892 is not one-half of the

as a point turning on the extent of the power of sale, under the contract of the Company, of portions of the ground, which might be actually opened as a cemetery, and takes the whole question as depending on the 38th section of the contract. This is really not the point at issue. The respondents do not defend the act complained of under the 38th section at all. Hence I have the less difficulty in differing from the view stated in the note of the Lord Ordinary.

The parties have wished to obtain our judgment on the bill and answers, and as the case is fully stated in the new form in which Bill Chamber cases come before us, we are really now in a condition to decide the case as well as if the bill were passed.

I apprehend it to be quite clear, that the acquisition or retention of Gilmorehill was no condition of the contract of copartnery. The subject of the copartnery is not Gilmorehill. It is the occupation of a suitable piece of ground for a cemetery, west of the town of Glasgow.

It is very probable—as the Directors early fixed on Gilmorehill—bought it, as they had power to do—and lauded its adaptation for the purposes of the speculation, in the usual terms of the present auctioneer style of such advertising speculations—that parties may have bought shares in the expectation and hope that Gilmorehill was to be the place for the proposed cemetery, and may have been the more induced to act on that expectation, from finding that such a situation would promote their own interests in other property belonging to them. This is very probable. But if the Directors or the Company were not tied down conclusively to Gilmorehill, such speculators just took their chance of such situation being ultimately approved and acted upon by the Company, or of a change in the proposed situation, by selling Gilmorehill, as not, in their ultimate opinion, suitable, and buying another piece of ground.

amount of the original stock of £40,000, and if the additional £20,000 has all been subscribed, is little more than one-fifth.

“The complainer, on the one hand, represents this transaction as a mere job to serve the purposes of a feuing company, in which he says several of the Directors of the Cemetery Company are interested. The respondents, on the other hand, say that the sale is most advantageous, and that the complainer, who has only advanced in all £10, 10s., is obstructing the sale, not for any advantage to the Cemetery Company, but as a protection for feuing ground of his own in the neighbourhood, near which he thinks the ground to be acquired, in place of Gilmorehill, will be taken. These are circumstances not necessary to be taken into consideration, as it appears to the Lord Ordinary that the question to be determined is properly one of power. It is not proposed to dissolve the Company, and the sale of the whole lands, whether at a profit or at a loss, is certainly a proceeding not contemplated by the contract—far less authorized to be taken by the Directors, and against which, as a perversion of the purpose of the Company, any shareholder appears entitled to protest. Besides, the complainer, however small his interest may be, acquired his shares upon the faith of the purchase of Gilmorehill, and with the enlarged stock consequent on that purchase, and therefore he has a legitimate interest to insist that the concern shall be conducted in the manner provided for by the contract. The Lord Ordinary is therefore of opinion, that the note should be passed and the interdict continued. But as the parties pressed upon him the urgency of the case, owing to the necessity of carrying through the sale without delay if it should be thought competent, and their desire to have the authoritative determination of the Court at once, he thought proper to yield to the suggestion of reporting.”

No. 153.

June 25, 1845.
Fleming v.
Campbell.

No. 153.

June 25, 1845.
Fleming v.
Campbell.

The question is one, therefore, which depends entirely on the powers of the Directors of the Company, if they did not finally think Gilmorehill the best, or an eligible situation, to dispose of it, and get another. Taking the facts set forth, I see no ground whatever for viewing this as a case in which there is any attempt to convert a Cemetery Company into a Company to deal in the purchase and sale of land.

That the Directors bought Gilmorehill, and held it out as bought for the objects of the Company, is undoubted. That they had power to buy it, under the 20th section of the contract, is also clear. But if the shareholders thought that the purchase was not a judicious one to retain, I think it just as clear that they could instruct the Directors to get rid of it, and make a purchase more suitable, in their opinion. This is really what has occurred. Neither do I doubt that the Directors had not exhausted the powers conferred on them by the 20th section of the contract; and that if they had come to be satisfied, from their own farther consideration, that Gilmorehill was not an advantageous situation for the proposed cemetery, they might themselves, without any application from the shareholders, have sold Gilmorehill, which had never been occupied or laid out as burial ground, and which the shareholders had never really ratified and adopted as the proper spot. But they resolve to sell it, after an application to that effect from £40,000 of the £60,000 of the whole stock, taking care to provide that they shall consult the whole shareholders by meeting, if that shall be necessary. In all this I see nothing inconsistent with the clear powers vested in the Directors.

This application for interdict against the sale of Gilmorehill, could not prevent them consulting, and was a good reason for consulting the shareholders. They do so. The shareholders, with singular concurrence of opinion, approve of what they have done, and resolve that Gilmorehill shall be sold off and got rid of.

The suspender contends, that not even the whole shareholders, except himself, can get rid of Gilmorehill, however strong their opinion of the objections to its retention and occupation for the objects of the copartnery. I own this plea, in which the suspender is necessarily driven, appears a very singular and strange doctrine of copartnery to urge against parties who are connected with a view to profit under their proposed speculation, unless, indeed, which is not pretended, the subject-matter of the copartnery had been the turning Gilmorehill to the best advantage as a cemetery. I apprehend it to be clear, that up to the actual occupation and laying out of Gilmorehill as a cemetery, the Directors and the shareholders had power to dispose of the same whenever it appeared to them that the place would not on the whole be suitable. No doubt, if the Directors, having once bought the ground for the Company, which made it the property of the shareholders, had attempted to sell it, and the latter had interfered in time, they might have prevented its sale. If they did not, or had not time to interfere, I have no doubt of the power of the Directors, when they saw it would not answer, to make, under the 20th section, another purchase, as a proper and more eligible site. No doubt the shareholders might throw any loss on them arising from their imprudent management, but, as a matter of power, I think the Directors could have parted with Gilmorehill. But this is not truly the real point now at issue, for the approbation of the shareholders was competently applied for and obtained, and cannot be thrown out of view; and I own that it appears to me to be a clear point under the contract, and under the general law of copartnery, that the shareholders, when

they find that Gilmorehill—of which they had not obtained possession, for the term of entry had not arrived—which had not been finally fixed on by the shareholders, which had not been laid off, or laid out, nor occupied to any extent, as a cemetery, and on which no expense had been incurred, and in which no interest was vested in any one—was not a suitable situation, were perfectly entitled to direct that it should be sold off, or to confirm the sale made by the Directors, and to acquire a more profitable place for a cemetery. I am, therefore, for refusing the note of suspension and interdict, and for remitting to the Lord Ordinary with that instruction.

No. 153.

June 25, 1845.
Fleming v.
Campbell.

LORD MEDWYN concurred.

LORD MONCREIFF.—I throw out of view the proceedings at the last meeting of shareholders. I do not think we are entitled to look at what has taken place since the suspension came into Court. The purchase of Gilmorehill had been completed, and an advertisement had been issued, stating it to be well adapted for the purposes of the Company; and, on account of this purchase, the stock of the Company was extended. Mr Fleming purchased his shares on the faith of this acquisition. After matters had gone so far, I am at a loss to see where the Directors had power to sell this ground to a third party. They had made the selection, and after that could not go back. Whether it would have been competent to have done it by the authority of a general meeting, I do not know, but this was not done. I entertain very great doubt upon the question of the power of the Directors.

LORD COCKBURN.—I am of opinion that the interdict ought to be recalled, and the bill of suspension refused.

By the 20th clause of the contract, the selection of the ground, and indeed the general management of the concern, including, as I think, a change of selection, is vested in the Directors in the first instance, but subject always to the control of the Company. So far as I can observe, this extensive power is always given to a majority of the partners. Two-thirds are required for a dissolution; but every other proposal must be settled by a majority—whether of those present, or of the whole shareholders present and absent, it is not necessary to consider.

The Directors at first thought Gilmorehill the best place, and accordingly, *without consulting the Company*, they not only bought it, but rested a public recommendation of the concern on this fact. Circumstances occurred, however, which made them, and an undoubted majority of shareholders, both present and absent, think it more expedient to sell that property, and to buy new ground. This they propose to do *rebus integris*. No one proceeding has taken place, beyond the mere fact of engaging to buy that property, and then resolving to resell it.

But the suspender objects; and this, so far as I can discover, solely on the ground that he became a shareholder after he had reason, from the public statements of the Directors, to believe that Gilmorehill was to be the place. This expectation, he holds, constituted a contract in favour of Gilmorehill between him and the Company; and a contract so paramount, that he alone would be entitled to resist any change of site, even although it were approved of, and on good reasons, by every other partner.

I think this totally groundless. The expectation may be conceded, and also that it was this expectation alone that made him take shares. But still he took them under the contract. He was not entitled to rely on any expectation, or

No. 153. understanding not warranted by the contract, or declared to be one of its conditions, still less if contradicted by it. Now he saw that the contract subjected every thing of this kind to the discretion of a majority of his fellow-partners. The 38th clause alone, though not the clause on which this case depends, ought to have checked his confidence; for it is there distinctly set down, in express words, that a majority may sell unused ground even after interments had begun. If, therefore, the Company had buried a single individual, and then, discovering that a change of site was expedient, had sold the whole ground except that one lair, he would not have had a word to say. But if he would have been obliged to submit to this, it is idle to say that they cannot change their ground without the ceremony of a solitary funeral.

June 28, 1845.
Preston v.
Gregor.

In short, the suspender is just in the position of hundreds of other partners who join companies, chiefly, or solely, because it has been held out that a particular thing is to be done, but for the positively doing of which the contract gives no absolute security. He took his risk of all changes within the power of the majority.

THE COURT accordingly pronounced an interlocutor, remitting to the Lord Ordinary with instructions to refuse the note of suspension, to recall the interdict, and find the suspender liable in expenses.

ANDREW HOWDEN, W.S.—DUNDAS and JAMIESON, W.S.—Agents.

No. 154. LADY ANNE CAMPBELL BAIRD PRESTON, Advocate.—*Deas.*
DAVID GREGOR, Respondent.—*Patton.*

Landlord and Tenant—Lease—Hypothec—Interdict.—Although a tenant was not *vergens ad inopiam*, held, that a landlord, under his right of hypothec, was entitled to interdict the sale and removal of the growing crop from a farm, until the tenant found caution for the current year's rent.

June 26, 1845. BY a lease, dated 22d December 1828, and 1st January 1829, Lady Baird Preston let to David Gregor the farm of Easter Crieffvechter, in the parish of Crieff, for nineteen years after Martinmas 1824, for £188, 17s. 8d. of yearly rent, payable at Martinmas and Whitsunday, the first payment to commence at Martinmas 1825, and the next at Whitsunday following, for the crop and year 1825; and so on during the currency of the lease.

1st Division.
Ld. Robertson.
W.

In the spring of 1843, Lady Baird Preston obtained a decree of removing in the usual form against Gregor, whose lease was to expire at the following Martinmas, decerning him to remove at that term. About the time when this decree was pronounced, Gregor had removed the whole of his stock from the farm to another which he had taken.

In the autumn of 1848, Gregor advertised a sale by roup of the growing crop on the farm.

On seeing this advertisement, Lady Baird Preston's agent addressed a No. 154. letter to Gregor, intimating, that before disposing of the crop on the lands, whereby nothing would remain to secure the rents, it would be necessary that he should either pay or find security for the current year's rent, about to fall due—the one-half at Martinmas 1843, and the other half at Whitsunday 1844. Gregor, in answer, did not allege any difficulty in finding caution to the requisite amount, but he denied his liability, either to find caution, or to make consignment before removing the crop from the lands; and he intimated his resolution to proceed with the proposed sale, and to stand upon what he conceived to be his legal rights.

June 26, 1843.
Preston v.
Gregor.

Lady Baird Preston thereupon presented a petition to the Sheriff of Perthshire, to interdict Gregor from selling or removing the crop from the farm, until he should find caution for the payment of the current year's rent.

The Sheriff granted interim interdict, but afterwards, on a record having been made up, pronounced the following interlocutor:—"Finds that the pursuer admits that, under the contract of lease, no part of the rent of the present year is presently due and payable: Finds, that the lease contains no clause binding the tenant to leave his last year's crop on the ground in security of the rent of that year, unless he finds personal security for its payment when due: Finds it admitted that the defender is decerned to remove at the ensuing term of Martinmas: Finds it not averred that the defender is insolvent or verging thereunto, but on the contrary: Finds it admitted that the defender is not in arrear of rent, and that 'he has become tenant of a much larger and more valuable farm, belonging to Lord Strathallan, and has entered to the possession of the same:' Finds, therefore, there exist no grounds, in fact or in law, whereby, contrary to the decree of removing, the tenant can be interdicted from removing from the farm 'any part of the growing crop and effects,' without judicial caution being found for punctual payment of the current year's rent: Therefore recalls the interim interdict, assoilzies the defender from the conclusions of the action; finds the defender entitled to expenses," &c.

Lady Baird Preston advocated, and minutes of debate having been ordered by the Lord Ordinary, she pleaded;—

That the landlord's right of hypothec over the crop for the current year's rent implied a right of retention in security of that year's rent: That whether or not the word "retention" was grammatically or technically applicable to the landlord's right to insist on the crop remaining on the farm till the tenant's obligation to pay the current rent, or find security for it, was fulfilled, the right itself had been recognised as necessarily implied in that of hypothec, and the name of retention applied to it by all the authorities:¹ That this right of retention existed as against both

¹ Bankton, B. I. 17, § 8; Stair, I. 13, § 15; Erskine, II. 6, § 58, 59, 60;

No. 154.
 June 26, 1845.
 Preston v.
 Gregor.

creditors and purchasers,¹ and was much more stringent over the crop than the stocking, and was stronger before the term of payment than after it: And that the view, that to require the tenant to find security to pay the rent when due, would be supplementing an obligation of personal security to the lease, which could only be created by express stipulation, was unsound: That a landlord was entitled to demand caution from his tenant for the payment of the current year's rent, before the removal of the crop from the ground, without any express paction in the lease; and the tenant, on the other hand, was entitled to insist that the landlord should accept caution, and allow the crop to be removed:² That the fact that the rent due was the rent of the last year of the lease, and that one-half of it was not payable till Whitsunday 1844, six months after the term of removal, was strongly in favour of the landlord's right to interdict, because, before the last half of it became due, the tenant might have disposed of the whole stocking and crop and be furth of the kingdom, leaving the landlord without security of any kind for the rent. And that so far from the landlord's not being entitled to interdict, unless he was in a situation to sequestrate, on the ground of the tenant's being *vergens ad inopiam*, it was just where he was not in a situation immediately to sequestrate, that the right to interdict became necessary and valuable.

The respondent pleaded;—

That there were no *termini habiles* for the landlord's exercise of the right of retention, seeing that he was not in actual possession;³ and although it had been held⁴ that a landlord might prevent a pouncing creditor of the tenant from carrying off the crop, this right was only admitted, because he would in the circumstances be entitled to sequestrate: That a landlord could not sequestrate unless it was shown that there was danger of his right of hypothec being defeated; and if he could not sequestrate, he could not exercise a right as stringent in the form of interdict, where, as in the present case, the tenant was undoubtedly solvent: That as there was no express stipulation in the lease that the tenant should find security for the payment of the last year's rent before selling the crop, he could not now be called to give it, because it had formed no part of the contract: That the right of hypothec was quite sufficient to secure the advocate, as the removing of the stock to another farm did not abridge her right over it, and the crop would remain hypothecated

Bell's Law Dict., p. 477, last ed.; 1 Bell on Leases, p. 869.70; Lady Dun v. Dun, 31st March 1624, (M. 6217); 2 Bell's Com., p. 32; Bell's Pr., § 1239, 1242.

¹ Earl of Dalhousie v. Amos, 27th February 1828, (6 S. 625,) 7th December 1830, (4 W. S. 420;) Cooper v. Bone, 18th December 1823, (2 S. 598.)

² Ersk. 11, 6, §§ 57, 59; 2 Bell's Com., p. 33, 5th ed.; 1 Bell on Leases, p. 419, last ed.

³ Alison v. Creditors of Campbell, July 1748, (M. 16246.)

⁴ Pringle v. Scott, 30th June 1736, M. (6216.)

for the rent of the year in which it was produced ; and that landlords had a better right than mere retention, for they could bring back the stocking and crop subject to the hypothec, though removed from the farm, and claim the price, to the amount of the rent, even from *bona fide* purchasers. No. 154.
June 26, 1845.
Preston v.
Gregor.

The Lord Ordinary pronounced an interlocutor reporting the case, accompanied by the subjoined note.*

At advising,

LORD PRESIDENT.—I am not able to agree with the judgment of the Sheriff. I cannot see any distinction between the last year of a lease and any previous year, with regard to the security of the landlord for the rent. He has the same protection, by his right of hypothec, during it as in any other year ; and I think that, if possible, he should be rendered more secure ; for, if unprotected that year, his claim for rent might be altogether defeated by the removal of the tenant from the farm. It appears to me that the authorities, from Stair downwards, establish that the landlord has a right to retain the crop in security of the current rent, without any exception of the last year of the lease. Now, here a sale of the growing crop is intended to be followed by its removal from the property, leaving nothing to the landlord but to follow it, or claim against the parties who have removed it ; and, in such a case, has he not a right to interfere and prevent its removal ? I can find no principle in the law of landlord and tenant sanctioning the doctrine of the Sheriff ; and I am therefore of opinion that we ought to decide in favour of Lady Baird Preston.

* “ NOTE.—Owing to the great importance, and very general nature of the question here raised, as affecting the rights of landlord and tenant, the Lord Ordinary has thought proper to take the case to report. With this view, when the case was originally argued before him, he ordered the minutes of debate which have now been lodged. It is very fully argued, and the opinion which the Lord Ordinary has formed is against the judgment of the Sheriff. The crop was undoubtedly liable under the hypothec for the rent when it became due. That crop might have been reclaimed from a purchaser by sample, even if in public market, as was settled in Lord Dalhousie's case ; and the authorities expressly treat the right of retaining, as subordinate to the right of recovery. The Sheriff seems to hold, that there is no right of retention, or power to prevent a sale, applicable to the last year of the lease ; while the tenant argues that there is no such power before the rent becomes due during any year of its currency, unless the tenant be *vergens ad inopiam*. It appears to the Lord Ordinary, that there is no authority for either of these propositions. The crop is primarily liable for the year's rent ; and, until that rent is paid or secured, the tenant is not entitled to remove it to the landlord's prejudice. To say that the landlord may recover it back, but that he cannot detain it, seems a very extravagant proposition ; and the Sheriff does not appear to adopt this view as applicable to any year's crop excepting the last. But if it be admitted that there is a right of retaining or preventing removal of the crop (whether correctly described as a right of retention or not) during any year of the lease, and before the term of payment of that year's rent, it seems difficult to hold that this does not extend to the last year. Although the tenant is to remove, there seems no reason why he should carry off the crop of the last year of his lease, and leave the landlord without security of any kind for that year's rent.”

No. 154. **LORD MACKENZIE.**—I am of the same opinion. It is not disputed that the landlord has a right of hypothec over the crop so long as it is extant, for the rent while it is yet due, and until it is paid; and the only dispute seems to be about the exact meaning of the words hypothec and retention. That, however, is really of no consequence; and indeed it is of equally little consequence whether the right of hypothec for current rent be admitted or not, for it is firmly established both by the law and practice of the country. Now, if the right of hypothec be undoubted, does not the right of retention follow as a matter of course? For what would the hypothec be, if the landlord had not the right of keeping the crop upon the farm? The tenant would have no more to do than march it off the land and sell it in bulk, in open market; for if he chose so to sell it in open market, that at once would defeat the hypothec. One necessary part, in fact the essential of the right of hypothec, is, that of reclaiming and bringing back the crop; and if the landlord has the right of reclaiming it, has he not a right to interdict its removal?

June 26, 1845.
Preston v.
Gregor,

The only other point to which it is necessary to allude is the argument, which appears to be indicated, rather than maintained, and which I can scarcely consider a serious one, that the decret of removing which was obtained against the tenant, ordained him to remove from the farm with all his effects. But are we to think that a landlord would order off the crop under hypothec, which formed his only security for the rent? The decree was intended to be in favour of the landlord, and can we suppose that he would take one against himself? The fact of this being the last year of the lease, just renders it the more necessary that the landlord's right should be protected. It is true there is no attempt here on the part of the tenant to defraud the landlord, (indeed he seems to have entered into the litigation chiefly on public principles, and for the interest of tenants generally,) for he seems to be perfectly solvent; but he might have been in a different condition; he might have been going off to America at the end of the lease, and intending to leave the landlord without either the rent or security for it.

LORD FULLERTON.—I am entirely of the same opinion. The whole difficulty expressed in the judgment of the Sheriff seems to have arisen from the supposed distinction between the rights of lien and hypothec; and the idea that the landlord has no right to retain unless he has a right of lien. Now, I don't agree with that, for this is not a case of lien, but one of hypothec, and the right of retaining arises necessarily from the hypothec. By our law, it is quite fixed that a landlord has a hypothec over the growing crop in security of the current rent; and this is a security much higher than one of mere lien, for he can follow the fruits wherever they may go, and reclaim them from the parties into whose hands they have passed. The whole authorities concur in giving effect to the doctrine, that the landlord has a right of retention. The right applies to the case of pawning creditors; and, therefore, there is no reason why it should not apply equally to the case of a tenant attempting to sell.

LORD JEFFREY.—I concur. Even if there were any doubt as to the principle of the law, I should hold that we were bound to adhere to it, by such a series of authorities as is to be found in its support. The whole authorities, from Lord Stair down to Professor Bell, agree in holding that, before the rent is due, the landlord has a security for its payment by a right of retention, although that word may not have been uniformly adopted as a technical term.

I don't see how you can admit the right of hypothec, and yet exclude the right to prevent the crop from being carried away, either after the term of payment has elapsed, or before it has arrived. The obligation for the payment of the rent is not a future one; it is a present debt from the moment when the grain begins to grow; and I should like to know how the landlord's interest, his claim for the rent, can be properly and efficiently protected except by the right of retention.

I agree with what has been said, that the circumstance of this being the last year's crop under the lease, is *a fortiori* in favour of the landlord; and the fact of the stock having been already removed from the farm, which, had it remained, would have formed an additional security to him, tells also in his favour.

THE COURT pronounced the following interlocutor:—"Advocate the cause; recall the interlocutor of the Sheriff complained of; declare the interdict perpetual, and decern; and find the advocator entitled to the expenses incurred both in the inferior court and this court."

ALEX. SMITH, W.S.—LOCKHART, HUNTER, and WHITEHEAD, W.S.—Agents.

WILLIAM ANDERSON, Petitioner.—*Pattison*,
DANIEL M'INTOSH, Respondent.—*Shaw*.

No. 155.

Bankruptcy—Interim Factor—Statute 2 and 3 Vic. c. 41, § 53.—Held that, under the 53d section of the Bankrupt Act, an interim factor had a claim for his advances, and the remuneration awarded him by the creditors, out of the first money which came into the hands of the trustee, preferable to that of the trustee for expenses incurred by him in the business of the sequestration after his own election.

PETER SINCLAIR, auctioneer and commission agent, having been sequestrated under the Bankrupt Act, William Anderson, S.S.C., one of his creditors, was elected interim factor. Sinclair had become indebted to the Crown in duties upon sales which he had conducted, and for the payment of these, proceedings had been taken, and a sale of his furniture announced. Anderson paid the sum which was due, with the expenses incurred by the Crown, amounting together to £16 : 4 : 3½. In these proceedings, and for the expense, among others, of making up his title as interim factor, he incurred an account to a law-agent of £9 : 18 : 1. The whole amount advanced by him on behalf of the estate was £29 : 4 : 10½. Anderson realized no part of the bankrupt estate, and had no intromissions with it. At the second meeting of the creditors, he laid before them a report of his proceedings, in which he stated that, with the exception of the value of the bankrupt's furniture, there was nothing else available to the creditors. The meeting approved of

June 28, 1845.
Anderson v.
M'Intosh.
1st Division.
Ld. Robertson.
No.

No. 155. his proceedings, and fixed his remuneration at £4, 4s., thus raising the debt due to him by the estate to £33 : 8 : 10 $\frac{1}{2}$.

June 28, 1845.

Anderson v.

M'Intosh.

At this meeting, Daniel M'Intosh was elected trustee on the sequestrated estate. M'Intosh sold off the bankrupt's furniture, and the free proceeds of the sale, after deducting the expenses of it, and the arrears of taxes, together with a sum afterwards obtained as rent of the premises occupied by the bankrupt, amounted to £79 : 17 : 3. Out of this he paid the current year's rent of the premises occupied by the bankrupt, the expenses of the law-agent in getting the sequestration awarded, and a sum to Anderson, in relief of his advances of the Crown duties; and there was then left in his hands the sum of £8 : 14 : 8 $\frac{1}{4}$.

M'Intosh had incurred an account to the law-agent, for the expense of obtaining confirmation as trustee, examining the bankrupt, and other business of the sequestration, of £12 : 18 : 10; while the balance still due to Anderson amounted to £17 : 10 : 9. Anderson claimed payment of this balance; but his claim having been disregarded, he afterwards offered to accept £8, 8s. in full of his demand. This offer not having been complied with, he presented a petition and complaint to the Lord Ordinary on the bills, praying for the payment of the balance still due to him, or, at all events, of such part of it as might have been actually received by, and was in the hands of the trustee, or had been paid away by him to his prejudice.

The petition was founded on the 53d and 55th sections of the Bankrupt statute, by the first of which it is provided, "That at the time and place appointed for the said meeting to elect a trustee, the interim factor shall exhibit the sederunt-book," &c.; that the meeting, if satisfied with the interim factor, "shall fix his remuneration, and he shall receive payment thereof, and of all advances made by him out of the funds in his hands;" and "the interim factor shall not be entitled, in respect of non-payment thereof, or on any other ground, to retain any part of the estate; and he shall be bound forthwith to deliver the estate, books, title-deeds, bills, vouchers, and the said state, rental, and all other documents, to the trustee, who shall (if sufficient funds have not been realized by the interim factor) pay the said remuneration and advances out of the first money which shall come into his hands."

By the 55th section, it is provided, that the trustee shall pay the sum allowed to the interim factor for his trouble during the period of his administration, and the expenses incurred by him, "out of the first of the funds."

Answers having been lodged for the trustee, and a record made up,

The petitioner pleaded;—1. Under the provisions of the statute founded on, he was entitled to payment, and the respondent was bound to make payment to him out of the first money which came into his hands. 2. The respondent having received into his hands sufficient funds to pay the balance due to him, or the greater part thereof, he was bound

to have so applied the funds, and was not now entitled to plead that the funds were exhausted by other payments. 3. Even upon the footing that the expense of obtaining the sequestration was preferable to the debt due to the petitioner, there was a balance in the respondent's hands on 1st September 1844, amounting to £8 : 14 : 8½, which sum the respondent ought to have paid over to the petitioner. No. 155.
June 28, 1845.
Anderson v.
M'Intosh.

The respondent pleaded ;—1. It was incumbent on him in terms of the Act to pay out of the funds realized by him—1st, The current rents of the premises which were occupied by the bankrupt, and in which the furniture sold was situated ; and 2d, The expenses incurred in getting the sequestration awarded. 2. The only right conferred by the statute on the petitioner, *qua* interim factor, was to be paid any balance justly due to him out of the first available funds realized by the trustee out of the estate. 3. The respondent, with the sanction of the commissioners, was entitled so far to relieve himself of actual and necessary expense or outlay in the conducting of the sequestration, particularly seeing but for such expense being incurred no funds would have been realized, and that he had no claim therefor against the creditors.

The Lord Ordinary pronounced the following interlocutor :—“ In respect it appears by the minute of the meeting of commissioners, of date the 30th October 1844, that there was a balance in the hands of the trustee at that date, amounting to the sum of £8 : 14 : 8½ ; and that, by the 53d section of the statute, the trustee is bound to pay the advances of the interim factor, and the remuneration fixed, out of the first money which shall come into his hands ; and that he was not entitled to retain the said sum to account of the expenses incurred by him in the business of the sequestration subsequent to his own election ; and that the said sum is greatly less than the balance due to the petitioner ; so that the taxation of any part of his claim for expenses is unnecessary—Decerns against the respondent for payment of the said sum of £8 : 14 : 8½, with interest since the 30th day of October 1844 ; and in the whole circumstances of the case, and specially in respect no answer was made to the demand of the petitioner, and also of the very reasonable limitation thereof made by him before this petition was presented, finds the respondent liable in expenses.”

M'Intosh reclaimed, but

THE COURT adhered, with additional expenses.

SHIELDS and FORREST, S.S.C.—WILLIAM POLLOCK, S.S.C.—Agents.

No. 156.

JOHN HARVEY, Advocate.—*Macfarlane.*June 28, 1845.
2d Division.ROBERT MILLER and MANDATARY, Respondents.—*Maitland.*

T.

Harvey v.
Miller.Paterson v.
Leslie.

Expenses—Process.—In this case the Court, on an objection to the auditor's report, allowed an extrajudicial correspondence between the agents to be charged against the losing party, in respect of the special circumstances of the case—observing, at the same time, that this sort of correspondence was not, in the common case, a charge which ought to be so allowed.

JOHN LEISHMAN, W.S.—JOHN CULLEN, W.S.—Agents.

No. 157.

HENRY PATERSON, Pursuer.—*Rutherford—Moir.*JAMES MICHAEL LESLIE of Balquhain, Defender.—*Sol.-Gen. Anderson*
—*J. T. Gordon.*

Entail.—A proprietor executed a deed of strict entail of his estate, reserving power to himself to alter or revoke: the deed was duly recorded, and a title completed under it by charter of resignation, and sasine thereon: the entailor thereafter executed a new deed, proceeding on the narrative of the first, and a desire to alter it, whereby he conveyed the same estate, and all other lands which he had acquired or might acquire, to a new series of heirs, and made certain modifications of the provisions and conditions: this second deed referred to the prohibitory, irritant, and resolute clauses of the first, and provided that the heirs should take only under these, but no such clauses were contained in itself: it was duly recorded, and a title completed under it by charter of resignation, and sasine thereon, in which were set forth at length the prohibitory, irritant, and resolute clauses contained in the first deed of entail, and referred to in the second;—Held that the second deed was a new entail, superseding the first, and that as it did not contain within itself the foresaid clauses, it was not effectual to protect the lands against third parties.

July 1, 1845.

1st Division.
Lord Wood.
W.

By a deed of strict tailzie, dated 8th November 1692, Patrick, Count Leslie of Balquhain, upon the narrative that he had already destined and conveyed his German estates to James Leslie, his eldest son by his first marriage, bound and obliged himself, his heir of line male and of tailzie, and his successors whatsoever, to resign, and accordingly granted procuratory to resign, the lands of Balquhain and Fetternear in favour of himself in liferent, and George Leslie, the eldest son of his second marriage, and the heirs-male of the said George Leslie's body; whom failing, the heirs-male procreated, or to be procreated, of his own body, of

his present or any future marriage, and the heirs-male to be procreated of their bodies; whom failing, a series of substitute heirs. The deed contained a provision, "that if it shall happen ye said George Lesly and ye heirs-male of his body to succeed to the sds lands and estate in Germany and that be the talye @-wrin the second sone of his or their body shall succeed to the estate of Balquhane and others @-spect. That in that caice ye second sone and ye heirs-male of his body who shall happin to succeed in ye sd estate of Balquhan shall come and live and have their residence and abroad in Scotland and possess and enjoy ye estate heir within two years after ye majoritie or tyme of succeeding yrto oyrwayes they shall amitt and lose ye state of Balquhane and oysr @-spect lying and pertaining to me within ye kingdom of Scotland and ye samen shall descend to ye next heir of taylie forsd."

No. 157.
July 1, 1845.
Patterson v. Leslie.

The deed of entail reserved full power to the entailer to sell or dispoone the lands conveyed, (with the exception of the lands of Fetternear,) and to alter, innovate, and revoke, without the consent of any of the heirs of tailzie.

A title was completed under this entail, by means of a Crown charter of resignation and infestment, duly recorded, in favour of the entailer in liferent, and his son George Leslie, and the other heirs of tailzie, in fee. The deed of entail was recorded in the register of tailzies in 1698.

On 13th July 1700, the Count executed a second deed, proceeding upon a narrative of the tailzie which he had formerly executed, and of his reserved power to alter and innovate; and that, after mature and deliberate consideration, he found "it most expedient and necessar to alter he foresaid taillie in the nominationes thereof and to dispense with a part of the irretant clausses of the samen And also to add some verry reasonnable and just provisions and conditions yrto."

The deed then went on to bind and oblige the granter and his heirs o make resignation of all the property specified in the tailzie of 1692 to and in favour of himself in liferent, and of George Leslie, his eldest son of the second marriage, and his heirs-male; whom failing, to a series of heirs, in certain respects different, and called in a different order, from he heirs enumerated in the original tailzie of 1692. The obligation to resign, bore no reference to the fetters. The procuratory authorized resignation of "all and hail the particular lands, &c., and others specified, contained and comprehended in the said bond of tailzie above narrated," and als all and sundry whatsoever oyr lands baronies teyndes or oysr which I have already acqyred or may hereafter happine to conqness and eqyure," for new infestment in favour of the series of heirs before set forth.

The deed then proceeded to discharge the obligation which had been imposed by the tailzie of 1692, upon such of the heirs of the entailer's German estates as should succeed to the Scotch estate, to reside in Scot,

No. 157. land, the granter declaring that, in virtue of his reserved power, he did "absolutely annull extinguish and exclude the irretance of the said clause."

July 1, 1845.
Paterson v.
Leslie.

This provision was immediately followed by a declaration, that the whole heirs nominated in the new destination should be "bound and obleidged lykeas they by their acceptatione hereof binds and obleidges them rexve and successive to mentaine compleat fulfill performe and elossly adhaere to the haill other clausses conditions provisions restrictions limitations irretances reservations and exceptions specified and contained in the fors^d regrat bond of tailzie also weill and sicklyke in all poynts as if the samyne were ane by ane herein at full length and *per expressum* insert and set down with the burden whereof (excepting alwayes their comeing to and abode in Scotland as is above excepted) thir presents are made and granted by me and accepted off by ane or nither and all of them successive as aforesaid allenarly and no other-ways."

The deed contained no precept of sasine, and in no part of it were the conditions, prohibitions, or irritancies of the tailzie of 1692 set forth at length. It was recorded in the register of tailzies in 1700.

By a subsequent deed, dated 8th May 1707, the entailor, with the consent of his son George Leslie, dispensed with and abrogated a restriction contained in the tailzie of 1692, against letting of leases with a diminution of rental; and this deed was recorded in the register of probative writs on 18th July 1739.

George Leslie, the fiar under both the first and second destinations, was succeeded, upon his death, by his only son, Ernest, Count Leslie, who, in 1739, was served nearest and lawful heir-male of tailzie and provision in general to his father, conform to the deed executed by Patrick, Count Leslie in 1700; and completed his title to the estate by a Crown charter of resignation, and sasine thereon, which was duly recorded.

In the dispositive clause of the charter of resignation, the conveyance was declared to be "with and under the reservations, burdens, conditions, provisions, restrictions, limitations, and clauses irritant after mentioned;" and, in the *quæquidem* which followed, the whole of the prohibitions and irritancies of the tailzie of 1692 were specially set forth, and the resignation was stated to have been made for new infestment in favour of Ernest Leslie, under all the provisions, restrictions, &c., before mentioned; and the precept of sasine authorized infestment to be given under the same limitations.

All the heirs who subsequently possessed the estate made up their titles to it in similar terms with the investiture thus completed by Ernest Leslie.

In November 1843, the pursuer, the manager of the North of Scotland Banking Company in Aberdeen, raised a summons of adjudication of the lands of Bakquhain against John Edward, Count Leslie, of Bal-

gubain, the heir then in possession of the estate, founded upon a promissory note for £1000, granted by him to Messrs Adam and Anderson, advocates in Aberdeen, and by them indorsed to the pursuer.

No. 157.
July 1, 1845.
Paterson v. Leslie.

Defences were given in, and a record having been made up and closed, cases were ordered by the Lord Ordinary.

Before the revised cases were lodged, Count Leslie died, and was succeeded in the estates of Balquhain by James Michael Leslie, who made up his title to the lands as next substitute heir of entail. The pursuer raised an action of transference against him, to which he lodged defences, in respect of his limited representation, as heir under a strict entail.

In the leading action the pursuer pleaded ;—

The deed of 1700 was the radical title of the heirs of entail. It superseded the previous entail of 1692, including all the estates which were included in that deed, and altering the destination, besides changing some of the prohibitions therein. The deed of 1700 was the foundation of the right of the succeeding heirs of entail ; but though it was thus the "original tailzie" in the sense of the statute, and was recorded in the register of entails, the irritant and resolutive clauses were not inserted in it, and the entail was therefore ineffectual to protect the lands against the diligence of creditors.¹ Further, the obligation to resign, and the procuratory of resignation itself, were unqualified by any reference to the fetters and limitations of an entail, and so authorized the heirs, in whose favour they were conceived, to make up titles to the lands in fee-simple only. But even if the procuratory of resignation could be considered as importing that resignation was to be made under the fetters of the deed of 1692, so far as unaltered by the new deed, this could not constitute an effectual entail as against creditors, because still there was no recorded entail in terms of the statute.² If the deed of 1700 did not form an effectual entail, as against creditors, the lands were attachable by adjudication for a debt contracted by an heir in possession ; and the next heir who took up the succession represented his predecessor as heir of provision, and was liable for his debts, to the extent at least of the value of the lands.³

The defender pleaded ;—

The whole fetters of the tailzie of 1692 were, by reference, imported into the deed of 1700, both of which deeds were recorded in the register

¹ Rennie v. Horne, March 13, 1838, (3 S. & M L. p. 142 ;) Ersk. B. 3, tit. 8, § 26.

² Bell's Pr. § 1739 ; Viscount Garnock, July 28, 1725, (M. 15596 ;) Murray Kininmond, July 5, 1744, (M. 15380 ;) Broomfield v. Paterson, June 29, 1784, (M. 15618 ;) Lindsay v. Earl of Aboyne, March 2, 1842, (ante, Vol. IV. p. 843.)

³ Mitchelson v. Atkinson, June 15, 1831, (9 S. p. 741.)

No. 157.
July 1, 1845.
PATERSON v.
LESLIE.

of tailzies.¹ The recording required by the statute 1685 was, therefore, satisfied. Further, the deed of 1700 was chiefly a nomination of heirs, executed under powers reserved in the deed of 1692; along with which, as relative parts of one settlement of the estate, it formed the entail, the whole of which was duly recorded.² The obligation to resign, and the procuratory of resignation, in the deed of 1700, were accompanied with an express reference to the deed of 1692, and a declaration that every heir was subjected to the whole conditions, provisions, irritancies, &c., of the entail 1692, as fully as if the same were “herein at full length, and, *per expressum*, insert.” In conformity with this obligation, Ernest, Count Leslie, as heir of entail in 1739, made up a title by resigning on the procuratory in the deed of 1700, and obtaining a charter and sasine, which contained, *in gremio*, the whole fetters of the tailzie 1692; and the successive heirs of entail since then had duly engrossed the whole fetters of the entail in their investitures. The entail had thus been both duly recorded and feudalized, and the lands were thereby protected against the diligence of creditors. But, in any event, the defender only represented his predecessor as heir of entail, and was not liable for his debt, so that the action of adjudication for such debt could not be transferred against him.

The Lord Ordinary pronounced the following interlocutor:—“The Lord Ordinary having considered the closed records in the original action of adjudication and action of transference thereof, with the revised cases for the parties, transfers the original action of adjudication against the said James Michael Leslie, and decerns: Conjoins the said two actions; and, in the conjoined actions, repels the defences stated to the action of adjudication, and adjudges, decerns, and declares, in terms of the conclusions of the summons of adjudication, reserving to the said James Michael Leslie all objections to his not being liable for the debts of the late John Edward, Count Leslie, beyond the value of the estate of Balquhain: Finds the pursuer entitled to expenses.”*

The defender reclaimed.

¹ Don v. Don, 5th February 1713, (M. 15,591;) Laurie v. Spalding, 24th July 1764, (M. 15,612;) Hope Vere v. Hope, 5th March 1833, (11 S. p. 520;) Strathmore v. Strathmore's Trustees, 1st February 1837, (15 S. p. 449;) 1 Robinson, p. 189; Porterfield v. Stewart, 15th May 1821, (1 S. p. 9;) 2 Wilson & Shaw, p. 369, (8 S. p. 16, and 5 W. & S. p. 515.)

² Leslie v. Orme, 2d March 1779, (M. 15,530;) Bontine v. Graham, (13 S. p. 905.)

* “NOTE.—The point at issue is not whether the deed of entail of 1692 would, if the maker of it had not subsequently executed any other deed, have been a good and valid entail of the lands thereby conveyed, but whether there is now any effectual entail of these lands in a question with third parties, onerously contracting with the heir in possession, the maker of that deed having afterwards granted the deed of 1700, by which he disposes and conveys the same lands, together with all others he had acquired in the interval, or might subsequently ac-

Lord President.—I am satisfied with the interlocutor of the Lord Ordinary. The title of the defenders here, like that of all the previous substitutes,

No. 157:

July 1, 1845.

Paterson v.

Leslie.

quire, in the manner therein set forth; and both of which deeds are duly recorded in the register of tailzies.

“When an entail has once been made and recorded, it may be—that if so far left unaltered, that it is allowed to remain as the source and foundation of the right of the heirs entitled to the succession of the entailed lands, its efficacy will not be impaired by every deed that the entailer may afterwards execute in regard to the conditions and provisions contained in the entail, or the heirs thereby called. It may be, that if only partially altered by a deed simply recalling the destination in favour of certain of the heirs, or discharging a portion of the restrictions and limitations, but only referring to the entailing clauses as contained in the original entail, that entail—provided the deed of alteration is recorded in the register of tailzies, or even (although that is doubtful) without its being so recorded—might in other respects remain valid and effectual for all the purposes of the statute. But this is not the kind of case which is here presented for decision.

“Upon the entail executed in 1692 by Patrick, Count Leslie (then Patrick Leslie) of the estate of Balquhain and others, a regular feudal investiture, subject to the powers of revocation and alteration reserved to the grantor, was completed by charter and sasine, both dated in 1694. The latter was duly recorded on the 4th October of that year, and the entail was recorded in the register of tailzies in February 1698. Then, on the 13th July 1700, the entailer, in the exercise of his reserved powers, executed a second deed of entail, by which he confessedly altered the destination in the prior deed, not merely by a simple exclusion of certain heirs, but by settling the same entailed estates upon a series of heirs, in certain respects different, and called in a different order from the heirs enumerated in the original tailzie of 1692, and for that purpose he made a new conveyance of the estates in favour of the line of heirs by whom he had resolved they were to be enjoyed. The deed then proceeds with a procuratory for resigning the lands and others comprehended in the tailzie 1692, and also ‘all and sundry whatsoever oyr lands, baronies, teyndis, or oys which I have already acqyred, or may hereafter happine to conquest or acqyre,’ for new infestment, in favour of the grantor in liferent, and of George Leslie, his son, in fee, and the heirs-male of his body; whom failing, the new series of heirs nominated in the deed. After this comes a discharge of the obligation imposed by the tailzie 1692, upon the heirs of the entailer’s estates in Germany, to reside in Scotland if they succeeded to the Scotch estate, and of the relative irritancy and forfeiture; and the discharge is immediately followed by a declaration, that the heirs of entail shall be bound and obliged ‘to maintaine compleat, fulfill, performe, and clossely adhaere to the hail other clauses, conditions, provisions, restrictions, limitations, irritancies, reservations, and exceptions specified and contained in the fors^d regrat bond of tailzie, also well and sicklyke in all poynts as if the samyne were ane by ane herein at full length, and *per expressum* insert and set down with the burden whereof, (excepting alwayes their coming to and abode in Scotland, as is above excepted,) thir presents are made and granted by me, and accepted off by ane or either, and all of them successive, as aforesaid allenarly, and no other-ways.’

“The deed of 1700 was recorded in the register of tailzies in July of that year, and in May 1707 the entailer, with consent of his son George Leslie, by another deed, dispensed with and abrogated a restriction contained in the entail of 1692, against letting of leases with diminution of the rental, which deed of 1707 was in 1739 recorded in the register of probative writs.

“Upon the death of George Leslie, he was succeeded by Ernest Leslie, his eldest son, who, in 1739, was served nearest and lawful heir-male of tailzie and

No. 157.

July 1, 1845.

Paterson v.

Leslie.

was made up on the deed of 1700, without any mention of the first deed. Now it is quite clear that there is a great change made on the previous destination of the

provision in general to his father, conform to the deed executed by Patrick, Count Leslie, in 1700, under which his father was the fiar, and he completed his title by charter of resignation, and sasine thereon, in which the prohibitions and irritancies of the deed 1692 are set forth *ad longum* in the manner mentioned in the paper. The subsequent heirs have since possessed upon titles in precisely similar terms with the investiture which was perfected by Ernest Leslie.

"In this state of matters, it appears to the Lord Ordinary that the deed 1700, which not only contained the lands previously entailed, but lands subsequently acquired or to be acquired, must be held to constitute a new conveyance of the lands entailed by the deed 1692, under which a feudal investiture had been previously completed—that the latter deed was thereby entirely superseded and displaced as the source or foundation of the right of the heirs called to the succession, and the former substituted for it—which then became the title of conveyance upon which the right of the heirs to the lands contained in it stood, instead of the deed 1692, which, as a conveyance and disposition of the lands, was in effect absolutely recalled, and ceased to be of any operative power. Accordingly, the deed 1700 was recorded as the entail of the estates of Balquhain and others, and all the subsequent titles have been made up upon that footing. The title of Ernest Leslie is made up by service under the deed 1700, and his title and those of the succeeding heirs proceed upon the assumption, that it is by that deed, and it also, that the feudal right in the estate of Balquhain was conveyed to them. In all of the titles it is dealt with as a substantive tailzie, or bond of tailzie, forming the real basis on which the investiture of the heirs was to rest.

"A point is raised in the papers, whether the reference in the deed 1700, to the limiting and irritant clauses of the entail 1692, is contained in the procuratory in the former, and whether the resignation upon that procuratory required to be made, or could competently be made, under the fetters of the deed 1692. The Lord Ordinary thinks that, without going into that matter, and assuming that resignation could be competently so made, and that so far the titles completed by the heirs, in which the fetters of the entail 1692 are set forth, are unobjectionable, there is enough remaining in the case to warrant the conclusion that, whatever may be the legal effect of the deed 1700, and the reference therein made to the deed 1692, as a conveyance to the heirs of entail, subjecting them to questions *inter se*, to the prohibitions, limitations, and irritancies of the deed 1692, there is no valid entail of the lands of Balquhain for the purposes of the statute, as in a question with onerous third parties. He thinks that this conclusion follows from the nature and character of the deed of 1700, as already explained.

"Holding the view which has been taken of the deed 1700 to be correct, that deed came to form the proper entail of the estate of Balquhain; for it appears to be a clear matter that the deed by which the lands are conveyed to the heirs of entail, and upon which their right rests as its fundamental and originating title, must be taken to be truly the proper deed of entail, and not a prior deed, which although therein referred to, ceased to be the title conveying the lands. The 'original tailzie' contemplated by the statute is that deed of conveyance executed by the proprietor which forms the origin or foundation of the subsequent investitures of the institute and substitutes. But, if so, then what are the provisions and declarations of the statute? It provides, 'That it shall be lawful to his Majesty's subjects to tailzie their lands and estates, and to substitute heirs in their tailzies with such provisions and conditions as they shall think fit, and to affect the said tailzies with irritant and resolute clauses, whereby,' &c. And further, 'It is also declared, that such tailzies shall only be allowed, in which the foregoing irritant and resolute clauses are inserted in the procuratories of resignation, charters, precepts, and instruments of seisin.' And there then follows the pro-

state by this deed of 1700, and that there are also other changes and alterations made by it on the positive provisions of the tailzie of 1692. Reference is no doubt

No. 157.

July 1, 1845.
Patterson v.
Leslie.

reason for recording the 'original tailzie' in the register appointed to be kept for that purpose.

"Now it is apprehended, that to satisfy the requirement imposed by the above declaration, it was essentially necessary that the prohibitions and irritant and resorative clauses under which the estate was to be conveyed should be engrossed, if not in the procuratory, at least in some part of the deed of 1700 itself, (the latter being a relaxation from the terms of the express statutory provision, which has been allowed upon a principle that in fact assumes that the provision even there truly complied with,) and that it could not be satisfied by a mere reference in the deed of 1700 to the prohibitions and limitations as contained in the deed of 1692, and by recording the deed of 1700 in addition to that of 1692.

"In the state of the deeds, the deed 1692 had ceased to be any thing more than an instrument containing the prohibitions, limitations, and irritancies under which the grantor, when thereby settling the estate of Balquhain upon the heirs named, had declared that the estate should be enjoyed; and it was by the deed 1700 kept in force, as containing the prohibitions, limitations, and irritancies, (except in so far as altered,) under which the estate was to be enjoyed by the heirs to whom it was by the deed of 1700 conveyed. But it ceased to be in force to any further extent. It ceased to be the title to the estate. To that extent both it, and the restitute completed upon it, were swept away. It therefore became nothing more than a deed of prohibitions, limitations, and irritancies, and as such it was a deed perfectly distinct and separate from the deed of 1700. No doubt it is recognised by the deed of 1700. Its limiting and irritant clauses are referred to as being to be obligatory upon the new series of heirs of entail; and it is declared that the deed of 1700 is granted, and is to be accepted with the burden thereof. But the two deeds could not thereby be united into one instrument. They remained separate deeds, and the result is, that while one deed conveys the estate, the other forms the title of the heirs of entail, the prohibitions, limitations, and irritancies under which the estate is to be enjoyed are not contained in that deed; they are not inserted in it, and do not appear in it as registered in the register of tailzies, but are there only referred to as set forth in a separate deed, in which they had been inserted when that deed was to form the title of the heirs who were then entitled to the succession. That is—there is one deed for the conveyance and title of the lands, declaring that they are to be enjoyed under the prohibitions, limitations, and irritancies described as contained in another and separate deed executed several years before, and there is that other and separate deed setting forth the prohibitions, limitations, and irritancies, so referred to, in which alone, as registered, they appear in the register of tailzies, while it is only in the titles afterwards made up—in the charter of resignation obtained by Ernest, Count Leslie, the assine thereon, and subsequent titles—that the whole come to be embodied in one deed.

But this being the state of the case, the Lord Ordinary can see nothing in the Act 1685 which countenances the idea, that, by such a form of proceeding, a deed of entail against third parties can be effectually constituted. On the contrary, the Act contemplates that the prohibitory, irritant, and resorative clauses shall be inserted in the deed, which forms the conveyance or settlement of the lands; and that they shall be found by third parties in the record of that deed, and not in a separate deed, which is only referred to as containing them, and which contains nothing more. If not engrossed in the former, how can it be said that the provision of the statute has been complied with? They no doubt must be engrossed in subsequent titles, but they must also be engrossed in the radical title itself, in the procuratory or precept thereof, or at least in some part of the deed, by which constructively they are held to be inserted in the procuratory or precept, by which they will appear in that deed as registered in the register of tailzies,

No. 157. made to the restrictions and limitations of that deed, though in the procuratory of resignation there is no such reference, nor any enumeration of them. This is just, then, an attempt to make an entail by reference to another deed; but it is a settled point that this cannot be done. In the Aboyne case, it was found that the decision in the case of Bromfield had settled the point, and that it was not now to be disturbed. Upon the whole, then, I cannot find any difficulty in agreeing with the Lord Ordinary.

July 1. 1845.
Paterson v.
Leslie.

I thought, at one time, that there might be a resemblance in this case to that of Porterfield; but, in reality, there is no similarity between the two. This is just the case of a man saying, "I will make a new entail;" but, not having done

so that the creditor or purchaser will find them there without looking further. If that be not done, then there is no entail framed in terms of the statute to put upon the record. The recording it, although it refers to another deed also recorded, as containing the prohibitions and clauses irritant and resolute, is not enough, for it is in the deed by which the lands are settled, and which forms the title of the heirs, and in the record of it, that a third party must find the prohibitions, limitations, and irritancies which qualify the title of the proprietor in the fee. If indeed it could be maintained that the deed of 1700 was not a new settlement of the estate of Balquhain and others, and did not require to be recorded as the entail of these lands, in as much as the deed of 1692 continued to be the entail thereof, although that deed as a conveyance was recalled, and the deed of 1700 became the title of the heir of entail, and the origin and foundation of the subsequent investitures, the case might be different. But if it did require to be recorded as the new settlement and existing title to the lands, then to refer the creditor or purchaser to another recorded deed is nothing to the purpose. It is the proper deed of entail which must, when recorded, convey full information of the fetters which are meant to be imposed; and if so, if at the outset the deeds were imperfect to the effect of constituting a valid entail against third parties, then clear it seems to be that that could not be accomplished by the titles afterwards completed, although in them be inserted all the provisions, conditions, and irritancies, and they thereby appear in the recorded infestment of the lands.

"With regard to the attempt to bring the present case within the principle which ruled that of Porterfield, by representing the deed of 1700 as being to be viewed as a nomination of heirs, the Lord Ordinary shall only say that, however ingeniously supported, he holds the principle of decision there adopted to be totally inapplicable here. There the original conveyance and destination remained untouched and continued in full operation, and the subsequent deed only named a portion of the heirs who, by force of the prior conveyance and destination, were to take the estate. That deed came to be a part of the original deed. It was its filling up and complement. It was the evidence, but not the foundation or source of the right of the heirs thereby nominated; and in the original deed which continued as the conveyance and settlement of the estate, the prohibitions and clauses irritant and resolute, were *ad longum* inserted and appeared in it as registered. Here there is in all these particulars a direct contrast. In all of them the circumstances are reversed.

"But while it is conceived that the case of Porterfield and similar cases have no application to the one under consideration, the Lord Ordinary is of opinion that it is within the rule and principle which governed the case of Bromfield v. Paterson, as explained and confirmed by that of Lindsay v. the Earl of Aboyne, 2d March 1842, (4 Dunlop, 843—House of Lords, 5th September 1844—Scottish Jurist;) and that the view he has taken of it is in conformity to the legal doctrine which was there recognised and adopted. Reference may also be made to the late case of Stewart v. Stewart, 28d May 1844, (6 Dunlop, 1079.)"

that which is necessary by the Act to constitute one, the entail turns out not to be a good one, at least as against creditors. No. 157.

LORD MACKENZIE.—I am of the same opinion. I think the last deed was intended to be a new entail; and, being a new entail, we cannot hold that the fetters can be effectually constituted by reference to a previous deed, in a question with third parties. I go upon the decisions in the cases of Bromfield and Aboyne, and don't think it necessary to go further. These decisions were pronounced after full consideration, and drawing a distinction between questions *inter hæredes* and those of third parties. The judgment in the Aboyne case was affirmed in the House of Lords, and cannot now be overturned. July 1, 1845.
Paterson v. Leslie.

LORD FULLERTON.—I am of the same opinion also. I think the case is completely settled by the decision in that of Aboyne. I can have no difficulty in holding that the deed of 1700 was intended to be a separate entail, for I find it expressly so stated in the outset of it. The granter says, "I find it most expedient to alter the foresaid tailzie;" and accordingly he does alter both the destination, and the provisions and conditions of the previous deed. The only point, therefore, is, whether, this being a new entail, it includes in itself the whole necessary clauses; and if it does not, whether it can be held to be effectual against creditors.

Now this is just the point decided in the Aboyne case. No doubt, there was there a new set of lands attempted to be entailed; but that makes no difference in principle. If a party, as here, conveys the same lands by a new entail to a different series of heirs, the rule must be the same.

LORD JEFFREY.—I come to the same conclusion. I acknowledge that I did not think the point settled at the time of the decision of the Aboyne case; but now, since the judgment pronounced in it has been confirmed in the Court of last resort, all my doubts are dispelled. Between that case and the present it is impossible to make any distinction.

With regard to the analogy attempted to be made out with the Porterfield case, I think it fails at once. There, the investiture had been made up on the old title; while here, the whole of the investiture under the tailzie 1692 has been abandoned and swept away by the new one under the deed of 1700. If the entailer had made a deed merely altering the previous destination, without a new conveyance of the lands, and put it on the record of tailzies, according to the cases of Porterfield and Don, that would have been quite competent. But he has gone further, and made an entirely new deed.

THE COURT adhered, with additional expenses.

GORDON and BARRON, W.S.—WALKER and MELVILLE, W.S.—Agents.

No. 158. ALEXANDER LAWSON and OTHERS, (Cattanach's Trustees,) and ANDREW THOM and OTHERS, (M'Nab's Trustees,) Advocators.—*More.*

July 1, 1845.
Lawson v.
Low.

JOHN LOW, Jun., Respondent.—*Maitland.*

Landlord and Tenant—Process—Expenses—Stat. 6 Geo. IV. c. 160, § 10—Sheriff: Court Act of Sederunt, § 61.—Circumstances in which held, that where a party had lodged a minute abandoning a process of sequestration for rent, and consigned a sum of money to meet the expenses of the opposite party, which were ultimately found to be less than the sum consigned, a second application for sequestration was competent, though made prior to the consignment in the first.

July 1, 1845.

1st Division.
Ld. Robertson.
N.

JAMES CATTANACH let to John Low certain houses and lands, near Ferry-Port-on-Craig, and, on 10th February 1843, with consent of the trustees for his (Cattanach's) creditors, presented a petition to the Sheriff of Fifeshire for sequestration against Low, for the rent of crop 1842, as due at Whitsunday and Martinmas preceding; or, at all events, the first half due at Martinmas preceding, and the next at the succeeding Whitsunday, (1843.)

Low, in answer, maintained that the rent was not payable until the term of Whitsunday 1843; and, moreover, that as Cattanach had granted a disposition in security in favour of John M'Nab, containing an assignment of the rents of the subjects, which had been intimated, he had no title to insist in the application.

On 23d May 1843, a minute was lodged by the petitioners, stating that they were about to present a new application, and that, therefore, they "abandon the proceedings in the present cause, and are ready to pay the respondent his expenses therein, as the same shall be taxed by the auditor of Court; reserving right to the petitioners to bring a new action."

The Sheriff allowed the cause to be abandoned, on payment of the full expenses of process.

The same day on which the minute, abandoning the first process, was lodged, a second petition was presented, at the instance of Cattanach's trustees, with consent of Cattanach himself, for any interest he had, and of John M'Nab, for himself and for his interest, praying for sequestration for the half-year's rent due at the Whitsunday preceding—and the Sheriff-substitute pronounced an interlocutor, by which he granted warrant for sequestration.

The respondent reclaimed against this interlocutor, by what was termed an incidental petition, on the ground that the original process was still in dependence, the condition of the petitioners being allowed to abandon it, viz. payment of expenses, not having been implemented.

The petitioners then consigned £5 with the clerk of Court to cover these expenses, and thereafter lodged a minute, authorizing the respondent to draw £2, 16s., being the ascertained amount thereof.

No. 158.

July 1, 1845.
LAWSON v.
LOW.

The Sheriff-substitute, after advising with the Sheriff, pronounced the following interlocutor:—"In respect that, at the date of the present petition for sequestration, the former process of sequestration, at the instance of the petitioners against the respondent, continued to constitute a *lis pendens*, finds the said petition incompetent, and dismisses the same: Finds the petitioners liable in expenses, subject to modification." *

Previous to this interlocutor, the rent sequestrated for had been consigned with the clerk of Court, and paid over to the petitioners, and the sequestration in consequence recalled.

The petitioners advocated and pleaded;—

I. Under the statute 6 Geo. IV. c. 120, § 10, and the Acts of Sederunt regulating the forms of process in Sheriff-courts, it was not necessary that the expenses of the action, which had been abandoned, should be ascertained and paid before any new action could be raised. It was true, that to enable the pursuer to abandon the action, he must pay the expenses to the defender, otherwise the action must be dismissed by the Judge, and expenses found due. But the new action might be raised before the expenses were either paid or ascertained, and had no connexion either with the payment of these expenses, or with the abandonment of the first action. A new action might competently be raised while the other was in dependence, and this new action must be disposed of on its own merits. It might be dismissed as being unnecessary, if it were really so, or it might be conjoined with the original action, if it should contain any additional conclusions, or if it should be raised at the instance of any new party, or if any other good reason could be stated for raising it. The mere circumstance that a previous action was in dependence, had never hitherto

* "NOTE.—The right of a pursuer to abandon an action before decree of *absolvitor* has been pronounced, depends on the Act of Sederunt, and must be regulated by its terms, which expressly require payment of full expenses as a condition of the abandonment. Until the condition is implemented, the abandonment is not completed, but the process continues a *lis pendens*, in which the defender may insist on obtaining his decree of *absolvitor*, if that be otherwise competent. In the present instance, the expenses were not even modified or ascertained. The Sheriff has great doubts whether the consignment of a random sum to cover the expenses, would be held sufficient compliance with the Act of Sederunt. But, in this case, no such consignment was made until after the date of the petition in the present application, and even until after the date of an incidental petition by the respondent, in which the fact of the failure to comply with the terms of the Act of Sederunt had been noticed and founded on. Although the petition has been thrown out on a point of form, the Sheriff would, under the circumstances, have thought the respondent entitled to full expenses, had not the respondent, by refusing to close the record, caused a very unnecessary accumulation of procedure."

No. 158.

July 1, 1845.

LAWSON V.

LOW.

been held to render incompetent a new action ; and it would be singularly inexpedient, and might lead to the most unjust results, were the doctrine laid down in the interlocutor now under review to be sustained. It might happen that the first action had been abandoned solely in consequence of some technical objection to the execution of the summons, or to the form of the action ; and, if this were to occur a day or two before prescription had run upon a bill of exchange, or upon an open account, it would be unjust to hold that such mistake could not be remedied by immediately raising a new action, and getting it executed in correct form. But, according to the doctrine of the interlocutor now under review, such new action would be incompetent till the expenses of the first action had been ascertained and paid, and it would thus be put in the power of the defender to let the prescription elapse before it was possible for the pursuer to raise his new action. 2. The respondent, holding in his own hands the whole year's rent of the subjects in question, amounting to £35, which was far more than sufficient to pay any expenses which could be awarded in the first action, it must, in all reasonable construction, be held that these expenses, which he was entitled to deduct from the rent, were truly paid to him, as soon as the abandonment of the action was duly notified. 3. The pursuers having consigned with the clerk of Court the sum of £5, to meet any expenses which might be awarded in the first action, in consequence of its abandonment ; and these expenses having been afterwards taxed at £2, 16s., the pursuers did more than they were bound to do in consigning the said sum. 4. As the second process was raised at the instance of M'Nab, an heritable creditor, who, according to one of the defences stated in the first, was the only party entitled to raise it, it might have been competently raised and insisted in, even though the first action had never been abandoned at all. And it was, therefore, a mistake to hold—even assuming the Sheriff's doctrine in other respects to be correct—that this action could not be competently raised till the expenses in the first action were paid. 5. If the reason assigned for dismissing the action be well founded, it ought to have been stated and disposed of as a preliminary defence. But not only was no such defence pleaded, but the action was sustained, and the record closed, and various interlocutors upon the merits pronounced, which are long ago final, and which have been implemented by the parties, and which the Sheriff had no power to recal. How, after all this, the action was to be dismissed, or what was to be the effect of such dismissal, it was not easy to see.

The respondent pleaded ;—

1. By the 10th section of the Judicature Act, and the 61st section of the Sheriff-court Act of Sederunt relative thereto, payment of the defender's expenses was a condition precedent of abandoning an action, and, until these had been paid, the action subsisted, and the defender might

take decree of *absolvitor*. 2. As the second action here had been raised before the expenses in the first had been paid, or a sum consigned to meet them, there was a *lis pendens* existing, which warranted the interlocutor complained of. 3. The objection founded on *lis pendens* could not be removed by the consignment, in the first action, of a random sum to cover the expenses.

No. 158.
July 1, 1845.
Lawson v.
Low.

The Lord Ordinary pronounced the following interlocutor:—" Finds that, on the 10th of February 1843, the advocator, James Cattnach, with the consent of the trustees for his creditors, for their interest, presented an application for sequestration against the respondent Low, for the rent of crop 1842, as due at Whitsunday and Martinmas preceding, or, at all events, the first moiety due at Martinmas preceding, and the next at Whitsunday 1843: Finds that, in answer, the respondent, *inter alia*, maintained that the rent was not payable until the term of Whitsunday 1843; and that the petitioner, Cattnach, having granted a disposition in security in favour of one John M'Nab, containing an assignation to the rents, which had been intimated, he had no title to insist in the application: Finds that, on the 23d May 1843, a minute was lodged in the said application, in which the petitioners stated that they were about to present a new application, and, therefore, they 'abandon the proceedings in the present cause, and are ready to pay the respondent his expenses therein, as the same shall be taxed by the auditor of Court—reserving right to the petitioners to bring a new action:' Finds that, on the same day, the Sheriff allowed the cause to be abandoned, on payment of the full expenses of process—reserving to the parties to bring a new action, if otherwise competent: Finds that, on the said 23d day of May, the present application, at the instance of the trustees of the said James Cattnach, with consent of the said James Cattnach, for any right or interest he had, and of the said John M'Nab, for himself and for his interest, was made, praying for sequestration for one half-year's rent, as due at Whitsunday preceding—thus giving effect to the plea of the respondent; and, on the said 23d day of May, the Sheriff 'having considered this petition, and the former case at the petitioner's instance against the respondent having been abandoned, in terms of the Act of Sederunt,' granted warrant of sequestration: Finds that the sum of £17, 10s., being the half-year's rent, was consigned—and that it was maintained that, as the expenses in the former proceedings had not been paid, there was an undue accumulation of actions: Finds that, on the 7th June 1843, the rent of £17, 10s., to become payable at Martinmas, was also consigned; and, in respect of the said consignment, the sequestration was recalled on 8th June, and the rent was received up by the petitioners on the 22d of that month: Finds that a record was afterwards made up, in which the respondent attempted to bring forward a claim of damages, which was repelled by the Sheriff as incompetent: Finds that, in the original application, the respondent, on 30th May 1843, presented a

No. 158.

July 1, 1845.
Lawson v.
Low.

reclaiming petition against the interlocutor allowing the cause to be abandoned, and that the petitioners consigned the sum of £5 to answer the claim of expenses, the amount of which, as afterwards claimed at the sum of £2, 16s., was agreed to be paid by the petitioners: And finds that, notwithstanding such consignment, and the actual recovery, under the present proceedings, of the whole rent due, the plea of *lis pendens*, in respect of the application abandoned in manner foresaid, has been sustained by the interlocutor now brought under review: Finds that the present application was in itself competent and regular, and that the former proceedings, which were objected to by the respondent as irregular, both with respect to the terms at which the rent was demanded, and for the want of concurrence on the part of John M'Nab, to which pleas effect was given in the new application, did not, after the former application had been abandoned, and more especially after consignment of a sum to answer expenses, constitute any *lis pendens*, so as to include the present application: Therefore advocates the cause, alters the interlocutors of the Sheriff complained of; and, in respect of the consignment and payment of the rent, finds any further procedure on the merits of the application unnecessary, and decerns: Finds the respondent liable in the expenses incurred, both in the inferior court and this Court."

The respondent reclaimed.

LORD JEFFREY.—*Lis pendens* is not an objection to the competency of a summons being called in Court. It may be a good objection to farther procedure in the action till the matter involved in the previous process has been exhausted, but not to the convening of the party *in curiam*. The respondent, I have no doubt, must be found liable in expenses.

LORD FULLERTON.—Were the question quite purely raised here—whether a party is entitled to raise a second action without having made payment of the expenses of the first, which he has abandoned, I should not think it so clear. That would not be a question of *lis pendens*, but one under the statute. When the statute says that a party shall be entitled to abandon an action only *upon payment* of the previous expenses, it would be difficult to hold that he is entitled to raise a new action without payment of them. For if the expenses are not paid, the first action is not abandoned, and decree may go out in it at the instance of the other party, and form *res judicata*. But, in this case, the difficulty is removed by the consignment; enough has been consigned to cover the expenses, which is quite sufficient; and on that principle I think the case is quite clear.

LORD MACKENZIE.—I take the same view; I think the consignment was quite sufficient, and that it was just equivalent to payment. I do not think the statute gives a party the power of abandoning an action until the expenses are paid or consigned. He may say he abandons it; but that is only abandoning his own pleas, for the opposite party may still take judgment against him. On the whole, in this particular case, I agree in the result which has been come to by the Lord Ordinary. I do not think the statute says that a new action, raised before the expenses in a previous one are paid, is to be an absolute nullity; but that is a question which we do not require to decide here.

LORD PRESIDENT.—I agree in the special circumstances of the case, and think No. 158.
that there is no ground for altering the finding as to expenses.

July 2, 1845.
College of
Glasgow v.
Earl of Eglin-
ton's Trustees.

THE COURT accordingly adhered, with additional expenses.

A. GIFFORD, S.S.C.—WOTHERSPOON and MACK, W.S.—Agents.

THE COLLEGE OF GLASGOW, Pursuers.—*Sandford.*
THE TRUSTEES OF HUGH EARL OF EGLINTON, Defenders.—*Sol.-Gen.*
Anderson—R. Henderson—Johnston—P. Fraser.

No. 159.

Teinds—Titular—Parish—Proof.—Circumstances in which held, that the payment for 200 years of “two and a half bolls parsonage,” from certain lands in one parish to the titular of another parish, did not give him a right to the whole teinds of these lands, on the ground that they were rental bolls, in a question with the titular of the teinds of the parish in which the lands were actually situated, and who was proved to have also drawn teinds from the lands.

THE Principal and Professors of the College of Glasgow, as titulars of the teinds of the parish of Kilbride, brought a process of valuation of the lands of Threeplands, belonging to the trustees of Hugh last Earl of Eglington, under the Acts 1633, c. 17 and 19, and 1690, c. 30. The title of the College to the teinds of Threeplands was thus set forth in the summons:—“That conform to Act of Parliament, dated 28th June 1617, and to precept from Chancery, dated 11th June 1618, in favour of the said College and the then professors thereof, and their successors in office, and instrument of sasine following thereon, dated the 2d, and recorded in the general register of sasines the 19th days of February 1620, the pursuers are titulars, and have always possessed, bruicked, and enjoyed, *inter alia*, All and Haill the kirk of Kilbride, called of old the chanterie of Glasgow, lying within the diocese of Glasgow, with the haill maills, farms, teinds, teind-sheaves, small teinds, fruits, rents, profits, emoluments, and duties whatsoever, pertaining or belonging to the said kirk, and comprehending, *inter alia*, the teinds of the following lands—viz. the lands of Threepland,” &c.

July 2, 1845.
1st Division.
Lord Wood.

The Earl of Eglington's trustees stated, as a preliminary defence, that no sufficient title to pursue had been libelled by the College, and that the title libelled had no reference to the teinds of the lands of Threeplands.

The Lord Ordinary reserved the discussion of the preliminary defence, and a record was made up.

The pursuers averred, that the lands of Threeplands were in the parish

No. 159. of Kilbride, and that for more than a century the teinds of these lands had been paid to the College of Glasgow as titulars of that parish, at certain agreed on commutation or rental bolls, described as parsonage bolls, or sums of money, latterly yielding from £2, 6s. to £5, 15s. yearly, and that this payment was regularly made down to the year 1802; about which time the College executed inhibitions against the heritors; and that the teinds of every year since that time have been given up in the College accounts as arrears.

July 2, 1845.
College of
Glasgow v.
Earl of Eglin-
ton's Trustees.

The defenders averred, that the lands of Threeplands lay wholly within the parish of Eagleshame, and that no part of them was in the parish of Kilbride; that they were patrons and titulars of the parish of Eagleshame, and that they and their predecessors had, for nearly two centuries, been in possession of the teinds of that parish, including those of the lands of Threepland. They admitted that, for a considerable time, two bolls and a half of meal were paid to the College of Glasgow, but denied that these were paid as the teind of the lands of Threeplands.

On the 21st December 1838, the Lord Ordinary pronounced the following interlocutor:—"Finds that the pursuers have set forth in the summons a sufficient title to pursue the present action, if it shall be proved that the teinds of the defenders' lands really were comprehended in the recent grant confirmed by statute, which is now libelled on: Therefore, before further answer, and with a view to prepare the case for a decision on all points, grants the pursuers a proof of the allegations in their condescendence, and also of the annual value of the lands and teinds as set forth in the summons, and grants the defenders a conjunct probation, as well as a proof of their own allegations in their statement of facts."

This interlocutor was adhered to on a reclaiming note by the defenders; and both parties accordingly led a proof of their averments, as allowed by it.

The pursuers led a parole proof, to show that the lands of Threeplands were in the parish of Kilbride, which consisted principally of the evidence of old people connected with the district, who remembered certain disputes which had taken place, whether Threeplands belonged to Kilbride or Eagleshame—it being said that the name of the lands was derived from these disputes.

The defenders produced a great number of plans, rentals, tacks, and other ancient documents, extending over a period of 200 years, in which the lands were uniformly described as situated in the parish of Eagleshame; while in all the rentals of the pursuers, with one exception, they were also described as belonging to that parish.

Cases having been ordered, the pursuers pleaded;—

1. That assuming Threeplands to be locally situated in the parish of Eagleshame, that was no answer to the claim of the College in point of

law, as it is notorious that lands locally situated in one parish often pay teinds to the titulars of another parish.¹ 2. That the predecessors of the defenders having for nearly two centuries paid to the College certain bolls in commutation of the teinds, as rental bolls, the titulars had a right at any time to use inhibition, and to claim the full teind; and that it was not necessary in support of this right to produce a tack of the teinds, as rental bolls may be paid either in virtue of a written rent-roll, or simply by use of payment.² Proof of the usage of paying rental bolls was therefore all that was required; and the books of the College showed, that from a period immediately subsequent to the time when the right to the teinds of Kilbride was obtained, the tenants of Threeplands had been in use to pay two and a half bolls, which were described as parsonage, and could not be considered to be any thing else than rental bolls.

No. 159.
July 2, 1845.
College of
Glasgow v.
Earl of Eglinton's Trustees.

The defenders pleaded;—

1. That for nearly two centuries the Eglinton family had been in possession, as titulars of the parish of Eagleshame, of the teinds of Threeplands, which were now claimed by the pursuers, and these teinds had all along been localled upon for the stipend of the minister of Eagleshame; that, in particular, by a contract entered into between the Earl of Eglinton and the then minister of Eagleshame, with consent of the presbytery, in the year 1665, a stipend was modified from the lands of Threeplands to the minister of Eagleshame, and the stipend thus modified continued to be paid down to the year 1791; and that, by the subsequent localities, these lands were also allocated upon for the teinds of Threeplands. 2. That it having been established by the proof, that Threeplands is in the parish of Eagleshame, of which they were undisputed titulars, it was incumbent upon the pursuers to produce a clear and undoubted right to the teinds of these lands, and to show an express title preferable to their otherwise exclusive right to them. But the title produced by the pursuers had no reference to the lands in question, as it applied to the parish of Kilbride, in the county of Lanark, and not to any lands in the parish of Eagleshame, in the county of Renfrew. That the claim of the pursuers, in point of law, rested on the alleged continuous payment of two and a half bolls, and was therefore founded upon prescription, and the acquisition thereby of the teinds as part and pertinent of the kirk of Kilbride; but that the payment of teind for any length of time, from lands lying in another parish, could not give the pursuers a prescriptive right to the teinds of the lands from which these teinds were paid, as part and pertinent of their grant. That the only cases in which teinds have been held to have been carried as part and pertinent, were of a quite different

¹ 2 Ersk. 10, 11.

² 2 Ersk. 10, § 25; Lennox, March 22, 1626, (Mor. 15328;) Galloway, Jan. 13, 1629, (M. 15329;) College of Glasgow, Feb. 20, 1633.

No. 159. and very special nature ;¹ and that the pursuers, merely as representing the kirk of Kilbride, and without any title whatever, either personal or completed by infeftment, to the teinds of Threeplands, could not acquire a prescriptive right to the teinds of these lands by the use of payment alone, even if found to have been made in the manner alleged.² 3. That even although there was nothing in the pursuers' title, or the nature of the subjects, which prevented the teinds of Threeplands from being claimed as part and pertinent of the kirk of Kilbride, still the claim made for them as part and pertinent of a grant of other teinds, could not compete with the express right to the same teinds existing in the defenders.³ 4. That, admitting that there had been a payment of two and a half bolls to the College, this was not a payment of the teinds of Threeplands, or a recognition of the right of the pursuers to draw these teinds. That it was incumbent on the pursuers to prove that the payment of these bolls, or their price, was a payment in full of the whole teind due from the lands ; but that in none of the documents founded on were they ever termed *rental bolls*, that they could not be assumed to be such, and that the whole argument of the pursuers on this head was therefore inapplicable. That whatever, therefore, was the origin of this payment of two and a half bolls—whether it was to be regarded as a ground-annual, or teind, or any other innominate fixed annual burden—it could not be held to give a right to the whole teinds to the titulars of Kilbride. 5. That the payment of the two and a half bolls had not been of the continuous character alleged by the pursuers, but had taken place only in a few isolated instances ; that the entries in the College rentals, except in a few of the earliest, were not entries of payments actually made, but of payments to be made ; and that the claim of the pursuers was therefore still more untenable from the irregularity of the payment.

The Lord Ordinary reported the case, accompanying his interlocutor with the subjoined note.*

¹ Scot, (Mor. 15638 ;) Callander, (Mor. 15649 ;) Ramsay v. Rose, (Hailes, 756.)

² Connell on Tithes, Vol. II. p. 68 ; Elchies *voce* Teinds, No. 26.

³ More's Notes, p. 201 ; Agnew v. Magistrates of Stranraer, Nov. 27, 1822, (2 S. 42.)

* " NOTE.—The pursuers have proved by the titles founded on by them that they are the titulars of the teinds of Kilbride, and it is as titulars of these teinds that they claim the teinds of the lands of Threeplands, which they say form a part of them, and which they accordingly allege have for a long period been possessed by them with the rest of the teinds comprehended in the grant. It is therefore clear that the pursuers have produced no express title to the teinds in question. The defenders, again, have proved by the titles which they found on, the earliest commencing in 1611, combined with the Act 1690, that the Eglinton family are, and have been from 1690 downwards, the patrons and titulars of the teinds of the parish of Eagleshame ; and they maintain that as such the teinds of the lands of Threeplands, of which lands they are the heritors, belong to them.

" It seems to be sufficiently instructed that the lands of Threeplands lie in the parish of Eagleshame, and not in the parish of Kilbride. There is some evidence

At advising,

No. 159.

LORD PRESIDENT.—The first question in the present case is in regard to the

July 2, 1845.
College of
Glasgow v.
Earl of Eglington's Trustees.

to show that the locality of these lands, as in the one or the other of these parishes, had at a remote period been a subject of doubt or dispute; but however that may bear upon the evidence of the possession of the teinds of Threeplands, to which the pursuers appeal as establishing their rights to them, it is thought that, as respects the present question, the lands must be taken to be in point of fact situated in the parish of Eagleshame, and the question at issue disposed of upon that footing. Indeed, the pursuers appear to admit that they must argue their case and make good their claim upon that assumption.

"In this state of title on either side, and of the locality of the lands, the right to the teinds of which is in controversy, the presumption, apart from possession, would be in favour of the defenders, and against the claim brought forward by the pursuers. Still there is nothing in the fact of the lands of Threeplands being locally situated in the parish of Eagleshame, which in law presents an absolute bar to the pursuers, as titulars of the teinds of Kilbride, having right to the teinds of these lands. At the same time, as that right is not said to stand upon any express title, but merely upon the general title on which the pursuers found, and as it is only by that general title being explained and fortified by possession, that it can be established to comprehend within it the teinds of the lands of Threeplands, lying in a different parish, it is clear that to have that effect the possession proved must be a possession which is attributable to the title to which it is ascribed, and is what in law amounts to a full possession of the whole teinds of the lands.

"Upon this point there is, it is apprehended, abundant evidence of an actual payment, for a very long period, of two bolls two firlots meal for parsonage, or an equivalent in value, having been made from the teinds of Threeplands to the pursuers or their predecessors, and which only ceased in 1803, upon the pursuers using an inhibition of teinds, in consequence of their demand for the actual amount of the whole teinds not having been acceded to by the defenders. Indeed it appears that the possession thus relied on by the pursuers was had by the College of Glasgow for forty years prior to the Act 1690, founded on by the defenders as giving them right to the teinds of Threeplands, and which Act contains a provision saving the right to teinds previously disposed of. The pursuers say that this possession was in truth a complete possession by them, as titulars, of the entire teinds of Threeplands by rental bolls, or a fixed quantity in lieu of, and as commutation for, the full value of the teind; and they have argued, that when the nature of the proof is considered, and the whole circumstances of the case, this is the sound conclusion to arrive at.

"On the other hand, the defenders allege, that although the payment just noticed was made to the College of Glasgow, the teinds of the lands of Threeplands, situated in the parish of Eagleshame, were, in the ordinary course of law, subject to the payment of stipend to the minister of that parish—that part of the stipend was localised upon them as early as 1685—and that in the different augmentations (but to which the College of Glasgow was no party) they have been taken into view as part of the proper teinds of that parish in modifying the stipend; and they maintain that the proof, therefore, truly goes to this, that the teinds of Threeplands were in possession of the family of Eglington, the heritors of the lands, as titulars of the teinds of the parish of Eagleshame, and that the annual payment out of these teinds made to the College of Glasgow cannot be held to have been drawn as an equivalent for the actual teind, in virtue of a right to the teinds as titulars of the teinds of Kilbride, and therefore as amounting to full possession, whatever proportion it may have borne to the whole teind, but must be viewed as a fixed payment, to which the College had acquired right in some particular way, the precise nature of which is now involved in obscurity.

No. 159.
July 2, 1845.
College of
Glasgow v.
Earl of Eglinton's Trustees.

possession, and whether the proof on this point be sufficient. It certainly does appear to be indisputable, that the College have right to the teinds of the parish of Kilbride; and they aver, that in virtue of that right they have drawn teinds from the lands of Threeplands. They maintain that the right they have thus exercised has been so in virtue of their royal grant. Now I must say, that it appears to me to be difficult to hold Threeplands to be in the parish of Kilbride, in the face of the evidence which the defenders have adduced. I no doubt see, that some evidence of old people has been led, in order to establish that there had formerly been a dispute as to the locality of the lands, and that Threeplands was not in the parish of Eagleshame, in the county of Renfrew, but in the parish of Kilbride, in the county of Lanark. But all this sort of evidence is entitled to very little weight; it neither extends to an ancient date, nor is it precise or definite in itself. The mass of documentary evidence which the defenders have laid before us, render it quite clear that Threeplands is in Eagleshame, in the county of Renfrew; and out of all these plans, rentals, tacks, and other documents laid before us, in order to settle this point as to the lie of the lands, none appears more conclusive to my mind than the fact, that in making out the old freehold qualifications, these lands were always treated as in the county of Renfrew. We all remember the strictness with which in former times these matters were scrutinized, and especially was this the case in a county so often and keenly contested.

Holding, therefore, the pursuers to have entirely failed on this part of their case the question now remains, whether the drawing two bolls two firloths, for a long period of time, is sufficient to give them a right, where otherwise they would not possess it. An ingenious attempt has been made to show that such payments were never actually made, and that the instances in which it is said they were made were at distant intervals, and originated in mistake. I cannot, however, adopt this. I hold that these payments were made by the Earls of Eglinton down to the year 1803. This is established by the correspondence, factors' accounts, and receipts produced. Now the question comes to be, What were the two bolls two firloths thus paid? After giving the subject full consideration, I can arrive at no other

"With regard to the statement thus made by the defenders, it is to be observed that the alleged appropriation of a part of the teinds of Threeplands to the minister of Eagleshame, was by a contract dated in 1655, and that it does not appear that it had reference to any proceedings in Court. Then as to the final localities in 1791 and 1812, the teinds of the lands belonging to the Eglinton family were given up *in cumulo*, and it is impossible now to say whether those of Threeplands were included or not; while, with respect to the subsequent locality, it is certain that the teinds were not included, the state of the teinds containing only those of the lands, the teinds of which had been valued by a decree obtained in 1810, and which, it is admitted, did not comprehend the teinds of Threeplands.

"It is in this state of matters that the present case arises. The Lord Ordinary cannot say that he has formed any clear opinion upon the matter. But, upon the whole, he is rather inclined to think, that as in a question with the defenders as titulars of the teinds of Eagleshame, the possession proved to have been had by the pursuers must, in the circumstances, be held to be a possession of the teinds of Threeplands by rental bolls received as a commutation for the full value of the teind, and that they have therefore established their right to these teinds, and have consequently, in virtue of the title libelled, a sufficient title to insist in the present process for the valuation."

conclusion than that they are rental bolls, which are well known in teind law, although very few cases have occurred upon the subject, and none since I have been upon the Bench. I find Sir John Connell explaining that these bolls were used as the commutation for the whole teinds, and, so long as they were drawn, were to be held as the full value of the teinds. The Court have enforced the right to them until a valuation should be obtained by the titular, or by the party paying. This is exactly the present case. There is a clear grant to teinds of Kilbride, and this is a good title to acquire a right to teinds; for, the mere fact of Threeplands being in Eagleshame, is not sufficient to free the Eglinton family, the proprietors of these lands, from payment of the teind to the titulars of Kilbride, if there be inveterate practice of payment of two and a-half bolls. If they be rental bolls, and I can hold them to be nothing else, then the law in regard to the case is clear, for the title of the pursuers is good. I say nothing, however, as to a question of great difficulty, about which I observe our text-writers are not agreed, viz., as to the mode in which teinds shall be valued, where, by long usage, they have been commuted to rental bolls. Stair's opinion upon this point is contrary to that of Erskine, and Connell combats both. This question is at present not *sub judice*, and I do not feel myself called upon to express an opinion upon the subject.

LORD MACKENZIE.—This is a question of some difficulty, but, upon the whole, I am unable to agree with the opinions expressed by the Lord Ordinary. It seems to me to be clearly established, that the lands of Threeplands lie in the parish of Eagleshame. Of that parish the defenders are titulars, and I, therefore, hold very strongly, that they are titulars of the teinds of the lands of Threeplands, unless the College establish a sufficient right to them. Have they done so? In my opinion they have not made out any right whatever to the teinds in question. I cannot see that they have established any thing, except a payment of two and a-half bolls, the nature of which they have failed to explain, and the origin of which is lost in obscurity. It certainly happens, that that payment is connected with the right which they possess to the titularity of the neighbouring parish of Kilbride; but Threeplands is not in Kilbride, and so their right just comes to this, that they have drawn payment of two and a-half bolls, and are titulars of Kilbride; but that is all. Their argument is, that that sufficiently shows that they are titulars of Threeplands, and that these two and a-half bolls were the commutation for the *whole* of the teinds of these lands. *Quomodo constat*, that they are for the whole? Why might they not be for a part? What could have prevented it, that the payment might not have been made upon an inferior right? It is nowhere said *expressly*, in any one of these many documents, that the bolls are *rental bolls*. This might not have created perhaps much difficulty, if the party insisting upon payment of the teinds had been otherwise the undoubted titular of the parish in which the lands lie. Then, if any ambiguous payment had been made to him of certain bolls, it might have been a very natural inference to conclude, that these were what are known in teind law as rental bolls; but in this case the pursuers have no pretensions to be titulars of Threeplands, and there is therefore no presumption in their favour as to what the bolls really were. The lands appear to have been too large and too valuable, for two and a-half bolls to constitute the commutation for the whole teinds; and therefore I am obliged to conclude, that whatever may be the origin or the nature of these bolls, they are not rental bolls, and that the pursuers have failed in making out a right to the titularity of the teinds of Threeplands.

No. 159.

July 2, 1845.
College of
Glasgow v.
Earl of Eglinton's Trustees.

No. 159.

July 2, 1845.
College of
Glasgow v.
Earl of Eglinton's Trustees.

LORD FULLERTON.—I am of the same opinion as Lord Mackenzie. If these lands of Threeplands had been in the parish of Kilbride, there would have been no question in this case; but the circumstances present a case, where the Eglinton family are the undoubted titulars of Eagleshame, in which Threeplands is situated, and the College of Glasgow claim a right to the teinds of these lands, in virtue of a grant which is not express. The Court formerly held that the defenders had not produced a title to exclude, because it might be perfectly possible that the College of Glasgow, under their grant to the chanterie of Glasgow, &c., might have a right to the teinds in question. They were allowed a proof to establish their right, and they have only established this, that at certain intervals two bolls two firlots have been paid to them. The question then comes to be, whether these are *rental bolls*?—and I am of opinion that they are not. Rental bolls exist in the case where a party, who has an unquestionable right to the teinds, has drawn certain bolls from the heritor; and in such a case, if the titular's right were opposed, all that would be necessary would be for him to show the entry in his rental, as establishing the value of his right. But in this case the pursuers have no title at all; and, with regard to the possession, that has only amounted to the drawing the two and a-half bolls. On the other hand, Lord Eglinton has a perfect right to the whole teinds of the parish; and it is proved that he drew teinds from Threeplands. Why, therefore, should the College's right be held the preferable of the two? Here are two titulars—the one possessing upon a good title, the other not. Why hold the two and a-half bolls to be the commutation for the whole teinds, seeing that there is no evidence that they were rental bolls? Whatever, therefore, may be the right of the College to draw these two bolls two firlots, I hold that, in the circumstances of the present case, it would be impossible to hold them to be the commutation for the whole teinds of these lands.

LORD JEFFREY.—I have arrived at the same conclusion with Lords Mackenzie and Fullerton. The whole question seems to me to be decided by the fact, that Threeplands lies in Eagleshame. The case fails on this ground, in all the points necessary to support titularity. The elaborate exposition of the law in regard to rental bolls, is in this case unnecessary. Erskine, and the cases which have been decided, go to a different question altogether. They apply to the case where there is an undoubted titular, who has drawn certain bolls from the heritors, and where there is no dispute that he that draws is the titular. In such a case, the payment of rental bolls must be held as the commutation for the whole teinds. But the case here is totally different. It is one whether, by the indefinite payment of certain bolls, the titularity extends beyond the precise use or possession had. It is limited by the very terms of the entries in the College's own rentals, where Threeplands is said to pay to Kilbride only two bolls two firlots. It has been completely established that the lands lie in the parish of Eagleshame; and it is shown by the documents of the College themselves, that from these very lands teinds are paid to the titular of Eagleshame. Here, therefore, the *onus probandi* lies on the party who claims a right to the teinds of one parish, by virtue merely of his right to the teinds of another. If there had been evidence of a tack granted by the College to the proprietors of Threeplands, or if the bolls themselves had been entered as rental bolls, the College might have had the semblance of a case; but we have nothing in the world of all this. We have merely the naked fact that two and a-half bolls were paid; and we are, from that circumstance alone, asked

to come to the conclusion that these are the commutation for the *whole* teinds. No. 159.
 It is perfectly plain, that at a very early period the proprietors of the lands of Threeplands became bound to pay certain sums to the minister of Eagleshame. July 2, 1845. Pollok v. Morris.
 This is established by the contract of 1655, which is an important adminicle in the evidence, and though voluntarily entered into, was acted upon down to a late period. It cannot be denied by the pursuers, in point of fact, that there was thus a payment of teinds by the tenants or heritors of Threeplands, for more than a century, to the minister of Eagleshame. How, then, can you hold, in the face of that fact, that the mere payment of two and a-half bolls to the titulars of Kilbride, is conclusive of the right of the latter to the whole teinds? The quantity of grain that was given to the minister of Eagleshame appears to have been greater than that paid to Kilbride; and in every view of the case, therefore, I am clearly of opinion, that the right of the College to the teinds of Threeplands has not been established.

With regard to expenses, the Court were of opinion that the pursuers were justified in trying the case, looking to the interests that they were bound to guard, and therefore found expenses due to neither party.

THE COURT pronounced the following interlocutor:—"Find that, in a question with the defenders as titulars of the teinds of Eagleshame, the pursuers have not established their right to the teinds of the lands of Threeplands; and to this extent, therefore, sustain the defences, and assoilzie the defenders from the conclusion of the libel: Find expenses due to neither party in this discussion."

HOPKINX and CAMPBELL, W.S.—TOD and HILL, W.S.—Agents.

MRS JANET POLLOK OF TENNANT and HUSBAND, Pursuers.—*Rutherford—Maitland—Moir.* No. 160.

DR WILLIAM MORRIS and MORRIS POLLOK, Defenders.—*Ld. Adv. McNeill—Sol.-Gen. Anderson—Ingliston—Tennent.*

Process—Jury-Trial—Bill of Exceptions.—Held, that a motion to amend or alter a signed bill of exceptions, so as to make it consistent and in conformity with the notes taken by the presiding Judge at the trial, was incompetent.

Proof—Jury-Trial—Insanity.—1. In the reduction of a settlement on the ground of insanity, certain letters written by the wife of the testator, shortly before the execution of the deed under challenge, and containing directions purporting to be from him upon matters of business, were tendered in evidence by the defenders as his "act and letter;"—Circumstances in which held, (on a bill of exceptions,) that these letters had been properly rejected by the Judge at the trial, on the ground of want of evidence of their having been written by authority

No. 160. of the testator, or of his having been cognisant of their contents. 2. Also held, that it was the province of the Judge to decide upon the admissibility of the letters, and that he would have acted erroneously had he, by allowing them to go to the jury, left it with them to determine whether there was evidence of their being the act and letter of the testator.

July 4, 1845.
Pollok v.
Morris.

Process—Jury Trial—New Trial.—Circumstances in which a motion for a new trial was refused.

July 4, 1845.
1st Division.
Lord Ivory.
Jury Cause.

THIS was an action of reduction of a cedecil to the settlement of the late James Pollok, manufacturer Glasgow, upon the ground of mental incapacity. An issue, whether it was "not the deed of the said James Pollok," was sent to a jury, and tried before Lord Ivory at the sitting in March 1844, when the jury found for the pursuers.

At the trial various letters were tendered in evidence by the defenders. These the Judge, of consent of the pursuers, allowed to be received for one purpose, but rejected for another, and the defenders excepted.¹ No note of exception was given in at the trial, the parties, as usual, trusting to the Judge's notes.

On coming to adjust the bill of exceptions, the parties were not agreed as to the terms in which the letters had been tendered, the defenders maintaining that they had been tendered generally, and the pursuers that they had been tendered only for the two specific purposes mentioned in the ruling of the Judge, by which they were allowed, of consent, to be received for the one purpose, and rejected for the other. The Judge proceeding upon his notes and recollection, (after various interviews with the parties,) was satisfied that the last was the correct state of the matter and refused to sign a bill of exceptions containing a different statement. His Lordship accordingly corrected the bill submitted to him by the defenders, so as to make it in accordance with the state of the fact, in his view of it. The bill so corrected was ultimately signed.

The defenders having obtained a copy of the Judge's notes, thought that part of them which related to the tender, upon a proper construction, supported their view of its terms, and accordingly moved the First Division, before which the cause depended, "to amend or alter the bill of exceptions for them, so as to make it consistent and in conformity with the notes taken by the Lord Ivory, presiding Judge at the trial."

In support of this motion, they produced affidavits from their own agent, and a shorthand writer employed by him at the trial, as to the terms in which the tender had been made.

Rutherford and Maitland, against the competency of the motion, argued;—The bill signed by the Judge was adjusted by his Lordship after various interviews with the parties, and was the only one which he could sign consistently with the facts, and his notes as he construed them. The

¹ For terms of exception, see pp. 979-80.

defenders had not availed themselves of the provisions of the Act 55 Geo. No. 160. III. c. 42, § 7, and the relative Act of Sederunt, § 32, for securing the terms of their exception by giving in a note of it, and having it settled and signed before the jury retired. It was admitted that this provision was generally neglected in practice, but, at the same time, it was often observed, and was the only regular course. In respect of the general practice, it was not contended that by the neglect the defenders were deprived of their exception; but it was submitted that, having left it to the Judge's notes, they must take it as it there appeared on the Judge's own interpretation of them. There was no statute, or rule of Court, or obligation in point of duty, obliging a Judge to take notes in any particular form, or otherwise than might be necessary for his own satisfaction. Those he did take were always subject to his interpretation. Was his construction, then, to be overcome by affidavits of agents and shorthand writers? If this were allowed, there would be affidavits on both sides, and then the only resource would be the Judge's notes as explained by himself. In the English cases referred to by the defenders,* where bills of exceptions had been allowed to be amended, the Judge concurred in the statement that they were erroneous. This was merely a remedy where mistakes had crept in by inadvertence, as to which there was no dispute. The rule in England was the same as our own, that the bill of exceptions must be tendered at the trial, and no action would lie against the Judge for refusing to sign it unless so tendered.¹ The party must observe this statutory provision, if he mean to proceed by action against the Judge.

July 4, 1845.
Pollok v.
Morris.

But it was said that the Judge ought to have refused to sign the bill tendered, if he was dissatisfied with it, and leave the party to his remedy, but had no right to make any alteration upon it. The verdict had not been applied because there was a signed bill before the Court. The Judge refused to sign any other bill, and, if the party was dissatisfied with it, let him give it up, and then the verdict would be applied. He must either go on with the only bill the Judge would sign, or allow the verdict to be applied, and take such remedy against the Judge as he thought proper.

The Lord Advocate and *Inglis*, in support of the motion, argued;—The exception taken was to the rejection of evidence by the Judge at the trial. If a record of what took place was preserved in the Judge's notes, so as to show the evidence tendered and rejected, that was sufficient to found a bill of exceptions, without any note signed by the Judge at the time. The defenders alleged that certain documents had been *generally* tendered, whereas the bill signed by the Judge bore that they had

* See next page.

¹ *Tid's Practice*, p. 284.

No. 160.

July 4, 1845.
Pollok v.
Morris.

been tendered for a *particular* limited purpose ; and the motion was to have this misrepresentation in the bill corrected, by altering it so as to be in conformity with the notes taken by the Judge at the trial. All the defenders asked was, that if they should satisfy the Court that the bill was not in conformity with the Judge's notes, but different in a material respect, it should be corrected.

The Judge's notes were the only authoritative record of what took place at the trial ; and the bill of exceptions, which was merely a formal statement of it, must be in conformity. There were no Scotch cases in support of the remedy sought, but there were English cases, and they were of authority.¹ The theory of bills of exceptions was the same in both countries ;—that they were just a formal setting forth of what was shortly taken down in the Judge's notes.² What was to be made the subject of the bill must be taken down at the time, so as to be conclusive against all parties.

The requirement of the statute, that a note of the exception should be written and signed by the judge and counsel before the jury retired, had been entirely superseded in practice, by allowing it to be taken down by the Judge in his notes, and read over to the parties. The bill now before the Court was at variance with the notes, and put into the counsel's mouth a statement he disclaimed, which was incompetent where a record had not been kept at the time.³

The Judge might refuse to sign a bill of exceptions if he thought it incorrect, but was not entitled himself to alter or amend it. His signing was not a judicial but a ministerial act. In the case of *Smith v. Mackay*,⁴ the question occurred, whether a Judge might sign a bill of exceptions after he had resigned his office ? It was referred to Lord Chief-Justice Tindall, who answered that he might, upon the ground that he was not thereby exercising any judicial function, but merely testifying that the bill contained a correct statement of what took place at the trial.

The remedy in England where a Judge refused to sign a bill of exceptions was this :—A writ was issued to compel him to do so, or else to allege a reasonable cause to the contrary ; the writ issued in a trial to which the Judge was a party, and in which, therefore, his conscientious statement could not be taken.⁵ A Judge had no right to send a party into Court with a bill which was not his own. He might refuse to sign that which was submitted to him by the party, but was not entitled to sign any other.

¹ Cally, (11 Adolph. & Ellis, 1013 ;) *Powell v. Maskall*, (2 Napp's Cases in Priv. Coun. 161.)

² Starkie, 527 ; *Wright v. Sharp*, (1 Salkell, 287.)

³ Adam's Treat. p. 333 ; and App. p. 140.

⁴ Jan. 27, 1835, (13 S. 324.)

⁵ 3 Chitty's Practice, 808.

The case was, therefore, out of shape here ; for the Judge ought to have refused to sign the bill at all, and left the party to his remedy. No. 160.

The Judge was bound to keep notes of what passed at the trial—particularly of evidence tendered and rejected, and such notes as might be intelligible to the Court¹—and his notes were not a sealed book. He might be required to attend and give explanations of his notes, and what the effect of these explanations might be was not now the question. The party was bound by the note taken of his tender ; and being bound by it, must he not also have the benefit of it ? The question was, whether a party was entitled to have his tender of evidence set forth in the bill in the same terms as in the Judge's notes ? The Judge thought his memory better than his notes, while the defenders thought his notes better than his memory. July 4, 1845.
Pollok v.
Morris.

The Court were unanimously of opinion that the motion was utterly incompetent, and directed that no notice should be taken of it on the record.

Of a subsequent date, the case was heard on the bill of exceptions.

Mr James Pollok had been engaged in business in Glasgow for many years as a manufacturer. In May 1811, in consequence of an attack of paralysis, he gave up attending to business, and went along with his wife to reside at Largs, where, upon the 29th of June, he executed the codicil under reduction. Upon his leaving Glasgow, Mrs Pollok had arranged, that in consequence of his state of health, Mr Speirs, his partner in Glasgow, should correspond with her upon matters connected with his business. Mrs Pollok had not previously been accustomed to take any charge of business. Accordingly a number of letters passed between Mrs Pollok and Mr Speirs. Mrs Pollok's letters contained directions and instructions to Mr Speirs from Mr Pollok upon business matters, which were for the most part prefaced by the words, " Mr Pollok desires me to say." The directions and messages so conveyed, were acted upon both by Mr Speirs and by other parties. Mrs Pollok's letters also generally conveyed an account of the state of her husband's health.

It was stated in evidence by Mr Speirs, in reference to these letters, that when he had seen Mr Pollok on two subsequent occasions, he understood him to be aware that Mrs Pollok corresponded with him, but not that he had dictated the letters ; and that he never had any conversation with Mr Pollok, in which he was given to understand that the contents of the correspondence had been communicated to him.

At the trial, the defenders, Dr Morris and Morris Pollok, tendered in evidence the above correspondence—Mrs Pollok being admitted to be dead—in so far as it contained her statements as to her husband's health,

¹ Adam's Sup. on Bills of Exceptions, p. 19.

No. 160.
 July 4, 1845.
 Pollok v.
 Morris.

and also as the act and letter of Mr Pollok. The presiding Judge (Lord Ivory), of consent of the pursuers, allowed the letters to be received in regard to Mr Pollok's state of health, "but *in hoc statu* rejected the same as the letters, acts, or correspondence of Mr Pollok himself, until it was established that the said letters of Mrs Pollok were proved to have been written by Mr Pollok's authority, or that he was cognizant of the contents of the same, or of the said correspondence with Mr Speirs."

The defenders excepted.*

They pleaded;—The meaning of the tender of the correspondence, as the act and letter of Mr Pollok, was not that it was offered as actually his writ, or as having been written by procuration of him or through a notary, but rather in the sense of its being sufficiently connected with him, as to prove how he dealt with matters of business, and what he did by the hand of another, during the period over which it extended. The words of the tender were to be construed by the subject-matter of the trial—the question was not one of mandate, or whether Mr Pollok would be bound by his wife's letters, but was one of mental capacity to execute the codicil under reduction, and they were tendered as evidence of a state of mind sufficiently unimpaired for this purpose. It had been proved that Mrs Pollok had desired Mr Speirs to correspond with her upon business, upon Mr Pollok's retiring to Largs. Previously to this she had never interfered with business matters; and the letters which she then wrote contained instructions upon business, and showed a familiarity with it, which she could not of herself have possessed. These letters were also acted upon by Speirs. They contained the strongest internal evidence that they emanated from Mr Pollok. But, besides, Mrs Pollok prefaced most of the letters by the statement, "Mr Pollok desires me to say." Being now dead, her statements in these letters had become admissible evidence, and connected their contents with Mr Pollok in the most direct manner. There were sufficient materials in the letters themselves and the other evidence, and it ought to have been left to the jury to say from these, whether there was proof of Mr Pollok having given authority for their being written or not.¹

The pursuers pleaded;—The letters in question had been tendered by the defenders as the act and letter of Mr Pollok himself; but they had not proved that they had been written by his authority, or that he had dictated or revised them, or that he was cognizant of their contents; and this could not be proved from the letters themselves. They had not been tendered as the letters of Mrs Pollok; but even although they had, they

* The terms of the exception, of which the import is given here, will be found at length in the Lord President's opinion, pp. 979-980.

¹ Earl of Fife, (1 Murray, p. 95;) Scott v. Wilson, (3 Murray, 529;) Wright v. Tatham, (3 Starkie, 1280; 7 Ad. and Ellis, 388;) Rex v. Hucks, (1 Starkie, p. 526.)

ould have been inadmissible, on the ground of Mrs Pollok's interest No. 160.
 er the codicil. In the state of the evidence, the presiding Judge
 ht not to have sent the letters to the jury, and they were properly July 4, 1845.
 eted. Had they been sent to the jury in the manner in which they Pollok v.
 e tendered, the jury would not have been at liberty to judge of whe- Morris.
 y they were the acts and letters of Mr Pollok, but would have been
 ad to have read them in that character, and would have been limited
 dging of their effect merely on the question at issue.

ARD PRESIDENT.—We must attend closely to what is set forth in the bill of
 ions, from the precise terms of which we are not entitled to travel in any
 et.

he question raised on the bill relates solely to the rejection of certain letters,
 h were tendered by the defenders in evidence on the trial of an issue, on the
 id of incapacity to execute that codicil of the settlement of the late James
 it, which is dated 29th June 1841. The exception was taken by Dr Morris
 Morris Pollok, and it is to the way in which these letters were tendered, and
 round of their rejection by the Judge, that we alone must look in deciding
 er the bill of exceptions ought or ought not to be allowed. Let us then
 to the bill, in order to see how the letters were actually tendered by the de-
 ns, and refused to be admitted by the Judge; and also what are the excep-
 taken to his decision. These are to be found from page 76 to page 81 of
 ll of exceptions; and, though it may be somewhat tedious, they must be
 in detail, and examined minutely. I am not going to trouble your Lord-
 with any observations on the progress or nature of the trial. That we are
 ed to be aware of, from the rest of the bill of exceptions; but you will
 e on page 76, at the examination of Speirs, this appears on the face of the

ereafter, the counsel for the said defenders did propose to give in evidence
 from Mrs Pollok, wife of the said James Pollok, addressed to the witness,
 Speirs, of date 20th May 1841—the said Mrs Pollok being admitted to be
 ad—in so far as it contained Mrs Pollok's statement relative to her hus-
 health; and also as the act and letter of Mr Pollok.

t the counsel for the pursuers, waiving objection to the admissibility of the
 er, in so far as it might contain Mrs Pollok's statement as to her hus-
 state of health, objected to its admissibility as the act and letter of Mr

ereupon the said Lord Ivory, of consent, allowed the said letter to be re-
 evidence, so far as it contained Mrs Pollok's statement relative to her
 's health; but, in so far as it was tendered and proposed to be received as
 and letter of Mr Pollok himself, while it was not proved that he knew any
 it, or had given any authority for its being written, *hoc statu*, refused to
 e same to be received.

st Exception.—And the counsel for the said defenders did then and there
 o the foresaid ruling of the said Lord Ivory, in so far as the said letter was
 on the above ground, and did tender their exception accordingly.”
 then, is the first tender of that single letter—an objection is taken by the

No. 160.

July 4, 1845.
Pollok v.
Morris.

pursuers to its admissibility—and here is the ground on which the Judge ruled that, *hoc statu*, it ought not to be received. I need not trouble you with referring to the farther evidence of Mr Speirs, but we come next to the second exception, which is in these words:—

“ Thereafter the counsel for the said defenders did propose to give in evidence the remaining part of the said letter, as the act and letter of Mr Pollok, when the witness was asked

“ *By the Court.*—Did any thing at this time, or any other, pass between Mr Pollok and witness, from which former gave witness to understand that Mrs Pollok acted in this correspondence by his directions? Mr Pollok witness understood to be aware that Mrs Pollok corresponded with witness, but not that Mr Pollok had dictated the letters. Pollok never stated to witness that he had either seen these letters, or been made aware of their contents.

“ *By Macfarlane.*—Had you ever any conversation with Mr Pollok, in which he gave you to understand that the contents of that correspondence had been communicated to him? *Answer*—No.

“ Thereafter the counsel for the pursuers did object to the admissibility of the remaining part of the said letter as the act and letter of Mr Pollok.

“ Whereupon the said Lord Ivory did sustain the said objection, *in hoc statu*, upon the ground before mentioned.

“ *Second Exception.*—And the counsel for the said defenders did then and there except to the foresaid ruling of the said Lord Ivory, in so far as the said letter was rejected on the above ground, and did tender their exception accordingly.”

Then your Lordships remember that the third tender related to all the letters between Mrs Pollok and Mr Speirs, conform to the list:—

“ Thereafter the counsel for the said defenders did propose to give in evidence the various letters from Mrs Pollok to Mr Speirs, and from Mr Speirs to Mr Pollok, mentioned in the following list, as the acts, letters, and correspondence of Mr Pollok, and insisted that the said letters were to such effect competent and admissible evidence, and ought to be received; conceding at the same time, that the whole of said letters, as so written by Mrs Pollok to Mr Speirs, were in the same situation with the letters from her already rejected, as regards the proof of authority from Mr Pollok to her for writing the same.

“ But the counsel for the said pursuers did object to the admissibility of the said letters as tendered, and on the grounds before stated by the said Lord Ivory, as applicable to the first exception.

“ Whereupon the said Lord Ivory, of consent, allowed the said letters to be received in regard to Mr Pollok's state of health, but, *in hoc statu*, rejected the same as the letters, acts, or correspondence of Mr Pollok himself, until it was established that the said letters of Mrs Pollok were proved to have been written by Mr Pollok's authority, or that he was cognizant of the contents of the same, or of the said correspondence with Mr Speirs.

“ *Third Exception.*—And the counsel for the said defenders did then and there except to the foresaid ruling, in so far as the letters were rejected upon the above ground, and did tender their exception accordingly.”

Such, then, being the special nature of the tender of those letters by the defenders as evidence to be laid before the jury, and the grounds on which, on the

objection of the pursuers, they were refused by the Judge—though your Lordships will carefully observe only *in hoc statu*—we are now to decide whether the exceptions to his decision are well founded or not. Now, in deciding this question, I must observe, in the first place, that I hold it to be clear and undoubted law; and, when I say this, you will be aware that I refer to the established law laid down in England, because any knowledge to which a Scotch judge can pretend to have on bills of exceptions or rules of law, raised on such questions, must be derived, and is necessarily solely derived, by making himself master of what the English authorities have said on the subject. We have no doubt the benefit of the Treatise of Lord Commissioner Adam, but he was a Judge who was appointed to introduce Jury-trial into this country, and adapt it to the laws of England. We have the benefit of his opinions; but he himself bottoms all his authority on the opinions of the Judges in England, and the adjudicated cases that have passed before them. I state this as applicable to my opinion of what the law is in this case; and I repeat generally, I must observe in the first place, that I hold it to be clear law, that it was the province of the Judge to have decided on the admissibility of those letters, and that he would have acted erroneously if he, by allowing the same to go to the jury, had left them to determine whether they had evidence sufficient to decide as to whether Mr Pollok had authorized the letters, or had dictated them; or, when written, had seen, sanctioned, and approved of their contents, and had desired them to be sent to their respective addresses, so as thereby to make them capable of being viewed as his own acts. Now I hold that the decision, as to the import of any such evidence arising from the letters and the rest of the evidence, could not be legally withdrawn from the Judge and devolved on a jury; and this, I think, is the clear import of the opinions delivered by the English Judges on the subject, and particularly by Lord Chief-Justice Tindal, in the case of *Wright v. Tatham*, reported in *Adolphus and Ellis*. His Lordship's words are—"It is for the Judge to say whether papers are found under such circumstances that they ought to be received as evidence. The Judge ought to draw such a conclusion as would be drawn by a sensible jury, but the question does not go to them." Again, the same learned Judge says—"The very question submitted to us here is, Whether or not, on a particular state of facts, evidence was rightly rejected? That question is one of the proper subjects of a bill of exceptions." And we all know, that a bill of exceptions is not worth a straw if it refers to any thing done by the jury themselves. Then Starkie, at p. 1280 of his work, has these same words—(Reads)—"Letters written by third parties, since deceased," &c. He then having laid down this as the undoubted rule of law, refers to this case of *Wright v. Tatham*. Now, when that case was last heard before the whole of the Judges, six of the Judges were clearly of opinion that all the letters should be rejected as evidence; the six others gave a different opinion, but also differing among themselves, for three were of opinion that all the letters were admissible, and three that only one was admissible. The Court of Error being thus equally divided, the case was taken to the House of Lords, and they affirmed the judgment of the Court below, finding that all the letters were properly rejected as evidence. These authorities distinctly show, that the Judge must decide on the admissibility of the letters in regard to the capacity of the testator, and that it can never be left to the jury to perform that part of his undoubted judicial functions. So then, looking only to the precise terms of the

No. 160.

July 4, 1845.

Pollok v.
Morris.

No. 160. tender of the letters, in reviewing the judgment of Lord Ivory in regard to their rejection as evidence, and putting ourselves exactly in the position in which his Lordship was at the trial, we are now to say whether his decision was right or wrong?

July 4, 1845.
Pollok v.
Morris.

Now, seeing the want of any evidence, except the assertion of Mrs Pollok herself contained in these letters, that she had been desired by her husband to state such and such things; that there is not only no sufficient evidence, that while he was living with his wife at Largs, to which place he had retired on account of his health, he ever saw or knew of their contents, or had desired the person or persons written to, to follow her directions as those of Mr Pollok himself; but that there is evidence given by Speirs, to whom most of those letters were written, that Pollok never spoke to him with regard to them, or indicated that he was at all aware of them—though it does appear that Speirs had acted in reference to the directions in some of these letters—I cannot hesitate, therefore, in holding that the Judge decided right in rejecting those letters as the acts and letters of Mr Pollok. As being such, they were alone tendered in evidence. Had they been so admitted, they must, one and all of them, have been taken and read by the jury as the actual letters of the party, the validity of whose deed they were considering; because, being once admitted under the statute, they became judicially stamped as the written acts not of Mrs Pollok, but of her husband himself.

It is, however, not to be overlooked, that Lord Ivory only refuses to admit them *hoc statu*, leaving it in the power of the defenders, if they were able, to supply that evidence which was desiderated. Why the letters in question, after being admitted of consent, as far as they contained the statements of Mrs Pollok as to her husband's state of health, were tendered in the very special terms appearing in the face of the bill, it is unnecessary to enquire, as we are undoubtedly restrained from considering them as offered in any other way than as the acts, letters, and correspondence of the testator himself; and we are bound so to determine, whether as such they were, or were not, rightly refused to be admitted as evidence. That is our province, and we have no other.

I need not observe, my Lords, how totally different the case might have been, and how differently it must have been dealt with, had the letters in question been tendered at the time generally as evidence bearing on the question of the capacity of Mr Pollok, and as a part of the *res gestæ* bearing on the execution of the codicil under challenge; or if offered out and out as Mrs Pollok's own letters, *valent quantum*, now that she is dead. If so tendered, the question of admissibility, and as to what extent, might have been an important and delicate one, involving, as it must necessarily have done, that the codicil under challenge created a direct interest in Mrs Pollok by the addition made to her annuity, and which, in consequence of her death stood undischarged—not to mention the impossibility of her being subjected to a cross-examination. But all this is quite apart from the only point raised by the bill of exceptions, and I need not at present further advert to it. I am to be understood, as not disposing of it at present either in favour of one or other of the parties.

In reference to the only point that is now before us, I must be decidedly for disallowing this bill of exceptions.

LORD MACKENZIE.—I am of the same opinion as to the result. I have thought all along that this was a very narrow point before us. Certain letters—for they

are all in the same predicament—are written by the deceased wife ; and these are offered as the acts or letters of Mr Pollok, the husband, and this is not allowed by the Judge ; and that decision is excepted against. The exception then is, and must be, that the other's motion should have been granted, and that those letters should have been admitted as the acts and letters of Pollok. Now I cannot see that the Judge was bound to have admitted that ; and my reason is just that assigned by Lord Ivory himself—that it did not appear that the letters bore that character. The letters themselves could not by possibility prove it. All the world knows, that when a man's mind is failing, nothing is more common than for his friends, and particularly his wife—for she is the most proper of all parties—to go on writing letters in his name, and performing those ordinary duties which would have devolved on him, and with the most blameless intentions ; in short, to try to carry on his business, not in all respects, but in certain respects, in order to prevent mischief, and as if he was well. This appears to have been done here ; she assumes his name, or assumes his authority. But such letters written by his wife, bearing in appearance his authority, or asserting it, I care not of which, when the husband was in that state, it is impossible that we can allow to be tendered in the mode attempted here. It must necessarily be proved that she gave that authority, or was cognizant of those letters, and by extrinsic evidence—not alone by extrinsic evidence, for the existence of the letters may afford me probability that they were authorized ; but that goes so little way, that it can hardly be said to form any material part of the proof. Then as to extrinsic evidence ; why, there is nothing in the least resembling it here—nothing to satisfy the Judge that these letters were authorized by, and emanated from, Mr Pollok. On the matter appears on the face of the bill, the proposal made here to admit these letters as the acts and letters of Mr Pollok, appears to me to be one that must necessarily be refused by the Judge, because it was proposed that he should admit them as a thing of which he had no evidence. I cannot say the Judge was wrong in doing this. I need not go further, or into reasoning as to the consequence and effect of doing so. If a Judge is moved to admit a piece of evidence being what it is not, can he admit it ? I care not for the consequences ; he is not to be called on to admit a falsehood ; he is not to be called on to admit a thing that is not ; he might as well be called on to admit two letters as if they were only one. I therefore think he is right, without being entirely satisfied to adopt one part of the reasoning assigned to support it. I cannot agree with your friendship in the view, that if once admitted, they are judicially stamped. I doubt whether it would be consistent with the principles of jury practice, that if admitted, it would have tied down the jury to hold that they were the acts and letters of Mr Pollok. I have doubts of that. I hold the Judge to be dictator of what evidence is to be admitted or rejected. He may admit or reject of his own reason, and judge of those reasons himself, to the effect of admitting or rejecting. If he rejects, there is an end of the matter—the jury cannot see it. But if he admits, I doubt if the jury are tied down to hold that the reasons of the Judge are decisive with the jury as *probatio probata*. I think that a very doubtful point. I think when the evidence is before the jury—I do not wish to give any definitive opinion—but I say when the evidence goes before the jury, it ought to be *ex quantum valere potest*. And if they are inclined on looking either at the

No. 160.

July 4, 1846.

Pollok v.

Morris.

No. 160.

July 4, 1845.
Pollok v.
Morris.

same evidence as the Judge looked at, or on contradictory evidence—for the case may go on after its admission, and contradictory testimony be adduced—I do not see why they may not take an opposite view. I do not think they are bound by their oath, or the statutory practice, to take the view of the Judge. But if the Judge is required to admit a thing as being what it is not, I cannot see why he should not reject it. He has nothing to do with consequences. It is clear there would be bad consequences from the opposite course—its admission—because nothing is possible except bad consequences from a Judge doing that which he believes to be contrary to fact. If we are not entitled to say that the jury would be pinned down to this extent, we are at all events entitled to say, that it would have misled them, if the Judge had admitted these letters in the mode tendered as the act and deed of a person whose act and deed it is not. It is no trifling matter to do this in a question of insanity. If they were proved as the act and deed of the testator, they would be the best of all evidence as to his sanity. But if they were not proved to be of that character, then the supposition is entirely out of the question. Therefore a wrong judgment, if it did not absolutely tie down the jury, would greatly tend to mislead them; and therefore the Judge here was perfectly right. Whether the letters might have been admitted in any other way is not before us, and I do not wish to give any opinion on that point.

LORD FULLERTON.—The points here are presented to us within limits more rigidly defined, than those which are to be found in the usual cases arising as to the admissibility of evidence.

In general, a writing is tendered as relevant to the issue, and, when it is objected to, and rejected by the Judge, the question arising on the exception is the general one, Whether the document is admissible or not?—that being the question determined at the trial. And if we are satisfied that it ought to have been received, the exception must be allowed, though there may have been an omission to state at the trial the precise grounds or argument on which the Court of Review ultimately sustains its admissibility. But here the point is narrowed, first, by the terms of the tender of the documents, and secondly, by the special ruling of the Judge at the trial.

Both are perfectly explicit and unequivocal.

Take, for instance, the first exception to the deliverance of the Judge, on the tender of the letter of Mrs Pollok, of 20th May 1841.

That letter consisted partly of the statements of the writer as to Mr Pollok's health, and partly of certain directions in Mr Pollok's affairs, said by the writer to be given at the desire of Mr Pollok.

The first passages of the letter were read, with the consent of the pursuer; and the latter part of the letter was, according to the bill of exception, tendered "as the act and letter of Mr Pollok."

The counsel for the pursuer objected to the admissibility of the part of the letter tendered "as the act and letter of Mr Pollok."

The terms of the tender being thus clear, nothing can be more definitely or specifically expressed than the ruling of the Judge.—(Reads.)—And that ruling is the only matter excepted to. There never was any tender of the letter in any other character than that of the act and letter of Mr Pollok.

The other exceptions are all limited in the same way. It is needless to go over

them; but the exclusive character in which these documents were tendered, is particularly observable in the third exception, applicable to the whole correspondence passing between Mrs Pollok and Mr Speirs, a third party, all of which are tendered as the "acts, letters, and correspondence of Mr Pollok," and disposed of by the Judge by a ruling, that *in hoc statu* they were rejected, "until it was established that the said letters of Mrs Pollok were proved to have been written by Mr Pollok's authority, or that he was cognizant of the contents of the same, or of the said correspondence with Mr Speirs."

July 4, 1845.
Pollok v.
Morris.

Holding, then, as we must hold, that the bill of exceptions is decisive, first, of the terms of the tender, and secondly, of the ruling of the Judge, the only point which it is competent for us to entertain and determine, is, whether that ruling on that tender is well founded or not?

Whether these various letters, if tendered in the character of the letters and correspondence of Mrs Pollok and Mr Speirs, ought to have been received or rejected, is a question not before us, and from the consideration of which I hold the Court to be excluded by the very terms of the bill of exceptions. The only ruling is, that, as the acts and correspondence of Mr Pollok, they were not to be received *in hoc statu*, nor until something else were proved, viz., the authority or cognizance of Mr Pollok himself.

Even after that ruling, these documents might have been tendered as the letters of Mrs Pollok and Mr Speirs; but they were not, and consequently there was no deliverance, and no room for an exception on that point, which could bring the matter before the Court.

The only point, then, for us to consider, is, whether the Judge was right or wrong in laying it down, that letters written by one person could not be received as the letters and acts of another, without some extrinsic evidence of the authority or cognizance of this last party in regard to the contents of these letters.

Now when the question is reduced to this simple form, it must at once appear that the deliverance of the Judge was perfectly right. To warrant the holding of letters *de facto* written by A as the acts or letters of B, requires strong and very conclusive evidence; and it is sufficiently clear, that such an effect cannot be ascribed to the letters or writings themselves, except perhaps in the very particular case of notarial attestation. In the ordinary circumstances, the contents of the letters can prove nothing more than that the authority to write them was assumed, not that it was truly granted. The evidence of the last fact, which is indispensable, must be sought for elsewhere.

And when it is argued, as was very forcibly done on the part of the defenders, that as Mrs Pollok was dead, her statements on the subject might be proved, and in this case were proved by passages in the letters, there arises the very obvious consideration, that such evidence, even although admissible, is of itself quite inconclusive. In order to warrant the receiving of the letters written by Mrs Pollok, as the acts and letters of Mr Pollok, the Judge was bound to satisfy himself, on sufficient evidence, that they truly possessed that character; and certainly no evidence can be well supposed weaker on such a point than that of the party by whom the authority is assumed. Even when given on oath it is not free from suspicion, because every party who assumes an authority has a natural tendency, and, to a certain extent, an interest to support it; but here, Mrs Pollok's letters

No. 160.

July 4, 1845.
Pollok v.
Morris.

are, at best, statements made by her when not on oath, and even if admissible at all, are evidence of the lowest possible character. It is true that, by the practice of Scotland, the hearsay of a party deceased is admissible, but it is universally laid down, and that upon the clearest grounds, that it falls far short of testimony on oath. Accordingly, if in this case the defenders, instead of founding on the statements in Mrs Pollok's letters, had called evidence to prove that she had been heard to say that she had Mr Pollok's authority for writing them, such evidence might, perhaps, not have been altogether inadmissible; but can any one doubt, that until some much better evidence than that was produced, the Judge would have been fully entitled to withhold from the jury those letters as the letters and acts of Mr Pollok himself?

In short, when the pursuers put their case upon the statements in Mrs Pollok's letters, combined with the fact of her subsequent death, their argument necessarily involves the proposition that a letter or document, written by one party, and bearing to be by authority of another, becomes, by the death of the writer, complete evidence of the authority which he had assumed.

Another, and a more plausible view taken on the part of the defenders, is, that the letters and correspondence, independently of Mrs Pollok's statements of directions from Mr Pollok, afford strong intrinsic evidence, from their contents, that they were written with his knowledge; and that, therefore, as the inference was a matter of fact, the letters from which it was to be drawn ought to have been laid before the jury. And I must confess, that at first this raised the only difficulty which I felt in adopting the opinion of the Judge, that extrinsic evidence was indispensably necessary before sending the letters to the jury.

But upon more mature consideration of the nature of the point, and of the duty of the Judge in such circumstances, I am perfectly satisfied that he was right. The only point raised was, whether these letters were admissible or not, the only tender of them being in the character of the acts and letters of Mr Pollok. Their admissibility, then, was to be determined in the first place, and that was a point necessary to be determined by the Judge. He was to be satisfied that they were the acts and letters of Mr Pollok, before he could allow them to be read to the jury; and to send the letters to the jury, for the purpose of their determining whether they were the acts or letters of Mr Pollok or not, would have been submitting to the jury letters or documents, which, upon one very supposable view of the case, the jury ought not to have been permitted to read.

In short, the proceeding of laying these letters, in such circumstances, before the jury, seems to me to involve the manifest contradiction of allowing letters to be read to the jury, for the purpose of determining whether they ought to be read or not. It is clear, that if they are once read, the wrong is done against which the whole rules as to the admissibility of evidence are intended to guard.

Indeed, the view which I was at first somewhat inclined to entertain on this point, arose from my overlooking one very important circumstance, and the consequent distinction between this case and another, which might easily be supposed, and in which a reference to the jury, of the nature contended for by the pursuer, might perhaps have been competent.

If the letters had been tendered generally as the letters of Mrs Pollok and Mr Speir, and found to be admissible in that character, and if the counsel for the de-

nders had endeavoured to show in argument that they were entitled to have a more conclusive effect as evidence, on the ground that they were to be held and read as the letters and correspondence of Mr Pollok himself, it might have been competent, perhaps, for the Judge to leave the fact of the authority upon the letters and the other evidence to the jury, and to direct them, that if they were satisfied of the existence of that authority, they should give that higher effect to the letters and correspondence, to which, as the acts and correspondence of Mr Pollok himself, they were entitled.

But, then, it is evident that the competency of such a direction and such a procedure, in that case, necessarily involved one condition which does not exist here, viz. the admissibility of the letters and documents, independently of their being the acts and correspondence of Mr Pollok. Being thus, legitimately, evidence before the jury, there might be no incompetency in permitting the jury to draw any inference or fact from them which the documents could not. But here, these documents, so far from being admissible in any other character than that of the acts and letters of Mr Pollok, were not even tendered under any other description. There was and could be no deliverance on that point, and, consequently, there is no room for the question before us, whether they were admissible, under any other description, or not. The single point decided at the trial was, whether, as the acts and letters of Mr Pollok, they were admissible; and, for the reasons already assigned, I think that, until the judge was satisfied of their truly possessing that character, by some good corroborative evidence of the authority from the party whose acts and letters they were said to be, he was called upon to withhold them from the consideration of the jury.

LORD JEFFREY.—I concur with your Lordships, and substantially on the grounds stated, so that it would be idle in me to detain your Lordships or the court by going over the views and reasons already so well stated by your Lordships. I think, though, there might have been an embarrassing question about the letters if the procedure had been different; still, the narrow shape in which they are necessarily refused, as shown by the bill of exceptions, and by the clear intimation of the rejection to the precise terms of the tender, this really comes to the case admitting of no doubt. In the earlier part of the argument, I did share the doubt that Lord Fullerton says extended to him, as to whether there was some chance or some probability of those letters being ultimately viewed by the jury as nearly equivalent to proof of the actual interference and management by the defunct himself. But I agree with Lord Fullerton, that, in order to raise the question, they must have been tendered primarily as the letters of Mrs Pollok and not in any other character. I have been very much startled with some of the *dicta*, and I think binding authority in so far as regards us—I mean the authority of the *dicta* of the courts of law in England in cases pretty nearly parallel—at all events, strongly analogous to the present, and which would make it doubtful as to the admissibility of the letters in that large comprehensive view, and to embrace the view that the jury might have been entitled ultimately to rely on them as expressive of the mind of the testator himself, though deduced from the written remarks of the wife, and from other circumstances. But we are excluded from that consideration by the terms of the tender and the terms of the Judge's deliverance. I do not think it necessary to go further. But there

No. 160.

July 4, 1845.

Pollok v.
Morris.

No. 160.

July 4, 1845.
Pollok v.
Morris.

was no proof, or any circumstances of evidence by parole or otherwise, that tended to bring their knowledge to the defunct testator himself. There is not, therefore, any thing to make us hesitate; there is nothing bearing the very semblance, to fasten them on the party as his express acts. If the lady had sat down to write a letter, and had said—I am authorized by Mr Pollok to say that he passes from his claim for a certain debt, or that he guarantees payment of a debt, I should like to know if you could, on such evidence, hold that he had incurred any thing like a legal obligation. In fact, the proposition comes to be this—supposing that the letters had been written in the name of James Pollok, and signed Jane Pollok for Mr Pollok, then, without any proof except the statement in the letters—without proof otherwise that such procuration was ever given, they should be received on such evidence as his letters. But, further, there is not any evidence that Speirs appeared *de facto* to have acted on them as if he derived his whole authority from Mr, and not from Mrs Pollok. Speirs was not entitled to question whether the authority was or was not given by Mr Pollok. She might have usurped this authority for any thing he knew to the contrary. But, after all when we come to look at the instructions contained in those letters, why, they do not appear to relate to matters of any consequence. There is a great deal about a search for a certain paper. Now, it was very innocent to look into a receptacle for a document, or to say that they wanted an account settled by an agent in Edinburgh, which seems the main substance of that correspondence. All this did not necessarily require any special directions by Mr Pollok. Why, Mr Pollok, hearing him talking about this document, might say that in some of those repositories it would perhaps be found. But it is argued, that the instructions which she gave must have been derived from the unimpaired intellect of Mr Pollok. I do not think there is any weight in that view. And then we must look to the proof in the last examination of Mr Speirs, as to whether Mr Pollok, in conversation or in writing, had ever recognised these letters as being dictated by him. The answer is completely negative of that supposition; and, therefore, it just comes pretty much to this, whether there was practically any great harm in making search for a document, and whether it required any great intellect to advise that this search should be made. A woman is living in family with a man who is becoming imbecile, and is it not then very natural to suppose that the man might have been talking, in the wandering of his intellect, about these matters, and that she, in order to tranquillize him, should suggest this search to be made, and write accordingly. But, considering the purpose for which the letters were tendered as his act and writing, observe into what contradictory results it might have led, had the Judge admitted them in that form. Why, suppose there had been conversations at intervals between husband and wife about those matters, and that he, in the morbid excitability of his intellect, had expressed anxiety about them, for he seemed to be very low in spirits, and that she, to relieve him, had proposed that something should be done. What was this but the mere emanations of a weakened mind? Well, she writes a legible account of the matter, discarding his contradictions—leaving out the emanations of his impaired intellect, and guessing that which he seemed to wish. Suppose that all this should go to a jury, with the improvement of her perspicuity, and reduced into a distinct logical form, and that all this should go before a jury as his letters, he having the

advantage that her superior and unimpaired intellect would give, I say this course would be pregnant with the most tremendous injustice—the purpose for which the letters are produced being to show that the man who could write such letters could not possibly be in the state of incapacity to dispose of his property. I also hesitate, with Lord Mackenzie, as to whether, when once passed by the Judge, they were judicially stamped as the act and writing of Mr Pollok, and the jury would have been compelled to hold them as such. It is difficult to compel a jury to find against their convictions; but, whether legally, it might have been held right or proper in the performance of their duties, is a different question. But from all that we are relieved; there is no necessity for intimating a judicial opinion on what is not before us; but if a question had arisen on that, I should have had some difficulty.

No. 160.

July 4, 1845.
Pollok v.
Morris.

LORD PRESIDENT.—I was most careful in giving no opinion on these hypothetical cases. But I must not disguise that I have expressed an opinion, that, if they had been once admitted by the Judge as the acts and letters of Pollok; though the jury might have been entitled to examine them, they must still draw this conclusion; because, if they had assumed the power of rejecting them, then I say it would have been a good ground for setting aside their verdict.

LORD MACKENZIE.—I have doubts of that.

The Court accordingly disallowed the exceptions.

Of a subsequent date the defenders moved for a new trial, on the ground of the verdict being contrary to evidence; arguing that there was such a preponderance of the evidence in their favour, as to entitle them to have the verdict set aside. The pursuers argued that the case was merely one of conflicting evidence, of the import of which the jury were the proper judges, and was not one in which the Court could interfere.

At advising, Lord Ivory, who had presided at the trial, was called upon for his opinion.

LORD IVORY.—I can have no hesitation in saying, that the verdict returned by the jury was entirely satisfactory to my mind, as Judge presiding at the trial. When I state this, I do not wish it to be understood that the case appeared to me in all points so clear and decided as to leave no room for difficulty. On the contrary, there was in various particulars a considerable nicety and balance in the evidence, tending to present the case under a sort of double aspect; and so strongly did I feel this at the time, that in my charge I endeavoured, to the utmost of my power, to bring both views of the matter distinctly, and in their full strength, before the jury, withholding all expression of any opinion of my own, just in order that they might come as free from bias as possible to the conclusion which their own deliberate impartial consideration of the facts should dictate. The case, in short, I considered as resolving eminently into a jury question; and whatever difficulties may have attended it, they were just such difficulties as it forms the policy of the law, in regard to this branch of our judicial institutions, to leave to a jury to pronounce upon and to decide.

No. 160.

July 4, 1845.
Pollok v.
Morris.

In this view of the matter, I ought perhaps to add—so nice was it in certain respects to deal with some views of the case—that I might not have been prepared to express dissatisfaction with the verdict, even though the jury had happened to arrive at a different conclusion from what they did. I cannot say this, however, without adjecting the important qualification, that in that case the verdict would certainly not have so fully accorded with my own estimate of the real substance and weight of the evidence. On the whole, therefore, so far as I am sensible of having allowed myself at all to entertain or form an opinion, I should now say decidedly, that it appeared to me at the trial, and that subsequent reflection has suggested nothing to my mind to weaken or to alter that impression, that the conclusion at which the jury did arrive, was the conclusion most consonant with a full and fair appreciation of the whole of the evidence, as that evidence was on both sides laid before them for their verdict.

LORD PRESIDENT.—This is an application made to the judicial discretion of the Court, and ought unquestionably to be disposed of in conformity with those principles that have been recognised since the introduction of trial by jury into the judicial establishment of Scotland.

At an early period I had occasion to consider and act upon the law applicable to cases of this nature; and after the fullest consideration and attention to the practice of the courts of England, from which, in reference to the Act of 1815, establishing trial by jury in Scotland, it was indispensable we should draw assistance, I delivered an opinion in the case of *Baillie v. Bryson*, from the principles of which I have seen no reason to depart.

Its nature is to be noticed. There was strong evidence of a contradictory nature on both sides; but as to which, and the weight due to it, it was, as I conceived, the peculiar province of the jury to decide; and as there was no ground for holding that the verdict was in the face of the evidence, nor any such preponderance of evidence as evidently showed that the jury had gone wrong in proceeding to find as they did, I held with Lord Robertson and the rest of the Court, that no new trial should be granted in that case.

It was no doubt satisfactory to us of the Second Division afterwards to find, that our decision in the infancy of the jury system was held by the Lord Chief Commissioner to be fully sanctioned by the principles laid down by the Judges in England; and that the grounds on which we had proceeded were considered by him as applicable to our system of jury-trial, as is stated in his Treatise. I have accordingly continued to act upon the same principle in later cases, and particularly in that of *M'Phin v. Heritors in the Nith*, where, in reference to the bounds of that river and the water of Solway, in regard to stake-nets, a variety of contradictory evidence by engineers and others had been adduced on both sides, and the verdict was objected to by the Heritors as against evidence; but a new trial was refused upon the very same principles as those that ruled the case of *Bryson*. In this Division again, in *Donaldson v. M'Fee*, 30th May 1834, the Court decided in the same way, and refused a new trial.

I consider it, therefore, as completely fixed, that unless where a verdict appears manifestly in the face of evidence, or where the weight of it clearly predominates against the verdict—and where there is no objection to the case laid down in the charge, or objections from the improper reception or rejection of evidence—and

moreover, where the Judge, who tries the case, states no opinion against the verdict—the Court ought not to grant, in such cases, a new trial. No. 160.

We see also, that in the English cases, where there has been conflicting evidence, new trials have been refused, even when the Judge reported that the evidence in favour of the verdict was weak, and that he had summed up strongly against it; and where the Judge reported that the weight of evidence was with the plaintiff, and that in his opinion the jury ought to have found a verdict for him, still the Court refused to grant a new trial—it being stated by the Court, “as there was evidence for the defendant, the jury were the proper persons to judge on which side the weight of evidence was.” July 4, 1845.
Pollock v. Morris.

Keeping, then, in view the nature and circumstances of the present case, and applying to the motion made for setting aside the verdict and granting a new trial, the principles I have now referred to—and considering that there was undeniably a body of evidence, parole and written, both in support of the affirmative and the negative of the issue submitted to the jury—I cannot, in consistency with the opinions I have judicially before expressed, refrain from concurring with your Lordships, that this verdict ought not to be interfered with by us.

It cannot be a just ground for granting a new trial, that we ourselves might have found otherwise had we sat as jurors—we must be satisfied that the verdict is, in fact, against the evidence, or that the weight of it strongly preponderates on the other side, before we can with propriety grant a new trial; and, without at all entering on a review of the evidence as contained in the Judge's notes—from which I purposely abstain as altogether unnecessary,—it is only requisite to say, that in regard to the state of mind of the maker of the codicil under reduction, and his capacity at the date of its execution, there is contradictory and conflicting evidence, as to the effect of which the jury was the constitutional body to decide; and they having done so, and no dissatisfaction with their verdict having been expressed by the Judge that tried the case, their verdict must be allowed to stand.

As to cases that were noticed in the course of the argument, in which new trials were recently granted, I need only observe, that in that of *Smith v. Gentle*, there being evidence only led for the pursuer, the weight of which bore strongly against the verdict for the defender, I felt with the majority of the Court it was impossible to refuse a new trial; and in another case relative to sea-worthiness, the new trial was granted chiefly on the ground, that the jury had disregarded a direction laid down by me, that it was the usage of Great Britain and not of Nova Scotia, as to the sufficiency of an equipment of sails, that was to be regarded in considering the evidence.

LORD MACKENZIE.—I come to the same conclusion as your Lordship, and on the same grounds. At the time jury-trial was instituted, we were in the habit of altering our judgments very freely on representations and petitions, and with no great regard to what we might have done before; and there was naturally some apprehension that the same liberty might be taken with the verdicts of juries; but it was distinctly contemplated that if that was done, the system of jury-trial would be in a great measure nugatory. It was, therefore, an anxious object that it should be shown distinctly that verdicts were not to be set aside, and new trials were not to be allowed, merely because the Judges of the Court, if they had sat as

No. 160.

July 4, 1845.

Pollok v.

Morris.

jurymen, might rather have given an opposite verdict. Something—indeed a great deal—more than that was required before a new trial could be granted, on the ground of the verdict being contrary to evidence. It is very difficult to express that requisite distinctly. I would rather not express it, (and I am not called on to express it here) for no definition could be given at which a metaphysician might not carp. I cannot say the evidence should be all on one side—I cannot say that a preponderance of evidence will not do. If I was sure that there was a preponderance, if that preponderance was demonstrable, I might say the jury had decided wrong; but we must be sure that there is such a preponderance. But if I merely felt that there was a difficulty in coming to the same conclusion as the jury, I should not be inclined to alter, merely because I might feel that difficulty. There is here very strong evidence on both sides that leads to a great deal of doubt, indeed, but upon which it was the proper duty of the jury to decide. There was an observation made at the bar, which was to me quite unexpected, and that was, that if there was a case where the verdicts of jury might be deemed of less weight it was the case of insanity, which was not to be held to be like an ordinary question arising in the course of trade. Now, I must ask, what is our regular tribunal for trying the question of insanity, according to our old Scottish law, but a jury? We have no other way of trying it but by cognition, which has always been by a jury. Therefore, I never can enter into that view. In these circumstances, I have no difficulty in agreeing with your Lordships, and refusing a new trial.

LORD FULLERTON.—I agree entirely with your Lordships.

LORD JEFFREY.—I am of precisely the same opinion, and have been so from an early stage of the case. It strikes me, that the principle to be gathered from the decisions includes this case eminently and conspicuously. It is, as Lord Mackenzie says, that in order to warrant the quashing of a verdict, on the ground of its being contrary to evidence, we must be clearly satisfied that the jury are wrong; and although it is impossible to say, that wherever there is a conflict of evidence, the fact of its being the province of the jury to balance that evidence, should alone be sufficient to render the verdict inviolable; yet it does require the requisite alluded to by Lord Mackenzie, before it can be set aside. The *quantity* of evidence must be looked to, and preponderance alone might be quite sufficient to warrant the quashing of a verdict. If by some extraordinary ill luck in the adjustment of their verdict, a palpable error happens to be committed, into which you are quite sure, or rather you feel that the odds are fifty to one (but I shall not attempt to fix the proper ratio,) that no other twelve men would fall, we may then have recourse to a second jury. But this is not a case of that nature. It is not a case where the evidence on both sides is of the same quality. It is not one where, as we sometimes see, in a valuation, skilled persons and neighbours come forward and give such contradictory evidence, that you must judge what is the middle term to be taken. The evidence for the defender is the man of business who saw the deed executed; the evidence for the pursuer is the medical evidence as to the state of mind previous to and after the date of the transaction challenged, and those two kinds of evidence point to opposite points of the compass—to points totally adverse.

If you had the evidence of the man of business alone, the sanity of the testator

would be unimpeachable ; but if you look to the medical evidence for the pursuer, you find those gentlemen speaking of undoubted and unmistakeable insanity, of the progressive nature of the disease, of its being constant, without remission, or lucid interval. Now, I may say, and in doing so I follow the example of your Lordships, and do not go into any details, that I concur with the views taken by the presiding Judge of the actual preponderance of evidence on the side of the verdict. The jury are the proper judges of the credit and weight to be attached to the evidence of the different witnesses ; but I may say that, on the whole, I have no doubt that the just weight of the evidence is on the side of the pursuers—at least, to such an extent as not to allow us to interfere with the verdict of the jury.

THE COURT refused the motion for a new trial, and found the defenders liable in expenses.

WOTHERSPOON and MACK, W.S.—JAMES BURNES, S.S.C.—Agents.

JOHN STRACHAN, Pursuer.—*Maitland—Forman.*
GEORGE MONRO, Defender.—*Rutherford—Monro.*

No. 161.

Expenses—Reparation—Process.—In an action of damages, laid at £500, for “illegal, unwarrantable, oppressive, and injurious” conduct, in causing the pursuer to be apprehended and tried in a police court on a false charge of creating a disturbance, the defender, denying that the pursuer had a well-founded claim to any extent, tendered £5 and previous costs, which was refused : the case went to a jury, who found for the pursuer, with one shilling damages ;—Held that the defender was entitled to expenses subsequent to the date of his tender.

SEQUEL of case reported ante, p. 178 and p. 399.

Damages were laid at £500.

July 5, 1845.

1st DIVISION,
Jury Clerk.

In the defences, a previous tender was thus narrated and repeated :—
“The defender was unwilling to enter into such a litigation as the present with a party in the position of the pursuer, who is believed not to be responsible for expenses ; and he accordingly instructed Mr Andrew Millar, vice-chairman of the Shipping Company, to offer, on his account, to the pursuer, the sum of £5, and the costs incurred up to that date, it being expressly declared that the offer should not be held as any admission of error or liability on the part of the defender. The pursuer required the offer to be increased ; but Mr Millar stated in reply, that the ‘sum is more liberal than, even for peace’ sake, I could or would advise him to make, after all the inquiry, which, under the circumstances, I found it my duty to make. Mr Monro having offered to refer the matter to Bailie Gray, or any gentleman you might name, ought,

No. 161. in my opinion, to have spared him these judicial proceedings, as, although successful, he must gain a loss, and my opinion is, that, as a friend, I would have recommended the offer to be accepted.' The pursuer rejected the offer, most probably in the expectation that the defender's wish to avoid judicial proceedings of a personal nature, and especially with one in the position of the pursuer as his opponent, would lead him to increase it. The defender, however, is not inclined to add to that offer. He again repeats it; but under the express declaration, that he makes that offer from no feeling that the pursuer has a well-founded claim against him to any extent, but solely in order to put an end to a litigation which cannot, in any view, be pleasant or profitable."

July 5, 1845.
Strachan v.
Monro.

The jury found for the pursuer, with one shilling damages.

When the pursuer moved to have the verdict applied, with expenses, a counter motion was made by the defender, that he should be found entitled to his expenses from the date of the tender.

The pursuer pleaded, that the action was one for the vindication of his character; that it was so stated in the summons, and so put to the jury; and that, in cases of such a kind, a verdict, however small might be the amount of damages given, carried expenses.¹ That in those cases where expenses had been refused on the ground that a smaller sum had been given as damages than had already been tendered, the question had been as to the amount of damages merely, and not one of character.

The defender pleaded, that although in actions for defamation a verdict for the pursuer might always carry expenses, however small might be the damages given, the same rule did not apply to cases like the present, which was in reality an action of damages for violence to the person; and that as the jury had found a smaller sum to be due as damages than had been already tendered to the pursuer, instead of his being entitled to expenses, he, the defender, had a right to them from the date of the tender.²

LORD JEFFREY.—I think the case of *Anderson v. Marshall* was rightly decided, and that it is parallel in all points to the present. In all cases of the kind, there may be a statement that it is on account of degradation to character that the action is raised; but an action for assault or violence is different from one for defamation, though I do not know any case of violence, when committed on a party in the upper ranks, which does not resolve into a degradation. The circumstances of *Anderson's* case were almost precisely the same as those here, except that the present case is less favourable to the claim of the pursuer; for here there were no opprobrious expressions made use of towards him, while in *Anderson's* case there were such expressions used in addition to the blows. In that case, too,

¹ *Cowan v. Campbell*, Dec. 17, 1833, (12 S. 221;) *Lane v. Mathieson* Jan 23, 1841, (ante, Vol. III. p. 434.)

² *Anderson v. Marshall*, Nov. 24, 1835, (14 S. 54.)

there was a tender made, which was answered by the statement that the action was not raised for the recovery of money, but in order to clear the pursuer's character; and yet though the tender contained no apology, and none was offered either before or at the trial, the jury having returned a verdict for a less sum than was previously tendered, the pursuer was found liable in expenses. I shall not go into the merits of this case; for all that it is necessary to know is, that the jury, having the whole circumstances before them, and seeing the tender made by the defender, which was founded on by the pursuer's counsel at the trial, refused to give larger damages than a shilling.

No. 161.

July 5, 1846.
Strachan v.
Monro.

I am very far from saying that in all cases, even of pure defamation, a verdict for the pursuer will entitle him to expenses, though it is for a smaller sum than has already been tendered and refused. The Court will judge of every such case according to its own circumstances. In the present case, which is not one of defamation, but of personal violence, for the only degradation or injury to character was walking to the police-office in charge of a policeman, a tender having been made and rejected, and the damages the pursuer was found entitled to by the jury being less than the sum tendered, I think he ought to be refused his expenses; and I do not think we can stop there, but must further find the defender entitled to his expenses from the date of the tender.

LORD MACKENZIE.—I am of the same opinion. I do not think the jury, looking at all the circumstances of the case, had any serious intention of vindicating the pursuer's character. They thought that he had suffered a shilling's worth of injury, and therefore they gave him a shilling of damages. I think the pursuer would have been better with the £5 tendered to him by the defender, than with the shilling given to him by the jury. I agree that he must be liable to the defender in expenses from the date of the tender.

LORD FULLERTON.—I have some difficulty in this case. It has been said that all questions of damages arising out of personal violence, may be resolved in substance into questions of character; but here there was no real violence at all; for the only injury suffered by the pursuer, was the public exposure of being carried along the street by a policeman at mid-day,—than which, I think, nothing could be more degrading. The injury was very nearly entirely to character, and the action was put upon that ground. Now I do not think that, in such circumstances, an apology in the tender was absolutely necessary, for a tender implies an apology; but the defender was not entitled to say what necessarily took off from any apology, either express or implied; and I cannot conceive any thing more insulting than the language which he uses here. The defender says, that he will give the pursuer £5, not because he considers himself to have been in the wrong, but because he does not wish to go to trial with a person who cannot pay the expenses of the suit. It is this circumstance that constitutes the difference between this case and those which have been referred to. In them the tender was made, on the admission, implied at any rate, that a wrong had been committed, to induce the pursuer to abandon the action; while here it proceeds on no such ground, but is coupled with a most offensive reason. It is on this ground that I cannot concur in the opinions which have been expressed.

LORD PRESIDENT.—I think it perfectly clear that this case cannot be taken up as one of slander or defamation. It is no doubt a degradation to be taken along the public streets by a policeman; but I have no conception that it can be viewed

No. 161. in the same light as a case of slander; and therefore I do not think that the same rule can be applied. I think the case of Anderson comes very near to this; and I cannot say that I am moved by the observations of Lord Fullerton as to the terms of the tender. The defender did not admit he was to blame; but he tendered the sum offered for the injury which was said to have been sustained. I think, then, we must follow the precedent of the case of Anderson; and that we must find the defender entitled to expenses.

July 8, 1845.
Aitken v.
Galloway.

THE COURT found the defender entitled to expenses subsequent to the date of his tender.

MAURICE LOTHIAN, S.S.C.—GEORGE MONRO, S.S.C.—Agents.

No. 162.

PATRICK WISHART AITKEN, Pursuer.—*Penney*.
ALEXANDER GALLOWAY, Defender.—*Maitland—Moir*.

Bankruptcy—Trustee—Composition Contract.—A composition having been accepted by the creditors of a bankrupt, and judicially confirmed, along with an arrangement under which a sum of money was borrowed by the bankrupt on his heritable property, with consent of the trustee upon the sequestrated estate, in whose favour a security over said estate had been granted for payment of the composition in terms of the arrangement, and which sum was placed in his (the trustee's) hands, for the payment of the composition;—Held, that the trustee was bound to administer the estate vested in him, including the loan, for the equal and rateable behoof of all the creditors interested in the composition.

July 8, 1845.
1st Division.
Lord Ivory.
N.

FLEMING and WOTHERSPOON, coalmasters, as a company, and William Fleming, Gavin Wotherspoon, and Magnus Aitken, the partners thereof, having been sequestrated, Alexander Galloway was appointed trustee on the sequestrated estate. Gavin Wotherspoon offered a composition of eight shillings per pound on the debts due by the company, and by himself as a partner of it; and, in security thereof, offered to grant a bond and disposition in security over his whole heritable property in favour of Galloway, as trustee for the creditors. This offer was accepted, and a bond and disposition in security accordingly granted by the bankrupt, in terms of the agreement, to Galloway as trustee. At the same time it was arranged that the security thus granted should be made effectual to the extent of £600, by a loan over the property. This sum was advanced by John Wotherspoon, and an heritable bond was granted in his favour by Gavin Wotherspoon, with consent of Galloway as trustee. The £600 was paid over to the trustee. The offer of composition was judicially confirmed, upon a report by him, in which he narrated the agreement above mentioned, and expressed his concurrence in it.

The trustee having paid away the whole £600 to the creditors who

first applied to him for their composition, Patrick Wishart Aitken, a creditor of Fleming and Wotherspoon to the extent of £225, in a debt constituted by decree, who had claimed in the sequestration, and given his vote acceding to the composition, and who had received no part of the £600, raised action against the trustee to compel him to hold count and reckoning for that sum, and to pay him the proportion of it effeiring to his claim against the sequestrated estate.

No. 162.
July 8, 1845.
Aitken v.
Galloway.

The trustee maintained in defence, that by the acceptance and approval of the composition, the sequestration was brought to an end, and his duties as trustee terminated; and that in receiving and distributing the £600 among the creditors, he acted merely as the cashier or banker of the bankrupt. He pleaded, 1. That the £600 having been placed in his hands for the purpose of paying the composition offered *pro tanto*, and having come under no obligation to distribute it rateably or proportionally, or in any other way than had been done, he was not liable to the pursuer's demand. 2. That having accounted for every farthing of the funds placed in his hands, and applied them to their destined purpose, and being ready to convey the heritage standing in his person either to the creditors, or to any person they might appoint, the action was altogether groundless.

The Lord Ordinary pronounced the following interlocutor:—" Finds, in point of fact, 1st, That in respect of the decree of constitution libelled, it must now be taken as fixed that the pursuer was a just and lawful creditor of the company of Fleming and Wotherspoon, and of Gavin Wotherspoon, as one of the individual partners thereof, at the date of the sequestration of their respective estates, in the sum of £225 : 4 : 2d, That, as such creditor, he was and is entitled to the full benefit (whatever that may have been) accruing under the composition contract concluded between the bankrupts and their creditors, and afterwards approved of by the Court : 3d, That, by the said composition contract, it was, *inter alia*, agreed and settled, that the said Gavin Wotherspoon should ' pay a composition of 8s. per pound upon the amount of the debts owing by the company of Fleming and Wotherspoon, and by me, as a partner thereof, at the date of the sequestration : ' And further, that as a security to the creditors for said composition, he should ' grant a security, to be taken in name of my said trustee, (*i. e.*, of the present defender,) for the general behoof, over all my heritable property, with the usual powers of sale : ' 4th, That the pursuer, who had previously lodged a claim and affidavit applicable to his said debt, (and between whom and the defender, as trustee in the sequestration, the value of the annuity which composed the principal item thereof had been finally adjusted and fixed, under reservation of all objections competent against the general liability of the bankrupts,) was a direct party to the said composition contract, and attended and gave his vote in acceptance thereof, (through the medium of his mandatory duly authorized to that effect,) at the meeting

No. 162.
 July 8, 1845.
 Aitken v.
 Galloway.

of creditors held on 21st October 1841 : 5th, That in implement of this composition contract, the said Gavin Wotherspoon did thereafter, by bond and disposition in security, of date 26th February 1842, dispo-
 and convey ' to and in favour of the said Alexander Galloway in trust, as trustee for behoof foresaid, and to his successors as trustees, his whole heritable subjects, all in real security, and for payment to the said Alexander Galloway in trust, as trustee for behoof foresaid, and his successors, as trustees, of the said several compositions on the said estates before mentioned : ' 6th, That upon the said deed an instrument of sasine (bearing date 31st March, and recorded 26th April 1842) was passed in favour of the defender, therein still designed ' Alexander Galloway, banker in Airdrie, as trustee for the purposes after specified,'—that is to say, as ' trustee for the general behoof ' of the whole creditors interested in the composition contract above set forth : 7th, That, in the meanwhile, (but not to the defeasance, in any respect, of the security thus held by the creditors for payment of the composition through the medium of the trust constituted, as aforesaid, in the defender's person, as their trustee—and, on the contrary, in express conformity with, and in order to the more easy and ready extrication of the same, by *pro tanto* impressing the defender with the means of payment,) the defender had entered into an arrangement with Gavin Wotherspoon, whereby it was agreed that the said Gavin Wotherspoon should, through the mediation of a third party, obtain and pay over to the defender, as trustee foresaid, an advance of £600 on account of the said composition—the said John Wotherspoon, on the other hand, receiving, in consideration of said advance, a security of corresponding amount from the said Gavin Wotherspoon, with the defender's consent, over the heritable subjects of the said Gavin Wotherspoon, to which the defender had right, as aforesaid, in his character of trustee for the creditors : 8th, That this transaction was carried through, and the said security duly completed in, the said John Wotherspoon's person, with the express consent of the defender, who, on his part, in his character of trustee for the creditors, received the stipulated advance of £600, and, of course, held the same as he would otherwise have held the heritable subjects themselves, (the said advance having, in truth, come so far in place thereof as a *surrogatum*,) for the behoof of the creditors : 9. Finally, that in the official report made by the defender, as trustee in the sequestration, and which accompanied and was mainly the ground of the application whereon the composition contract was both approved of by the Sheriff and afterwards confirmed by the Lord Ordinary, the defender did accordingly set forth the grounds upon which he had concurred in the above change on the original shape of the composition security, in manner following—viz. that as it was ' stipulated that I, as trustee, was to get the full benefit of this transaction, by receiving the money, I had no difficulty in concurring in the same : ' The security has accordingly been executed, and the money paid to me ; and, in implement of the said offer

of composition, I have likewise taken security in my own favour, as trustee, over the bankrupt's heritable property, generally for the composition : ' The security in my favour will be completed by infestment, as soon as the discharge is obtained : ' Therefore finds, in point of law, 1. That whether the defender is, in the above circumstances, to be regarded as still continuing to hold his proper character of trustee in the sequestration, or whether the trust constituted in his person, with special reference to the composition contract, is to be regarded as a superinduced and separate trust, the defender was equally bound to administer the estate vested in him, as said is, including the foresaid advance of £600, as coming *pro tanto* in room of the heritable subjects, for the equal and rateable behoof of all the creditors interested in the composition : 2. That more especially as regards the said advance of £600, he was not entitled so to apply and exhaust the same, as that certain creditors should receive full payment of the composition stipulated in their favour, while others should be left without receiving any payment whatever : 3. That as well by the claim and affidavit duly lodged by the pursuer, as a creditor, before the final deliverance approving of the composition, as by the action of constitution thereafter instituted at the pursuer's instance, and to which the defender was duly called as a party, before he had received, and, of course, before he had paid away, any portion of the said advance of £600, the defender was fully certiorated of the pursuer's claim as one of the creditors : And therefore, 4. That the defender is bound, not only to hold count and reckoning with the pursuer for the due distribution of the said sum of £600 sterling among the whole body of the creditors, himself included, but to make payment to the pursuer of his own rateable share and proportion thereof, along with the other creditors, according to his and their respective interests in the composition : With these findings, appoints the cause to be enrolled, that the proper steps may be taken for ascertaining the exact amount that may be due to the pursuer, as said is, and for thereafter pronouncing such further deliverance and decernitures, in regard to the expenses of process, and otherwise, as may be necessary to exhaust the cause."

Galloway reclaimed, but

THE COURT adhered.

JOHN PATERSON, S.S.C.—WOTTERSPORN and MACK, W.S.—Agents.

No. 162.
July 8, 1845.
Aitken v.
Galloway.

No. 163.

JOHN MURRAY, Pursuer.—*Maitland—N. Campbell.*July 8, 1845.
Murray v.
Murray.JAMES MURRAY and ROBERT LAIDLAW, Defenders.—*Rutherford—
Pattison.*

Mandate—Process.—Circumstances in which (altering the Lord Ordinary's interlocutor) additional time was allowed for receiving a mandate from a defender who was abroad.

July 8, 1845.

2D DIVISION.
Ld. Robertson.
T.

JOHN MURRAY advanced to his son James, then on the eve of emigrating to America, the sum of £200, and received from him an acknowledgment of his having received that sum "to account of his patrimony," and obliging himself to grant a formal discharge to that extent, if required. Before leaving the country, James Murray granted a factory and commission in favour of his brother Alexander, and Robert Laidlaw, S.S.C.

John Murray having raised an action against James for repayment of this sum, Mr Laidlaw gave in defences to the action in the name of James, and also in his own name and that of Alexander Murray, his co-factor. Alexander having disclaimed the defence, the Lord Ordinary, in December 1844, pronounced an interlocutor, finding that the defence could not proceed on the authority of one of the joint-factors only, and sisted process till the first sederunt day in March, to afford an opportunity for procuring a mandate from James Murray. A further delay was afterwards granted till the third sederunt day in May, under certification, and no mandate having been then produced, the Lord Ordinary pronounced decree in absence.

A reclaiming note having been presented for the defenders, it was stated that James Murray was in the employment of the American Fur Company at Fort Pierre in the United States; that they had written to him at Fort Pierre, and that information had been received from the manager of the Company there, that he was then absent in the course of his employment, but was expected to return by the end of summer, when he would receive the letter. In these circumstances it was contended, that further time should be allowed for receiving the mandate.

THE COURT* were of opinion, in the whole circumstances of the case, that further time should be allowed, and accordingly sisted process till November.

WOTHERSPOON and MACK, S.S.C.—ROBERT LAIDLAW, S.S.C.—Agents.

* Lords Justice-Clerk and Cockburn being absent, Lord Murray was called in

BAIRD'S TRUSTEES, Pursuers.—*Deas.*ALEXANDER MITCHELL, Defender.—*Rutherford—Handyside.*

No. 164.

July 8, 1845.

Baird's Trustees
v. Mitchell.

Process—Amendment of Libel.—In a case in which the record was closed, the court refused to allow an amendment of the libel to be made, which changed the nature and of action.

ROBERT CATHCART, W.S., in 1808 feued to Alexander Wight and William and Adam Armstrong the coal seams under a part of the lands of Drum, including those under the Deer Park of Drum. This feu-disposition was granted under the condition that the Messrs Wight and Armstrongs, their heirs and disponees, should pay all damages that might be occasioned to the lands, mansion-house, &c., of Drum by the operations in working the coal, and this condition was appointed to be engrossed in the instrument, and in all future transmissions and infeftments of the same, under pain of nullity. Messrs Wight and Armstrongs became bankrupt, and were sequestrated in 1813. This coal was, in 1820, purchased by the late Mr Gilbert Innes of Stow from the trustee on Wight and Armstrong's sequestrated estate, and eventually came by succession to be the property of Mr Alexander Mitchell. Certain parts of the lands of Drum, and in particular the Deer Park, were also sold by Mr Cathcart, in 1809, to the late Mr Robert Baird of Newbyth, and became part of his trustees. The trustees, in 1833, sold the Deer Park to the late Mr Wauchope of Edmonstone.

Mr Baird's trustees brought an action of damages against Mr Mitchell, proprietor of the coal seams, setting forth that Messrs Wight and Armstrongs, by their operations in working the coal, caused great and permanent damage to the lands, especially to the Deer Park, in which, by their operations, the surface of the ground was much broken and sunk in many places. That, in consequence of the damage caused by these operations, the park came to be worth only half its value at the time of Mr Baird's purchase, and when sold brought only half what it would have been worth but for the operations in working the coal. That the late Alexander Wight, William Armstrong, and Adam Armstrong, their heirs and assignees, had right to the foresaid coal, only under the reservation of the payment of all damages done by them to the lands in which the coal was situated, and could only transmit the said coal to others subject to the real burden of such damages, as well those already incurred by them, as to be incurred by their disponees or successors; all damages to the said lands, subsequent to the date of the feu-right of the coal mentioned, being real burdens upon the said coal, and the payment of such damages being essential conditions of the feu-right thereof, affecting the

July 8, 1845.

2^d DIVISION.
Lord Wood.
R.

No. 164. said coal, into whose hands soever the same might come. That the said
 July 8, 1845. Gilbert Innes, by purchasing and possessing the said coal, became liable
 Baird's Trustees for the said damages sustained by the said deceased Robert Baird," &c.
 v. Mitchell.

The summons concluded for payment of a sum as the yearly loss sustained for the period between the years 1813 and 1833, and for a further sum as the loss and damage sustained on the sale.

After the record had been closed, the Lord Ordinary issued an interlocutor, stating that it appeared to him to be doubtful whether the summons was so expressed as to embrace the averments and pleas of the pursuers on record, and he therefore, before answer, allowed them to give in an amendment of the libel. The grounds upon which his Lordship considered the summons to be defective, will be found stated in his note.

The following proposed amendment was then given in :—" That some of the sinkings or sits which thus occurred in the surface of the said park, and of the other injuries to the ground occasioned by the said coal-workings, occurred prior to the purchase of the said coal-seams and coal-heughs by the said Gilbert Innes, which took place in or about February 1820, and prior to his term of entry thereto, which took place at or about Whitsunday 1820 ; but the greater part of the said sinkings or sits, and of the said injuries to the ground, took place subsequent to the said purchase and term of entry, whereby great additional damage was sustained, the causes of which, although arising from the said previous coal-workings, had been latent until after the purchase and term of entry of the said Gilbert Innes, and the nature and extent of which injuries and damages could not have been anticipated and ascertained during the proprietorship of any of the former owners of the coal :"—" That the damages sustained by the said Robert Baird, and by the pursuers as his trustees, from the said sinkings or sits, and injuries to the said ground, sustained as aforesaid, and the relative conditions contained in the feu-rights and conveyances of the said coal-seams and coal-heughs, formed real burdens thereon ; or otherwise, and at all events, formed inherent conditions of the said feu-rights and conveyances, and, more particularly, of the right and title under which the said Gilbert Innes acquired the said coal-seams and coal-heughs ; and the said Gilbert Innes, and the defenders, as his representatives, became, in either case, liable for the whole damages sustained by the pursuers and the said Robert Baird from the sinkings or sits, and injuries before referred to ; or otherwise, and at all events, the said Gilbert Innes and the defenders became so liable for the said damages, in so far as sustained by sinkings or sits which occurred, or injuries which happened, or became apparent, after the date of the purchase of the said coal-seams and coal-heughs by the said Gilbert Innes, and his term of entry thereto : That the damages sustained, as aforesaid, prior to the date of the said term of entry of the said Gilbert Innes, amounted in whole to £ , or thereby ; and the damages sus-

tained as aforesaid between the dates of the said term of entry of the said No. 164.
 Gilbert Innes and the term of Whitsunday 1833, when the pursuers
 ceased to be proprietors of the said Deer Park, amounted to the further July 8, 1845.
 sum of £ , or thereby, inclusive of the deficiency of price Baird's Trustees
 obtained by the pursuers on the sale of the said park as after men- v. Mitchell.
 tioned."

The defenders declined to allow an amendment of the libel to be received.

The Lord Ordinary reported the case.*

* "NOTE.—Upon considering the revised cases for the parties, the Lord Ordinary has reported the cause without pronouncing any judgment, in consequence of the doubts he entertains, in regard to whether the summons embraces the different grounds upon which the pursuers' claim for damages has been rested in the pleadings.

"As the summons is laid, the Lord Ordinary inclines to think that, strictly, it is limited to a claim for damages, founded on the ground that, by the terms of the titles by which the seams of coal under the different lands there mentioned, and particularly under the park called the Deer Park, were feued out by Robert Cathcart to Alexander Wight and William and Adam Armstrong, and their heirs and disponees—they were disposed under the real burden of all damages that might be occasioned to the surface of the ground by the working of the coal, and operations connected therewith, the payment of which was an essential condition of the feu-right, and affecting the coal, into whose hands soever the same might pass; and that it is in respect of such real burden or condition alone, that liability for the damages sued for is, by the summons, alleged to have been incurred by the late Gilbert Innes, the purchaser of the said coal-seams; and, therefore, by the original defender, Miss Innes, by whom he was succeeded, and in whose place her representatives, the present defenders, have now been sisted as parties to the action. The damages sued for are stated in the summons to have arisen from the injuries done to the surface of the Deer Park, (which became the property of the author of the pursuers, the late Mr Baird of Newbyth, in 1809,) by the workings and operations of Messrs Wight and Armstrong, when proprietors of the coal under that park, and of the adjoining seams; and pages 5 and 6 of the summons are particularly referred to, as apparently limiting it to the effect which has just been mentioned. And further, it seems also doubtful whether, by the terms of the summons on the said pages, the injuries libelled as occasioned to the surface, and for which reparation in damages is concluded for, are not libelled, not only as having arisen from coal operations prior to 1813, but as having actually been done to the surface itself at that date; so that the damages concluded for are damages for reparation of the continued loss to which, from that date, the proprietor of the ground was subjected by the injuries then sustained by it, and not any damages that might have been occasioned by injuries subsequently sustained by the ground, although produced by the coal operations of prior date.

"Entertaining these doubts, and seeing that although the summons might be of this limited description, the record has been so prepared as to apply to other grounds of liability by the original and present defenders, and to damages arising from injury to the surface from coal operations prior to 1813, at what time soever their effects may have exhibited themselves, the Lord Ordinary proposed that the record should be opened, in order that the summons might be so amended as to remove the difficulties which its present terms had suggested, after which any trifling adjustment of the record, or addition to the cases, deemed to be desirable, might be made. Accordingly the pursuer was allowed, (7th March 1845,) before answer, to state in a minute the amendment he would propose to make. This

No. 164. The pursuers contended, that the summons was broad enough to cover all the averments on the record, and, at all events, if it were not, it was

July 8, 1845.

Baird's Trustees

v. Mitchell.

was done; but ultimately the defenders declined to agree to any amendment being received; and the Lord Ordinary has therefore considered it most expedient at once to report the case, holding that he has no power, without the consent of the defenders, to open the record, and allow the summons to be amended, while he believes that this has been done by the Court in cases similar to the present, where, while it may be questionable whether the summons is so worded as to include the whole grounds on which the pursuers really meant to put his claim, the record is sufficiently broad and explicit in its statements on both sides for the trial of the whole; so that the cause might, by the amendment of the libel, (should the Court think it defective, and requiring amendment,) be brought into the proper shape for that purpose at a trifling additional expense.

"Upon the merits of the case, the Lord Ordinary is of opinion, that the damages to the surface of the ground done by the working of the coal underneath, or operations therewith connected, do not, by the titles, form a real burden on the said coal, and that the payment thereof is not an essential condition of the feu-right thereof, affecting the coal in the hands of a singular successor; and that, therefore, Mr Innes, the predecessor of the original defender, as the disponent to the coal, did not, on that ground, become liable in reparation of the damage occasioned by the workings or operations of Messrs Wight and Armstrong, the former proprietors of the coal.

"But it is thought, that as the purchaser of, and disponent to, the coal-seams and whole workings thereof, or in relation thereto, and, as such, taking possession of the entire subject, Mr Innes, although not responsible for damage or injury done to the surface prior to his purchase, by the workings or operations of preceding proprietors of the coal, (the claim for reparation of that damage attaching only to these parties,) did come under a liability for all damage or injury done to the surface after the date of this purchase and possession, notwithstanding of such damage being occasioned by coal workings which had taken place at a prior date. This, it is conceived, was a burden which went along with the right to the coal. By becoming the proprietor of the coal, with all its workings and appendages, and entitled to the whole benefits thereof, it seems to follow that he became responsible for all the damage which these workings might cause to the surface of the ground during the period of his possession, and that it is no answer to say that the workings from which the damage arose, were of a date antecedent to his acquiring the property of the coal. It is enough that the workings were his at the time when they were productive of the injurious effects for reparation of which liability is maintained to have been incurred. Nor is it apprehended to be a sufficient answer, that no part of the coal was worked by Mr Innes, or by the original defender, and that neither of them availed themselves of any of those workings to which the injuries suffered by the surface are attributed. Mr Innes, of course, had and claimed the right at any time he pleased, to resume the working of the coal, and to take advantage, in doing so, of the whole previous operations of Messrs Wight and Armstrong. This right descended to the original and present defenders, along with the right to the coal. In this state of matters, it is supposed to be immaterial, in the question of liability, whether the right which thus appertained to Mr Innes, has been exercised, or not. If the workings which preceded Mr Innes's purchase, and all their consequences, although not produced till after he was in possession, as purchaser of the coal, could only raise a responsibility against those whose operations they were, then the damages now referred to could not have been recovered from Mr Innes, and cannot therefore be recovered from the defenders. But if that be not a conclusive answer, and if, in any view, when the injury to the surface is not done till after the purchase, but is

LORD MONCREIFF.—I think the summons lays the whole matter on the real burden, and that the proposed amendment completely changes the ground of action. A party who brings an action of this sort—a penal action—should know his ground of action before raising his summons. If we were to open up this record, it would just be allowing a new action to be begun, after the whole case had been prepared. Even though the record had not been closed, I should have doubted the expediency of allowing the ground of action to be changed. It is impossible to read the amendment without seeing that it has this effect.

No. 164.
July 8, 1845.
Baird's Trustees
v. Mitchell.

LORD MURRAY.*—I concur. I think that the amendment changes the ground of action.

LORD MEDWYN.—I had held a different opinion; but perhaps the course your Lordships have taken is the safest. I concur in thinking that the summons as laid founds only on the real burden; but, notwithstanding, I think the amendment might have been made, and the case tried at a comparatively small expense, as sufficient pleas are on record, and both parties proceed on the ground that the question is fairly raised.

THE COURT accordingly refused to allow the amendment to be made.

ALEXANDER SMITH, W.S.—HAY and PRINGLE, W.S.—Agents.

then caused by prior workings (and by them exclusively, being in no way attributable to any subsequent workings), the damage so sustained could have been recovered from Mr Innes, it does not appear that his liability could depend upon his choosing or not to avail himself of these prior workings. The claim of the pursuer would seem to stand upon a different principle, and which renders it of no importance to its validity, whether Mr Innes or his representatives, used, or did not use, the workings which, ex hypothesi, were the sole cause of the injuries for the loss sustained by which the claim is made, and which it was his privilege to exercise or not at his pleasure.

The Lord Ordinary has only to add, that while he has thus intimated the view which he is at present inclined to take of the merits of the case, apart from the question of real burden, it is to be observed that the revised case for the defenders contains no argument upon the point alluded to, and he has therefore not had the benefit of that fuller discussion which it will no doubt undergo, if the Court shall hold it to be embraced by the summons, or, if not, shall allow the summons to be amended in order to correct the defect.

* Called in, in the absence of Lords Justice-Clerk and Cockburn.

No. 165. The REV. ALEXANDER MAXTONE and OTHERS, Petitioners.—*Inghis*.
WILLIAM MUIR and OTHERS, Respondents.—*Monro*.

July 9, 1845.
Maxtone v.
Muir.

Judicial Factor—Partnership.—Circumstances in which the Court refused the petition of a minority of the shareholders of a subsisting solvent company, incorporated by Act of Parliament, for the appointment of a judicial factor to supersede the directors of the company, and wind up its affairs.

July 9, 1845.

1st DIVISION.
N.

IN the year 1822, a joint-stock company was formed for the purpose of carrying goods and passengers between Leith and the ports of Australia, under the name of the Australian Company. It was afterwards incorporated by the Act 5 Geo. IV. c. 71, and carried on business till the year 1830, when it was resolved, at a general meeting of the shareholders, that the business should be given up, and the most speedy measures taken for winding up the whole concerns of the company, in terms of the contract of copartnery. Accordingly, the directors ceased to carry on any active trade—sold the vessels belonging to the company—and confined themselves to the winding up of its affairs. From the commencement of the company, it had carried on the business of commission and *del credere* agency, but, in the year 1836, an action was raised by certain of the shareholders against the then manager and directors, on the allegation that this business was unwarranted by the contract, and concluding for payment of the sums which had been advanced by the pursuers on their shares, and applied by the defenders to the traffic objected to.

It was found by an interlocutor of the Court, of the 17th January 1839, that this business was not warranted by the contract of copartnery; and the case having been remitted to the Lord Ordinary for further procedure, he pronounced various orders upon the manager and directors to lodge a state of their accounts. A partial state was in consequence lodged in 1841, but its accuracy having been disputed, a remit was made to an accountant, who reported that, by carrying on the commission business, a large loss had been incurred. A portion of the company's funds, it appeared, was applied in payment of the expenses incurred by the defenders in defending the action; and, after its institution, various calls were made by them, as directors of the company, upon the pursuers and the other shareholders, to account of the original subscribed stock, the last call being for five per cent upon it.

In these circumstances, a correspondence took place between the agent for the pursuers and the agent and secretary of the defenders, in which the former complained of the delay that had taken place in settling the affairs of the company, and getting it dissolved—of the continued calls that had been made, while it was alleged that the property still belonging to the company was sufficient to meet all its debts—and of the applica-

tion of the funds to the payment of the law expenses incurred by the directors individually. He called upon the directors to take immediate measures for realizing the funds, and winding up the affairs of the company, and to produce a state or balance-sheet showing the application of the calls; and asked the concurrence of the defenders, who held about half of the stock, to the dissolution of the company, intimating, if that concurrence was refused, an application would be made to the Court for the appointment of a judicial factor. The agent for the defenders ultimately produced a balance-sheet of the affairs, as at 31st October 1844, but refused to accede to the other demands of the pursuers.

No. 165.

July 9, 1845.

Maxtone v.

Muir.

A petition was then presented by the Rev. Alexander Maxtone and certain of the other pursuers, who hold less than a tenth of the stock of the company, against William Muir the manager, and certain other parties, "directors or shareholders, now or formerly," or the representatives of former directors or shareholders of the company, "and the acting office-bearers thereof;" but neither the present directors nor the existing partners were called by name.

The petition narrated the facts above set forth, and stated that the litigation already mentioned had been kept up for nine years by the gross delay of the respondents, without any perceptible progress in winding up the company affairs. It also stated, that from the state of the assets of the company, and the value of the property still belonging to it in Australia, there was no necessity for the last call which had been made upon the shareholders. The petition contained no allegation of the insolvency either of the directors or the majority of the partners; but its prayer was for the appointment of Mr Donald Lindsay as a judicial factor on the estate and effects of the company, with power to recover and realize them, and to sell the heritable property; and to wind up the affairs of the company, and divide the free proceeds among the parties legally entitled to the same, according to their respective interests.

Answers were lodged for Muir and the other parties called, in which they pleaded;—

1. That all parties were not called; neither the present directors nor the existing partners of the company had been called by name—the only persons named being the present manager, and the parties who had been directors in or prior to the year 1830, and who were defenders in the action mentioned, and their representatives; while the statutory privilege of suing, and being sued, in name of the manager, did not apply to such a case, which was a question between the partners themselves.

2. That the petition was incompetent under the Act of Sederunt, 13th February 1730, inasmuch as, though in form an application for the appointment of a judicial factor, it was in substance an attempt to turn a body of statutory directors out of the management of a subsisting and solvent company, by a minority of the shareholders.

3. That even were the application competent, there were no grounds

No. 165. of justice or expediency upon which it could be granted. That, in the circumstances of the case, there had been no undue delay in winding up the company estate, as its transactions had been large and complicated; and that, from the actual state of the funds and liabilities of the company, the calls which had been made were necessary for settling its affairs.

July 9, 1845.
Maxtone v.
Muir.

LORD PRESIDENT.—I have no difficulty in this case. We cannot interfere in the way asked in the petition, and, upon an allegation by a minority of the shareholders of misconduct on the part of the directors of a company incorporated by Act of Parliament, proceed to appoint a judicial factor. There is no precedent to be found for such a proceeding; and I doubt whether, in any case, we could supersede a company, and appoint a judicial factor on its estate, on a mere allegation of mismanagement made by a minority of the partners. If, as stated by the petitioners, improper calls have been made upon them recently, they have an obvious remedy by means of suspension. I hold the petition to be utterly incompetent.

LORD MACKENZIE.—I am of the same opinion. I do not know, however, whether, in some cases, we might not be compelled to interfere, for the purpose of getting the affairs of a company wound up, at the instance of a minority of the partners; but then the application would require to be in a less summary way.

LORD FULLERTON.—I concur. It would be a very strong thing at once to divest the statutory managers, and place the affairs of the company in the hands of a judicial factor. If a company had been substantially dissolved, and an application were made by certain members of it to have its affairs wound up, they might have some case; but then they would require to call all the other members of the company. But the application is not made in that form here; and the company is still subsisting. Then, what would be the use of appointing a judicial factor? There is nothing here to wind up; there is nothing to do but to ascertain the liability of these shareholders in proportion with the others.

LORD JEFFREY.—I have the same opinion. This is an extravagant application, and it would form a most perilous precedent to grant it. The company is solvent. The calls are made upon the subscribed capital, which forms part of its assets, and if there is any objection to these, it may be discussed in a suspension. The question is, whether, when the company is undoubtedly solvent, and its affairs all settled except the adjusting of the accounts, we are to go on the allegation of certain discontented persons of malversation on the part of the directors, and place it in the hands of a judicial factor? I don't think that we should be warranted in doing so.

THE COURT accordingly refused the petition, and found the petitioners liable in expenses.

DAVID MITCHELL, S.S.C.—WM. ALEXANDER, W.S.—Agents.

HUGH MUIR, Pursuer.—*Logan.*

MARTHA HOOD or CHAMBERS, Defender.—*James Donaldson.*

No. 166.

July 10, 1845.
Muir v. Hood.

Process—Citation.—In an action against a widow the summons and citation stated her maiden name to be “Martha Reid,” whereas it was “Martha Hood.” She was otherwise correctly designed by her residence, and the name and designation of her deceased husband. A preliminary defence founded upon the error repelled.

HUGH MUIR raised action against Mrs Chambers for payment of money. In the summons, and in the citation following upon it, the defender was designed as “Mrs Martha *Reid* or Chambers, residing in Dunoon, relict of the deceased James Chambers, vintner in Glasgow.”

1ST DIVISION.
Ld. Robertson.
N.

Mrs Chambers pleaded, as a preliminary defence, that, being designed in the summons and cited as Martha Reid, while her name was Martha Hood, the action ought to be dismissed with expenses.

The accuracy of the rest of the designation was not disputed.

The Lord Ordinary sustained this defence, and dismissed the action, with modified expenses.

The pursuer reclaimed, and pleaded ;—

That the error was only in the maiden name of the defender ; that it was unnecessary, in the citation of a wife or widow, to give her maiden name in full, and that an error in what was mere surplusage could not be fatal ; that there was no doubt as to the identity of the defender, as he was correctly designed by the name and designation of her deceased husband, and her place of residence.¹

The defender pleaded ;—

That it was not a sufficient answer to an objection to an erroneous citation, that there was no real doubt as to the identity of the person meant. That though it might be surplusage to give the maiden name of a widow in a citation, yet where given it must be correct.²

THE COURT, after consulting with the Judges of the Second Division, being unanimously of opinion, that as, notwithstanding the error, *constat de persona*, the objection was not good, altered the interlocutor of the Lord Ordinary, and remitted to his Lord-

¹ Brown's Synopsis, *voce* Falsa Demonstratio ; Scottish Union Insurance Company, March 8, 1836, (14 D. 667 ;) Hagart v. Robertson, Dec. 20, 1834, (13 D. 234.)

² Dalgleish v. Hamilton, July 6, 1753, (M. 4163 ;) Dickson v. Gibson, Feb. 3, 1745, (M. 8859 ;) Guthrie v. Munro, Feb. 27, 1833, (11 S. 465.)

No. 166.

ship to proceed with the cause, reserving all questions of expenses.

July 10, 1845.

Home v.

Menzies.

JOHN LEISHMAN, W.S.—M'MILLAN and GRANT, W.S.—Agents.

No. 167.

JOHN BELSHES HOME and MANDATORY, Pursuers.—*Rutherford—A. Wood.*

CAPTAIN WILLIAM MENZIES, Defender.—*Sol.-Gen. Anderson—Macfarlane.*

Trust—Process—Jury-Trial—Issues—Bill of Exceptions.—Testamentary trustees, who, by the trust-deed, were specially exempted from liability for the insolvency of factors, or for omissions, and declared liable each only for his own actual intromissions, were called to account by a beneficiary for a loss arising from the bankruptcy of a factor, whom they had allowed to retain, without security, a large sum uplifted by him on the part of the trust. An issue was sent to trial whether the trustees had allowed the sum to pass into and remain in the factor's hands "wrongfully, and in contravention of their duty as trustees;" and the Judge directed the jury, that they were liable only if proved to have been guilty of "gross and culpable negligence."—An exception against this direction disallowed. Question, Whether the ground on which an exception is taken must be stated at the trial, and appear on the face of the bill?

July 10, 1845.

1st Division.

Ld. President,

Judge at trial.

Jury Clerk.

MRS CATHERINE HOME died in 1827, leaving a trust-disposition and settlement in favour of Captain William Menzies, Alexander Robertson, W.S., and Messrs James and David Home, who all, except the last, accepted as trustees. The trust-deed contained the following clause:—

"And for their (the trustees) further encouragement to accept of the trust, I hereby authorize my said trustees to appoint factors, one or more, under them, with such salaries or upon such terms as they shall think proper; and I hereby declare, that the said trustees shall not be liable for omissions or diligence of any kind, nor for the insolvency of factors or others whom they may have occasion to employ, for uplifting any sums of money or disposing of any of my effects, nor on account of the insolvency of any persons who may be indebted to the trust-estate, or to whom they may lend out any sums of money for answering the ends and purposes of this trust; nor shall they be answerable for the intromissions of one another, but each of them allenarly for his own actual intromissions in virtue hereof, as these may be instructed *scripto vel juramento*."

In 1829, the trustees raised a multiplepoinding for distribution of the trust-property, condescending on the sum of £4375, contained in an heritable bond due to the trust-estate by James Home, with interest, as the fund *in medio*. In March 1833, the trustees sold and assigned this bond for the full amount, and out of the price paid £3000 to certain preferable

claimants. The balance was allowed to remain unsecured in the hands of Mr Robertson, W.S., (one of the trustees,) who, as factor for the trust, had received the whole amount from the assignee.

No. 167.
July 10, 1845.
Home v.
Menzies.

Soon thereafter, Robertson's circumstances became embarrassed, and, in February 1834, he was sequestered, being then indebted to the trust to the amount of £2890.

The multiplepointing, which had fallen asleep, was wakened at the instance of Captain John Belshes Home, a beneficiary under the trust, and a claimant in the multiplepointing, who, in 1843, gave in a minute, having an order upon the trustees, conjunctly and severally, to make interim payment to him of £600, with interest from December 1826, and to consign the sum of £775, with interest from the same period, as the balance of the fund *in medio*.

Captain Menzies, who was now the only solvent trustee, stated, that one of the trust-funds were in his hands, or recoverable by him, and pleaded, with reference to the express terms of the trust-deed, that he was not liable for the loss arising from the bankruptcy of Robertson.

The cause was tried before the Lord President and a jury, at the sitting in March last, upon the following issue:—

"It being admitted that James Home, some time of Linhouse, now residing in London, and the said William Menzies and Alexander Robertson, V.S., accepted and acted as trustees of the late Mrs Catherine Home, widow of the deceased James Home of Linhouse: It being also admitted that the pursuer, Captain John Belshes Home, is a beneficiary under the trust of the said Mrs Home,

"Whether, on or about the 2d day of March 1833, the defender wrongfully, and in contravention of his duty as trustee, allowed the sum of £4375, or thereby, being part of the trust-estate, to pass into, and thereafter remain in the hands of the said Alexander Robertson, without taking any security therefor, to the loss, injury, and damage of the trust?"

"Damages laid at £1275, with interest thereon."

The pursuer examined three witnesses, who deponed to their own knowledge of Robertson's embarrassed state or insolvency in 1833, but would not speak of the general repute as to his solvency during that year.

The LORD PRESIDENT directed the jury in point of law,—That the defender and his co-trustees were liable, if they acted in a grossly negligent and culpable manner; but that, in order to subject them, it was incumbent on the pursuer to prove that they were guilty of gross and culpable negligence.

The counsel for the pursuer excepted to this direction. The jury returned a verdict for the defender.

No. 167. On discussing the bill of exceptions, the pursuer pleaded,—That by the direction of the Judge, though the law laid down in it might, abstractly considered, be correct, the issue was misconstrued and changed, or rather withdrawn from the jury, and another substituted in its place; because, while the issue was, “whether the defender wrongfully, and in contravention of his duty,” allowed the money to remain in Robertson’s hands, the jury were directed to find for the defender, unless it was proved that he had been “guilty of gross and culpable negligence.”

July 10, 1845.
Home v.
Menzies.

The defender pleaded,—1. That the exception did not bear to have been taken on the ground of the misconstruction of the issue, or its having been withdrawn from the jury, which was necessary to entitle the pursuer to plead such an objection to the charge. 2. That the law laid down, being sound in itself, was properly applied under the issue; because, under the protecting clause in the trust-deed, gross negligence was necessary to constitute “wrongful” conduct; and the jury required to be directed what degree of diligence was, in point of law, prestable by the trustees in the circumstances of the case; and that if no direction had been given as to the degree of diligence prestable by them, and a verdict had been returned for the pursuer, the defender would have had a good ground of exception.

LORD JEFFREY.—I never had any difficulty in this case, for I think the law laid down by your Lordship was incontestably right. The issue sent to the jury was intended to try the particular case, of which the protecting clause in the deed formed a prominent and essential feature; and if the law applicable to the case was not excluded by the terms of the issue, the presiding judge was entitled to state that law to the jury. The issue here was in general terms, and required some direction by the judge as to the law applicable to the evidence. There are many cases of this kind; as, for instance, the general issue in a reduction, whether a deed is the deed of the party by whom it bears to be executed. Under such an issue the deed may be challenged on a great many different grounds; but there can be no question as to the meaning of the issue until evidence has been led, and it is seen what the challenger is to found upon: the question then arises, whether the evidence comes up to and substantiates his ground of reduction; and it is then, and not till then, that the judge can state to the jury the law applicable to the facts of the case, as they have been established by the evidence.

What is the issue here? It is, Whether the defender acted “wrongfully and in contravention of his duty as a trustee?” Does the pursuer mean to say that a proof of any thing that might be considered in the slightest degree wrong—of the smallest neglect or omission—was what the issue was intended to apply to, and would have entitled the jury to return a verdict against the defender? It is impossible to maintain, that, under such an issue, the judge was not to tell the jury how far wrong the trustee required to go—what kind and extent of wrong it was necessary he should have committed to render him personally liable. It was the duty of the judge to state the *quantum* of wrong necessary in law, in the circumstances of the case, to render the trustees liable,—the general word *wrongful* being

in the issue, the legal *quantum* of wrong necessarily required to be defined by the judge, in order to guide the jury. No. 167.

With regard to the first objection to the bill of exceptions, I think that it ought to have been stated at the trial, that the ground on which the exception was taken was, that the direction of the judge was a misconstruction or change of the issue, and that this should have appeared upon the face of the bill. July 10, 1845.
Home v.
Menzies.

LORD MACKENZIE.—I concur, on the same grounds. The issue was undoubtedly intended just to try the question, whether, in the circumstances of the case, the trustees had been guilty of such a contravention of their duty as to render them liable in damages to the pursuer. It might indeed have been more specific, but that might perhaps have been difficult, and was not necessary. The question was, whether there had been such a contravention by the defender of his duty as trustee, as subjected him in damages; that I think was the meaning of the issue, and if so, the direction of the judge was absolutely necessary. The objection to that direction would go very far—it would just go to this, that if there was proof of any contravention of duty at all—of any wrong, however slight, the jury must be bound to find damages due. But it is quite impossible to hold that. Any contravention would apply to, and include even an innocent error, for that is “a wrong.” Suppose an error made in a calculation, though by the best accountant in Edinburgh, who had been employed by the trustees, that would have been “a wrong,” just because it was an error; but would the pursuer have been entitled to damages in such a case?

As to the question, whether the exception can be looked at now, as the ground on which it was taken was not stated at the trial, I have considerable doubts; it is not necessary to determine it, but I am rather inclined to think, that it should have been stated at the time that the objection to the Judge's direction was founded upon his supposed misconstruction of the issue.

LORD FULLERTON.—I am of the same opinion. There is no objection made to the law itself laid down by the Judge to the jury; but it is said that that law did not arise under and apply to the issue. But the issue was a general one; and therefore it was quite right and necessary for the Judge to state what were the particular facts which, in law, came up to the general description of wrong which the issue contained. Looking to the words of the issue, I think there can be no doubt that it was intended to be a general one; and that the word “wrongful” must be considered as meaning not every error or wrong, but that degree of wrong which must be necessary to warrant a conclusion for damages. That being the case, the direction was not only called for, but necessary.

LORD PRESIDENT.—I should have been astonished if your Lordships had come to any other result, and held that the direction which I gave to the jury was erroneous in the circumstances of the case.

The grounds of an exception to the charge of a Judge, should be stated at the time when it is taken; but here, there was not a word said at trial of the ground of exception being the supposed misconstruction of the issue; nor does it now bear upon the bill.

THE COURT disallowed the exception.

D. M. and H. BLACK, W.S.—J. A. CAMPBELL, W.S.—Agents.

No. 168.

July 10, 1845.
2D DIVISION.
Lord Cuning-
hame.

R.

Murdoch v.
Munro.

Ranking and
Sale of
Kennoway.

Caddell v.
Caddell's
Trustees.

JOHN MURDOCH, Advocate and Defender.—*Dundas*.
CHIRSTY MUNRO, Respondent and Pursuer.—*Pattison*.

Bastard—Proof—Semiplena Probatio.—THIS was an action of filiation, in which the pursuer was held to have established a semiplena probatio. The pursuer's evidence consisted principally of the testimony of her mother and sister, which was held to be corroborated by certain discrepancies in the account given by the defender in the declaration emitted by him.

ROBERT LAIDLAW, S.S.C.—JOHN HUNTER, W.S.—Agent.

No. 169.

RANKING and SALE of KENNOWAY.—*Penney*.

July 10, 1845.
2d DIVISION.
Lord Ivory.

Process—Ranking and Sale.—IN a ranking and sale, where proof had been led of the value of a property, and thereafter, pending the ranking, a number of years had elapsed, during which the property had been changed in its character, the Court allowed additional proof.

Agents.

No. 170.

JOHN CADDELL, Petitioner.—*Dunlop*.
WILLIAM CADDELL'S TRUSTEES, Respondents.—*Marshall*.

Entail—Assignment.—AN heir of entail in possession obtained an act of Parliament, authorizing him to apply to the Court to have an account taken of the debts owing by the entailor at the time of his death, and to have as much of the estate sold as would be sufficient to discharge them, and he accordingly presented a petition to the Court with this view; this petition he did not insist in during the years that followed, and in the mean time paid off a number of the entailor's debts, in some cases taking assignments to them, and in others merely taking a simple discharge. In a question between this party's trustees, after his death, and the succeeding heir of entail,—held that the trustees were entitled to claim out of the entailed estate those debts which had been paid without assignments having been taken to them, as well as those where this had been done.

July 11, 1845.

2D DIVISION.
Ld. Robertson.
R.

The late John Caddell, in 1801, entailed the estate of Tranent. There were at that time debts affecting the entailed estate, contracted

by the entailer. He was succeeded in the estate by William Caddell, No. 170. who, in the year 1817, obtained an act of Parliament, granting liberty to him, or failing him, to the heir of entail for the time being, to apply by summary petition to the Court, which was thereby authorized and required "to enquire into and take an account of the debts of the said John Cadell, deceased, which were owing at the time of his death, and of the provisions and annuities left by him which affect or might be made to affect the said estate, and how much of the said debts and provisions are remaining unsatisfied; and having fixed and ascertained the extent and amount of such debts, provisions, and annuities, still remaining due, with the interest due thereupon, by interlocutors or judgments, to order such parts and portions of the said estate and barony of Tranent and others," &c., to be sold, as should be deemed sufficient for payment of the said debts, provisions, and annuities, specified in a schedule (B) annexed to the act, and of such other debts as should appear to the Court to have been owing by the said John Caddell.

July 11, 1845.
Caddell v.
Caddell's
Trustees.

Upon obtaining this act, William Caddell presented a petition to the Court, praying them to take an account of the debts due by John Caddell at the time of his death, and to authorize a sale of parts of the estate for payment of them.

This petition was not moved in for a number of years, and William Caddell in the mean time paid off many of the debts due by the entailer. To a number of these debts so paid by him Mr Caddell took assignations; in the case of others, he took a discharge, with an obligation to grant an assignation when required; and in the case of a number of other debts, merely a simple discharge was taken without any such obligation. The petition was again moved in before Mr Caddell's death.

William Caddell was, upon his decease, succeeded in the entailed estate by John Caddell, advocate. He had previously conveyed his property to trustees.

William Caddell's trustees claimed to rank against the entailed estate, in the depending process under the Act, for the whole debts which had been paid off by him.

John Caddell, the heir of entail, objected to those debts which had been paid upon a simple discharge being stated against the entailed estate, contending that these debts were not intended by William Caddell to be kept up against the entailed estate, as, contrary to his usual practice of taking an assignation when it was meant that this should be the case, the debts in question had been absolutely discharged and extinguished.*

* Reference was made to an unreported case of Dundas v. Dundas, February 8, 1840.

No. 170. The Lord Ordinary reported the case.*

July 11, 1845.
Caddell v.
Caddell's
Trustees.

LORD JUSTICE-CLERK.—I have formed a different opinion from the Lord Ordinary. This Act of Parliament authorizes any heir of entail to apply to the Court to ascertain the amount of debts owing at the death of John Caddell. Immediately after the Act is passed, William Caddell presents an application to the Court for this purpose. It is true that this petition lies over for a length of time—it was probably his object, if possible, to have avoided selling—but it was again moved in during his lifetime. After the date of the petition, he pays off a number of John Caddell's debts. It is not necessary under the Act of Parliament that he should put himself in the right of the creditors; all that it is necessary for him to show is, that the debt paid was a debt of John's. It is true, that as to the debts in question he did not take an assignation when he paid them; but still he has done all that is necessary to make the estate answerable. It cannot be held that he meant to make a present of these debts to the heirs of entail, when his petition was in Court. These debts are beyond all question debts of John Caddell. The case of Dundas, supposing it to be an authoritative decision, is not applicable to the present case.

LORD MONCREIFF.—I am of the same opinion. I do not see that the case of Dundas has any application. In that case there was not then the Act of Parliament, nor had a petition been then presented. Suppose William Caddell had

* "NOTE.—By the Act in question the Court is, inter alia, directed to enquire into 'and take an account of the debts of the said John Caddell, deceased, which were owing at the time of his death, and of the provisions and annuities left by him which affect, or might be made to affect, the said estate, and how much of the said debts and provisions are remaining unsatisfied.' The schedule of debts does not supersede the necessity of the enquiry here appointed to be made; but, on the contrary, when the sale is to be authorized, it is to be of such portions of land 'as shall by the said Judges be deemed sufficient for payment of the said debts, provisions, and annuities still remaining due as aforesaid, as in the said schedule marked (B), to this Act annexed, more particularly stated, and of such other debts as shall appear to the said Court to have been owing by the said John Caddell, deceased.'

"In so far as William Caddell paid debts of the entailer and took assignations, it is admitted that these debts have been effectually kept up, and must accordingly be cognosced. Having this in view, the Lord Ordinary is of opinion:—

"1st, As to the class of debts where an obligation to assign was taken, and the purpose of keeping up the debts indicated, that these also form a good claim against the estate. He understands the amount to be £635 : 2 : 4.

"2d, With respect to the debts in the schedule, amounting to £1590 : 19 : 5, and those not in the schedule, amounting to £90 : 10 : 6, which have been absolutely discharged, the Lord Ordinary thinks that in no sense can these be described as debts remaining unsatisfied, and which could be made to affect the estate; and that Mr William Caddell, who paid them without taking an assignation, or an obligation to assign, contrary to his practice in other instances, thereby indicated his intention of not keeping up these debts, and consequently that they cannot form a charge against the entailed estate. The case of Dundas in 1839 seems decisive on this head.

"The Lord Ordinary thought it proper to report the views he entertains on the subject for the consideration of the Court."

taken no assignments at all, would the Act of Parliament in that case have gone No. 171.
for nothing.

LORD IVORY.*—I am clearly of the same opinion. The only difficulty is caused by William Caddell having taken assignments in some cases; but the measure of his right must be taken as at the date of the petition. If he has paid pende lite, he must be held to have paid in furtherance of the objects of the petition, and in the view of the sale. July 12, 1845.
Waddel v.
Waddel's
Trustees.

THE COURT accordingly held that William Caddell's trustees were entitled to be ranked for the debts paid off, without assignments having been taken to them, as well as for the others.

J. and W. R. KERMAK, W.S.—DALMAHOY and WOOD, W.S.—Agents.

MISS ANN WADDEL and OTHERS, Pursuers.—*Rutherford—Maitland—Buchanan—Moncreiff.* No. 172.

RIGHT HON. CHARLES HOPE and OTHERS, and WADDEL'S TRUSTEES and OTHERS, Defenders.—*Sol.-Gen. Anderson—Whigham—Boyle.*

Process—Jury-Trial.—In the reduction of a codicil, on the ground that the testator was of unsound mind,—Verdict of jury set aside as against evidence, and new trial granted.

SEQUEL of case reported May 13–16, 1845, (ante, p. 605;) and 29th July 12, 1845. June 1844, (ante, Vol. VI. p. 1230;) and also 2d December 1843, (same Vol. p. 160.) 2d DIVISION.
Ld. Moncreiff.
Jury Cause.

For a statement of this case, reference is made to the former reports.

The issue, “Whether the deed, No. 452 of process, sought to be reduced, and bearing to be dated 3d January 1835, is not the deed of the said deceased William Waddel?” was tried before Lord Moncreiff and a jury at Edinburgh, upon the 13th, 14th, 15th, and 16th of May 1845, when a verdict was returned for the pursuers.

Whigham, for the defenders, moved for a rule to show cause why the verdict should not be set aside as against evidence.

The rule having been granted,

Rutherford, in support of the verdict, contended, on the authority of *Swaine v. Hall*, (3 Wilson's Reports, p. 45;) *Ashley v. Ashley*, (2 Strange, 1142;) *Carstairs v. Belcher*, (5 Maule and Selwyn, 192;) and

* His Lordship was called in, in absence of Lords Medwyn and Cockburn.

No. 172. *Belcher*, (10 Bingham, 408,) that there must be a moral certainty that the jury have arrived at a "diametrically wrong conclusion," before the Court are entitled to upset a verdict as contrary to evidence: that, according to the decisions of our own Courts, the verdict must, as in *Baillie*, (1 Mur. 341,) be in the face of evidence;—as in *Maxwell*, (15 S. & D. 873,) there must be not a mere disapproval of the verdict on the part of the Court; and as in *Thorburn*, (16 S. & D. 1113, and *Robertson*, 1239,) the verdict must be flagrantly against evidence. The authority of the cases of *Mackenzie*, (ante, Vol. I. 487,) *Berry*, (19th February 1839, *ibid.* 535,) and *M'Lelland*, (ante, Vol. IV. 646,) were also cited to the same effect.

July 12, 1845.
Waddel v.
Waddel's
Trustees.

The *Solicitor-General*, for the defenders, replied;—As to the rule of law in granting new trials, it was sufficient to show that the verdict was manifestly against evidence. It was not enough that the Court were inclined to take a view of the evidence different from that taken by the jury; but if it could be shown that the case was one of impression, and not of evidence, that was enough to entitle a party to have the verdict set aside. The English cases quoted did not bear much on the present. They were all of a different description. One related to a promissory-note—another to a charge by a banking-house—a third to a deed granted in fraud of creditors—cases in which a court would be more unwilling to disturb the verdict of a jury than in one like the present. The last two were tried by special juries of merchants. The general rule was laid down by the Lord Chief Commissioner, in his Treatise, p. 179, where his Lordship quoted the case of *Bright*. Great regard must always be paid to the opinion of the presiding Judge, who had as good an opportunity of judging of the evidence as the jury, and greater skill. Here was a mixed question of law and fact, and the Judge was peculiarly well qualified to express an opinion upon such a case. It was contended by the pursuers, that greater deference was to be paid to the verdict, because it was against the expressed opinion of the Judge. The reverse was the true doctrine, and the verdict ought to be more unfavourably regarded; and this verdict was a perverse verdict.

The case was of this date advised.

LORD MEDWYN.—The point which the jury had to try under the issue in this case was, "Whether the codicil, bearing to be dated 3d January 1835, is not the deed of William Waddel;" and it is alleged not to be his deed, solely on the ground of insanity. There is no other ground of challenge. Now, it is not said, and there is no appearance that Waddel had been afflicted with this calamity at any previous period of his life; he was manager of a great concern, requiring constant attendance and superintendence, and till the beginning of the year 1836 there is not an allegation even of his insanity; and though he may have been of a violent, and irritable, and suspicious temper, perhaps increasing with years upon him, and hypochondriac about his health, there is no legal proof of insanity which would

disqualify him from making a settlement of his affairs, unless undue influence were used, prior to 1st March 1836. But I have no objection to date it at the time that M'Donald came to him, or the Dean of Faculty's opinion was given, or even at the strange midnight conversation with the butler at Nuthill. It is not so much as alleged that he was insane when he subscribed the codicil, 21st January 1836, before Mr Henderson and Mr Black, which they test; and still less can the pursuers possibly maintain that Waddel was insane on 30th November 1835, when he entered into the agreement with them about making over to them fifty shares of his Royal Bank stock, nor on 7th December, when he made over the fifty-five shares. Nor can they say he was insane when he appeared personally in the Bank, and in presence of one of the directors, on the 7th January 1836, made the transfer, the benefit of which they have been enjoying ever since.

No. 172.
July 12, 1845.
Waddel v.
Waddel's
Trustees.

In finding then for the pursuers, the jury find that it has not been established that the holograph codicil, bearing, in gremio, to be dated 3d January 1835, was written and subscribed prior to the period of his insanity, which took place more than a year after its asserted date. Thus the question of fact the jury had, in truth, to decide was, not the insanity so much as the date of this codicil; a matter of fact, no doubt, otherwise it would not have been submitted to them, but of fact not unmixed with law; but, on the contrary, depending upon a question of law as to the character and effect of a holograph writing, in respect that it does not, per se, prove its own date, when the date is of importance. The question of law is this, Whether, in establishing its date, the law holds it absolutely to have no date, or whether the date inserted in the writing may be taken into view, so that it is only incumbent on the party founding on it to support it by additional evidence, and whether that evidence may be drawn from the writing itself, or from extrinsic evidence only. Accordingly the judge who tried the case laid down the law necessary for the case; and, as he was entitled and bound to do, directed the jury to consider the evidence as applicable to that view of the law. We have been furnished with this part of the charge, which shows how anxiously the judge had prepared himself for this trial, foreseeing how much would turn upon the law as to the effect of a holograph writing; and we see how clearly and distinctly he expressed himself on the subject, which ought to have been perfectly intelligible to the jury. I need scarcely say that I concur in the law as laid down; and although an exception was taken, that law was not laid down to the jury that should have been, yet as the judge refused to do so, the jury were bound by the law as given to them by the judge, and therefore we have nothing to do with inquiring whether any different law was pleaded to them, nor need we conjecture what that might be; we have only to consider whether the jury could have arrived at the conclusion they have done according to a sound view of the evidence, if they had followed the direction of the judge as to the law; or if they did hold the law as laid down from the bench, whether they must not have gone entirely against the evidence submitted to them, and drawn a false conclusion from it, which it will not bear.

There is no question that the jury are the sole ultimate judges of the facts of a case; no one disputes that; and that this verdict is not to be easily disturbed or set aside by the Court, so that it is not enough even to obtain a new trial, that in a case of conflicting evidence, the jury have taken a different view from that which

No. 172.

July 12, 1845.
Waddel v.
Waddel's
Trustees.

the Court would have been inclined to do, provided it appears that the view taken is after a calm, dispassionate review of the evidence, which might bring the inquirer to such an opinion, without any suspicion that motives and feelings, unknown possibly to the person himself, had influenced his decision, and produced an unjust result. But if it should appear to be otherwise, as the object of all judicial procedure must be to procure justice to the suitors, and to secure to every man his legal rights, and as the statute law has most expressly conferred upon this Court the duty of setting aside a verdict if it be against evidence, we must act as we are directed to do when such a case arises, keeping always in view, no doubt, the favour which is due to the verdict; less in a case of mixed law and fact, than of fact alone; less, too, in a case which affects the heritage, than in a case of simple debt; and, even in this last class of cases, less in a case of ordinary debt, and with a common jury, than in a case involving a matter of mercantile understanding and usage tried by a special jury of merchants, such as were chiefly the English cases from which dicta against new trials were read to us, where, accordingly, it is fit that Judges hesitate before they unsettle a practice, or even throw doubt upon it by allowing a new trial; or, in the more recent case alluded to, where one of the points was, whether a man had colluded with some of his creditors to make a fraudulent conveyance to them. There the verdict, on conflicting evidence, was in favour of the defenders; and the judge who tried the case did not think it proper to put the parties on their trial and defence in such circumstances a second time. When a new trial is granted, the Court does not usurp the province of the jury, but only exercises their statutory right of control where manifest injustice has been done by the verdict, and exercises this control to no further effect than to enable the case to be submitted to another jury. Until juries are found endowed with intellect more than human, and with calm and unprejudiced minds beyond the reach of false impressions, such a control must always accompany the practice of jury trial, to prevent injustice as far as it is possible to do. It has been so with us. I need not refer to the many instances of this in which the Court has been obliged to exercise this control as an essential part of that branch of jurisprudence, and it would have been little to the credit of the system, or the advantage of the subject, if this power had not accompanied its introduction into this country. In truth, the right to do this is so express, as well as its exercise so necessary, that I persuade myself that it will not be deemed as an abstract truth; and the only question ever can be, if it ought to be worked on the present occasion. But while I hold it my duty to review a verdict when objected to as against evidence, and while I must be satisfied that it is clearly, flagrantly so, before I ought to set it aside, it was quite new to me, that if the judge at the trial, not thinking it a case of un-mixed fact without law, nor of nicely balanced evidence, which he thinks it best to leave to the jury to form their opinion upon, without any indication of his own, should think that the evidence is all on one side, or at least very strongly preponderates, when applied to the law as laid down, so as to lead to a verdict in favour of one of the parties, and mentions this opinion to the jury, if the jury adopt an opposite conclusion, that this is to be held as in favour of the verdict. It was, however, so pleaded to us. If the judge's opinion concurs with the verdict, it is reasonable to hold that it should not be set aside; but in the opposite case, and where a jury has come to an opposite opinion, from the cool judicial view taken

by one accustomed to weigh and balance conflicting testimony, it may show the value they attach to their own view of the evidence, but surely never can add weight to it, or afford even a presumption that it has been coolly and dispassionately formed, and is well founded.

Now, then, is there not proof sufficient that this codicil was written by Waddel, when he was in the full possession of his mind, nay, that it must, in all probability, have been written of the date it bears?

I think it important in this view, that it made a rational distribution of his fortune, which had been of his own acquiring, according to the circumstances in which he was then placed by recent events. It betrays no marks of insanity; but, on the contrary, of a very sane and reflecting mind, influenced by feelings of gratitude and friendship. It is not the disposition of the estate of Sydserff alone, in 1836, we are considering at present—that was not before the jury. It was the codicil, 1835, which disposed generally of his property, now that his nephew was dead without issue; and its purpose was to dispose of that property which would have gone to his issue, if he had left any. It refers to his trust-settlement, and leaves the liferent untouched, which went to his brother James, of whom he speaks as then alive; he gives the fee of Sydserff to the Lord President, “who has been friendly to my brother and myself;” and to Mr Henderson of the King’s Printers’ Office, the fee of his house. This was but a small portion of his property. His personal property was large; out of which, without interfering at all with the disposal of his heritage, he could have amply provided his nieces, if he had thought it proper to provide more for them than he had done by the trust-deed. But the evidence shows that he entertained a notion on that subject, which made him think, that leaving a large fortune to them would not conduce to their happiness—a very considerable proof, I think, of good sense and a sane mind; and therefore he distributes it among five parties—one whose father had been his schoolfellow, and whose family had been kind to him in his youth—two fellow-apprentices with old Mr Smellie, the printer, with whom he had kept up a great intimacy—and two friends, with whom he had been connected for many years in the office of King’s printers. Among these five parties he divided the fee of his moveable property, the liferent of it being with his brother; so that the case is not as if Waddel had possessed Sydserff alone, and had given his whole fortune to the Lord President; others, besides, benefit as sharers in his grateful and kind affections; while his brother and his daughters have not been forgotten by him. And it is only comparatively a small share of his fortune which he bestows on the man who was ever in his mind as the friend who had put him in the way of making it all. He had mentioned to his brother his intention of leaving this portion of his property to his benefactor; and we do not find that that brother thought it objectionable or unnatural.

On the same sheet of paper there are three other codicils written in succession, all holograph of Waddel like the first, and not tested, and bearing to be all of subsequent dates to it. These are not challenged; and it is quite admissible to use these writings in support of the proof of the date of the first one.

Had James, his brother, survived him, Waddel very naturally thought, that as he had the liferent of his fortune, this would enable him to provide for his daughters. But James might not survive him. Seemingly having reflected on this contingency, he felt it proper to provide against its effects. Accordingly just two

No. 172.

July 12, 1845.

Waddel v.

Waddel's

Trustees.

No. 172. days after the first codicil—that is, on 5th January 1835—he adds this other codicil:—“In the event of my brother dying, and not leaving sufficient means to afford a yearly income of £100 a-year to each of two daughters,” he directs the deficiency to be made up. This was plainly to supply an omission in the other, (which thus must have preceded it,) and the latter was written plainly during James’s life. But James did not die till August following. Therefore, at all events, the first codicil must have been written before the month of August 1835.

July 12, 1845.
Waddel v.
Waddel’s
Trustees.

Now I think it very clear that it was this paper which was sealed up and deposited with Mr Henderson on 5th February 1835. It was at least once returned to Waddel, and by him again deposited with Henderson. Henderson says he got it back once or twice; that he opened it, made additions, and, from the number of after codicils, this seems probable.

Next there appears a codicil, dated 4th May 1835, by which he restricts Ann M'Donald’s bequest to £26, plainly implying that this was subsequent to the first codicil, which confirmed that bequest; and, on the same day, he makes another codicil, by which he revokes the bequest in his trust-settlement and in the second codicil as to his four nieces—thus plainly implying that the second codicil, made during his brother’s life, was of a date prior to it. Next comes the important codicil, dated 9th October 1835, by which, besides revoking bequests made in his trust-settlement to Ann and Thomas Ramsay and Mary Waddel, and substituting annuities to them, he refers to an agreement then in progress with his brother’s family; and in the event of this being completed, he recalls the bequest made to Mrs Waddel and her daughters by the second codicil, of date 4th May 1835, implying, of course, that that was of a prior date to this one.

Now the proposal for this agreement was made by Waddel at least prior to 25th September, but it was not completed till 30th November 1835; and between these two periods, any alternative, according as it should be completed or not, must have been proposed and dated. This codicil accordingly, which appears last in order on the original sheet of paper, bears date 9th October 1835.

Next comes the tested and separate codicil of 21st January 1836, about whose date there can be no question.

If I recollect right, the codicil in October was not alluded to at all in the address to us by the counsel in support of the verdict; and certainly it is not easy to deal with it on the hypothesis, that it does not prove both the codicils of 4th May to be of a prior date; the latter of which again proves the codicil of 5th January to be of prior date to it; while the other of the same date proves the first codicil to be prior in date to it. And while this codicil in October was not alluded to, it was said that the codicil in January 1836 referred to the letter by Waddel to Ann M'Donald, dated 30th August 1833; whereas I think it quite clear that that is the promise alluded to in the first codicil, where it is said, “I have promised,” &c.; and the letter accordingly calls it a promise. It becomes a bequest of an annuity, and is so termed in the codicil of May 1835; and then this is quite correctly referred to and revoked in January 1836, as the promise or bequest. To the first of the codicils then, dated 4th May 1835, this tested codicil plainly relates; and at the date of this last codicil, which does prove its own date, that date being 21st January 1836, it is not so much as alleged that Waddel was insane; for this was prior to his visit to Nuthill, where he did not go till the 27th; and all the codicils

bear internal evidence, supported in a very remarkable manner by the external evidence, from the true date of the facts to which reference is made in them as the cause of granting them, that all the codicils, without exception, were at least of a prior date to it.

No. 172.
July 12, 1845.
Waddel v.
Waddel's
Trustees.

It was said that there was a third paper sealed up and deposited with Henderson, on 11th November 1835, as the envelope has been found, but opened and empty; that no explanation has been given of this; that it might have contained a revocation of the first codicil, or parts of it. Henderson is now dead, who alone could give any explanation of this matter; and it would be hard on that account, that any doubt should be thrown on the uncanceled writing deposited finally with Chalmers. But whatever conjecture may be made, I think it never can be supposed to apply to a revocation, in November 1835, of the destination of Sydserff, after the testimony of Mr Storie, or of the rest of his property, after that of Mr Tyndal Bruce, both of them as to Waddel's intentions and acts subsequent to this period.

I have already said that it appears to me, there is most conclusive evidence that all the codicils were written prior to the tested one on 21st January 1836.

There seems to be just one supposition which can be stated in opposition to this conclusion, and it is so utterly improbable, as to make it impossible to suppose that sane men could entertain it for a single moment. It appears very distinctly, that after Waddel's return from Nuthill, he had got back from Henderson the sealed paper of codicils, and tested codicil, for he put them into Mr Chalmers' hands on 28th February 1836, with instructions to make out an inventory of them. Chalmers does so, and the inventory states the paper as containing the codicils, of the following respective dates, quite correctly, viz., 3d January 1835, 5th January 1835, 4th May 1835, *eo. die.*, and 9th October 1835. They were written then prior to 28th February 1836, but during his insanity, which, in order to support the verdict, must be supposed to have then commenced. Further, it will be recollected, that his trust-deed, on its being executed, was sealed up and put into Mr Henderson's hands on 29th January 1834, and it remained with him unopened till after Waddel's death, and was never opened or seen by Waddel or any other person till 5th August 1840. Now it is a very remarkable fact, that all the codicils bear constant reference to various minute particulars contained in the trust-disposition, even to the matter of the nomination of executors, and their remuneration, and must have been written by a person intimately acquainted with, and most perfectly recollecting all the clauses and provisions of that settlement, and with a recollection, too, of what was not in this settlement—the promise made to Ann M'Donald, so far back as 1833, of the dividends of eight shares of Royal Bank stock in liferent. This circumstance demonstrates, that no person could have devised these codicils who did not know the trust-settlement, and it is quite plain it could be known only to Waddel himself or the writer of it. It could not then have been by dictative suggestion, or undue influence of any parties interested in them, for not one of them could possibly have known the particulars of it. But that is not in the case. This may have been suggested to the jury, as it was to us; but no such case is stated in the record, and there is of course no evidence in support of it, and none such could have been admitted. They are all written by Waddel, and of his own suggestion, and the impulse of his own mind; and if they were written when he was insane, though prior to 28th

No. 172. February 1835, we must hold that he wrote them all in one day, but antedated them, using a different pen and different ink for each, to conceal this deception, (for their single witness, Lizars, failed in proving their appearance as of having been written all at one time,) and that he made them of different dates, taking care to cause them refer to contemporary events correctly, according to the dates assigned to each; and that all this contrivance, the undictated work of a madman, was with the view of obviating the effect of the insanity under which he is supposed to have felt himself labouring at the time, and which he knew would vitiate any holograph deed executed by him of that date. This, as I have said, is to be supposed the act of an insane man. Now, I had always understood that it was one of the characters of insanity to be alone unaware of the malady: besides, the knowledge and recollection of particulars and art with which they were made to correspond to each successive step in the chain of writings, indicate a degree of intellect at once destructive of all idea of insanity. It is on this account, I presume, that while our law-books speak of holograph writs not proving their dates, in the case of death-bed, and debts or diligence, no notice is any where taken of such a deed in reference to insanity; for while it is easy to understand that a man, ill of a mortal disease, might apprehend the possibility of his not surviving it, and would antedate a settlement or a bond or bill to secure a preference to some favoured party, it is difficult to suppose that an insane person either would or could deliberately sit down to draw up a deed and antedate it, to save it from reduction, on the ground of the existing insanity, still less such a succession of writings as we have here.

But, further, it seems very clear that Waddel had told his brother James, in spring 1835, that he had left his estate of Sydserrf to the President—so Dr Watson and Daniel Forbes say; and he certainly told Mr Tyndal Bruce, on 27th January 1836, that he had left Sydserrf to the President, and mentioned Mrs John Cockburn and the others, to whom he had given portions of his property. He further said he would, on his return to Edinburgh, put a deed into the President's hands as to Sydserrf. Now these expressions distinctly refer to the codicil as then in existence, and this before any alleged insanity; and his statements are supported by the real evidence of the codicil, dated about a year before, and by his having put into the President's hands the disposition to Sydserrf immediately upon his return from Nuthill, as to which he had previously given instructions to Mr Storie. This conversation with Mr Tyndal Bruce took place, let it be observed, just six days after executing the last codicil before witnesses. Though it is denied that the first codicil had been written at the time, it is admitted that at least he had the intention to leave Sydserrf to the President, as the person who had put him in the way of making all his fortune; and it cannot be questioned, that he had also by that time made up his mind as to the disposal of the rest of his fortune, having, in a day or two after that, mentioned his disposition of it to Mr Tyndal Bruce. Now, with this intention, would it not have been natural for him, at least, to have then executed some deed (when evidently thinking about his affairs, and revising his settlements,) to carry out his intentions as to Mrs Cockburn and the others, supposing that, having given instructions to Mr Storie, he rested satisfied as to the President; but as he did not do so, this is strong corroboration of the other evidence, that the codicil had been previously executed by him in favour of the residuary beneficiaries.

It was strongly urged on us that Waddel did not mention the existence of this codicil when he was at Falkland in spring 1835 for a fortnight, nor to the President, nor to Mr Storie. I cannot see that this argues any thing against its existence. A holograph writing is generally resorted to for the sake of secrecy in case of any change of intention, and, as he had actually given directions to Mr Storie to have a regular formal disposition of the estate substituted in its stead, showing that he did not mean to rest satisfied with the instructions to his trustees in the codicil, I do not see that there was any occasion for his mentioning it on the occasions alluded to. He seems to have thought, and thought truly, that although he might leave the distribution of his large personal property upon the instructions to his trustee in his codicil, it would be better to execute a formal conveyance of his landed estate; and it is only unlucky, with regard to the fulfilment of his grateful feelings for the President's favours to him, that, having given to Mr Storie in the end of December, or beginning of January, his final instructions for his repeatedly expressed intentions on this matter, he had not subscribed the deed before he went to Nuthill.

No. 172.

July 12, 1845.

Waddel v.
Waddel's
Trustees.

In truth it appears that Waddel, though he evidently thought much about them, and frequently altered them, was not communicative about his settlements. Mr John Henderson, it appears, was, as the son of an old friend, very intimate with him, and often dined with him, yet, even in such hours of convivial intercourse, Waddel only once spoke of his settlements, and this was in 1835, after his nephew's death, when he mentioned that Sydserrf was to be left to the President. His communication to Mr Tyndal Bruce was also once only on this subject, and seems to have been most naturally brought on, and purely accidental. They were in Mr Bruce's carriage together on their way to Nuthill, and the conversation began as to how he first became connected with the printing-office. He said he was indebted to the Lord President for this, and, through his instrumentality, had become what he was in the world. This naturally led him to express his gratitude to the President, and, when his heart was warmed with these generous feelings, it was almost of course, that though close in general on such matters, he should tell his friend (as the deed was actually preparing at the time according to his instructions) that he meant to evince his gratitude by giving him the estate of Sydserrf; and this led to the mention of how the rest of his property was to be disposed of. And this conversation led on his return to Edinburgh to his keeping the disposition for some days by him till Mr Bruce could witness it. Perhaps no other occurrence or opportunity would have induced him to open his mind so fully about his settlements to any person; so that if we except Mr John Henderson, Mr Tyndal Bruce is the only person, in addition to his brother James, from whom we could expect to receive testimony of his having already disposed of Sydserrf. He is represented as a single witness to this; and, although this is scarcely the correct import of the evidence, yet as he is at all events a most important witness, the most distinct to the fact, a strong attempt was made to diminish the weight of it, chiefly, as I recollect, because he did not think Waddel insane at the time of signing the disposition on 27th February 1836. His opinion on that matter may be mistaken, and yet this ought not to affect his accuracy in recollecting of a fact, or his credibility in relating it. These two acts of the mind are totally distinct, and exercise very different faculties; so that a mistaken opinion about a matter where a person is not professionally conversant, ought not to affect his general credibility regard-

No. 172.
 July 12, 1845.
 Waddel v.
 Waddel's
 Trustees.

ing a fact which occurred to him. It does not appear that he was informed by Alexander of the night scene with Waddel at Nuthill, which, however, Dr Davidson will not say proved insanity; and, moreover, when we recollect the character of the insanity as given by Dr Chapman, under whose care Waddel remained so long, when the insanity was fully developed after 18th March 1836, viz. that "the disease was one of fits and paroxysms,—when out of the fits, he was then quite conversible,—I have sat with him for hours, and, unless I had touched the key, no one would have seen that any thing was wrong;"—is it at all wonderful that, in the probably short calls Mr Tyndal Bruce made between 24th February and 10th March 1836, he should not have detected insanity, as to which he previously had no suspicion? In like manner, Mr Storie saw him on the 7th, 8th, or 9th of March, and nothing that occurred, or that he observed, raised the most distant suspicion of any thing wrong in his mind. In short, that Mr Tyndal Bruce did not detect insanity in Waddel, leaves my confidence in his testimony, as to what was told him by Waddel, perfectly unshaken.

I cannot help, therefore, on the whole, entertaining the opinion with very considerable confidence, that laying the *onus* on the defenders as strictly as may be, if we were to hold even that the asserted date is not to be a circumstance to be taken into account, the defenders have most fully established existence of the first codicil before the insanity of the granter; but if, as we are bound here to do, and as the jury was bound to do, if the date be taken into view, which is only to be adminiculated, as our law writers term it—as this has been done by a very remarkable concurrence of evidence, extrinsic as well as intrinsic, gathered out of the whole series of changes he made on his settlements during the twelve months preceding his insanity, according to the varying circumstances occurring during that period in the family of his brother, and the corresponding changes of opinion incident on these in his own mind, I cannot entertain a doubt in my own mind that the codicil under reduction was written by Waddel prior to any appearance of insanity, nay, certainly of the date it bears, and that he did not antedate it.

I have no occasion to speculate on what may have misled the jury, and made them arrive at a conclusion contrary, as I think, to the evidence. It is enough, that it appears to me that the verdict is flagrantly against the evidence, when applied to the law laid down by the Judge; but I must say this, that in the argument we heard in support of the verdict, I was often obliged to recal my mind to the real question before us, which was also that which was before the jury, viz. the validity of the codicil in 1835, which, besides disposing of Sydserrf, also distributed the residue of his fortune—in so far as not provided to his brother and nieces by the trust-disposition—to four personal friends, and the child of an old schoolfellow and friend; and that the subject of enquiry was not the disposition of Sydserrf to the Lord President, executed a year afterwards, when it is now held the insanity had commenced. From the manner in which the case was treated, it was throughout the course of the argument an effort for me to retain this in my mind; and one cannot but fear that the jury may not have been altogether successful in relieving their minds from this impression, which may have influenced a verdict so greatly to the prejudice of the justice of the case.

Upon the whole, I am of opinion that justice has not been done to the defenders by the verdict, and, therefore, that the only course we can follow is to allow the question to be submitted to the award of another jury.

LORD MONCREIFF.—By the statute 55th Geo. III., c. 42, by which trial by jury in civil causes was introduced into Scotland, it was expressly provided, in section 6th, “That in all cases in which an issue or issues shall have been directed to be tried by a jury, it shall be lawful and competent for the party who is dissatisfied with the verdict to apply to the Division of the Court of Session which directed the issue, for a new trial, on the ground of the verdict being contrary to evidence, on the ground of misdirection of the Judge, on the ground of the undue admission or rejection of evidence, on the ground of excess of damages, or of *res noviter veniens ad notitiam*, or for such other cause as is essential to the justice of the case.”

No. 172.
July 12, 1845.
Waddel v.
Waddel's
Trustees.

It is evident, that this statutory provision established a right in every party against whom a verdict might be given by a jury, to move the Court to set aside the verdict, and grant a new trial, not on the grounds of law only, but distinctly and specially on the ground of the verdict being contrary to evidence in matter of fact. For, though the object of the statute was to introduce a new system of trial, whereby all questions of fact should be determined by the verdict of a jury, and though, of course, in any such trial, the jury must, in the first instance, be the sole judges of the effect of the evidence in regard to the matter of fact in issue, subject to any direction in law by the Judge which the nature of the case might call for, and with the aid of such observations on the evidence as he might see cause to address to them, it was thought indispensably necessary, to the safety of that system itself, and the working of it in regard to the most important interests of the community, that it should not be left without some efficient means of control and redress against the mistakes or errors of juries even in the trial of matters of fact.

The right thus given to the party to move for new trial, and the power and the duty of the Court to grant it, when a case is presented which appears to them to call for the exercise of the power and the discharge of the duty, constitute therefore a branch of the statutory law of jury-trial of the most sacred and vital character—essential to its very existence, and without which, important as are the benefits and blessings which it is calculated to bestow on the country, it could not exist at all.

Accordingly, so indispensably necessary was the power of allowing a new trial upon any of the grounds enumerated in our statute, or on other specific grounds covered by the last general words of the enactment, found elsewhere, that it was early introduced into the law of England by practice alone, and had been constantly acted upon during a very long period.

But though I hold the right of the party, and the power of the Court, undoubted as they are under the statute, to be of a very sacred nature, to which the Court, if they are to do their duty correctly, must give full and fair effect, and though I observe that in one of the early cases, in which a new trial was granted, the Lord Justice-Clerk, Boyle, used these words, “I am clear that, in the infancy of this institution, the clause in the Act must be liberally construed,”¹ no one is more sensible than I am, that it is one of the most delicate duties which a court can be called on to discharge, to set aside the verdict of a jury upon matters of

¹ Clerk v. Thomson, (Murray, 1, p. 179.)

No. 172.

July 12, 1845.
Waddel v.
Waddel's
Trustees.

fact. It is not to be done lightly. It is not to be done merely because the Judges may think that, if they had been in the place of the jury, they would have come to a different conclusion; nor is it to be done, merely because the verdict may be opposed to the opinion expressed by the Judge in the trial, although all authorities hold that that is an important consideration in the question, and more or less so according to the nature of the case. It is a duty which rests in discretion, certainly; but it is not an arbitrary, but a legal discretion, to be exercised with due discrimination, and with great caution.

I come, therefore, to the consideration of this motion with great anxiety, and with the more anxiety, because, having been the Judge before whom this case was tried, and having felt it to be my duty not to withhold from the jury the impression which the evidence had made on my mind—that impression leading to a different verdict—I am sensible that more than double caution and consideration is required of me before I disturb the verdict returned by the jury. And if I could conscientiously come to the conclusion, that with any due regard to the state of the evidence in reference to the proper question under trial, and the truth and justice of the case, this verdict ought to stand, it would not be the first time that I had concurred in refusing a new trial, with whatever difficulty, even where the verdict was contrary to my own opinion in the trial.

But, in every such question, it is always of importance to attend to the nature of the cause under trial, and the effect of the verdict returned. This would be evident, on the simple ground that every authority says that it is a question of discretion; for the discretion, the legal direction in a Court, can only be justly exercised with reference to the nature of the case before it. And so it has always been practically held. The very cases referred to by the pursuer's counsel prove this. The moment those cases, and the nature of them, are examined, it becomes evident that the dicta of law relied on, as imperatively laid down, have relation to an entirely different class of cases, and a different category of law, from those to which the present case belongs.

We must always speak with great diffidence when we are referring to authorities in the law of England. But, in regard to the general effect of those authorities, I think we may safely rely on the statements of the Lord Chief Commissioner Adam in his book on this subject, taken along with the cases in which he had occasion practically to apply the principles. One practical explanation, given in a case of great importance, to which I shall afterwards refer, warns us of a serious danger with reference to cases of the general character which, in part at least, the present case bears. It is in *Hogg v. M'Gill*, March 6, 1828; 4 *Murray*, 451,—“In England, questions on the validity of a will, whether on the ground of capacity or any other, are in a situation which makes it not so easy to derive from them the principles on which new trials are granted, as from other cases. Wherever there is real property, they are tried in an action of ejectment; and as this is an action that may be brought as often as the party chooses, the Court refuse to aid him, by granting a new trial.”

But, in general, it appears to me, that the statements in the Chief Commissioner's book, with reference to the practical doctrine laid down by Lord Mansfield, give us as clear an idea of the principles on which new trial is granted or refused in England, as we are likely to obtain in any other way. His Lordship had elsewhere explained, that, till the time of Lord Mansfield, there was some degree of uncer-

July 12, 1845.

Waddel v.

Trustees.

tainty in the rules adopted, and at least an apparent inconsistency in the judgments; and in the early practice it had been with great difficulty that new trials could be obtained. But for the general principles he relies mainly on the explanation of the law given by Lord Mansfield and other judges in *Bright v. Eynon*.¹ He has not quoted all that was said upon the particular case, but only the passages which go to show something like a general rule. But the case itself was a very strong one. It related to a will, or rather a deed of discharge, which was challenged on two grounds,—forgery and fraud. There was evidence on both sides, and on both points. Lord Mansfield, who tried the case, though he had a strong opinion on the question of fraud, left that question entirely to the jury without any express direction, and the jury found a general verdict for the defendant. Even in such circumstances, a new trial was granted. In showing cause against the rule, the counsel “went very much at large into the propriety and risk of granting new trials. They urged, that a verdict ought to be conclusive, where evidence of any sort was given on both sides.” In giving judgment, Lord Mansfield took occasion to lay down the general principles of new trial, in the terms which the Lord Chief Commissioner has incorporated in his work. I may advert to the principal passages:—“But a general verdict can only be set aside by a new trial; which is no more than having the cause more deliberately considered by another jury; when there is reasonable doubt, or perhaps a certainty, that justice has not been done.”—“If unjust verdicts, obtained under these, and a thousand other circumstances, were to be conclusive for ever, the determination of civil property, in this method of trial, would be very precarious and uncertain. It is absolutely necessary to justice that there should, on many occasions, be opportunities of considering the cause by a new trial.” (Other passages from the same judgment were also read, showing the progress of the law of England on the subject, ending thus:—“The reasons for granting a new trial must be collected from the whole evidence, and from the nature of the case, considered under all its circumstances.”)

From all this it may be deduced, 1. That the granting or refusing new trial is a question of discretion, but a judicial, not arbitrary, discretion. Judicial, that is, on a careful and cautious consideration of the whole evidence, so as to see with reasonable clearness, if not certainty, that the verdict is wrong, or that the jury have not duly considered the evidence. 2. That it is no sufficient reason for not granting a new trial, if the circumstances appear to render it necessary for justice, that there has been evidence led upon both sides. 3. That the right to demand new trial, and the power to grant it, as well as the actual exercise of that power, are essential to the very existence of jury trial; and, 4. That that discretion may be justly and legally exercised even in so strong a case as that of an issue of forgery and fraud, and a verdict obtained for the defendant.

I have seen nothing to invalidate the doctrine established in that case. What state of circumstances will be sufficient to establish, in any particular case, that a verdict is contrary to evidence in the legal sense, is a question for judicial discretion, which cannot be brought within any general rule. But see the opinions of Dennison and Foster in that case.

¹ 1 Burrows, 393.

No. 172.

July 12, 1845.
Waddel v.
Waddel's
Trustees.

I know not that it is necessary to look further for authority in the law of England. But Mr Rutherford having referred to some cases, it may be right to take notice at least of those which are of a late date.

The case of Carstairs,¹ tried before Lord Ellenborough and a jury of the city of London, turned on a question of mercantile fact and practice,—the question being, whether a certain charge of commission in mercantile transactions was a charge made in bona fide for trouble, or was merely a cover for a charge of usurious interest. There was contrariety of evidence as to the nature of the commission, and its reasonableness, on a banking account. Lord Ellenborough directed the jury in particular terms, and left that question to the jury. That was a verdict, in a matter of mercantile practice, which liberated the plaintiffs from the imputation of usury. On a motion for a new trial, the rule was granted, but afterwards it was discharged. What was then said by Lord Ellenborough must be considered with reference to the nature of the case, and other cases of the same class. But what does it come to? In the strongest passage, it is merely thus: "The question before us is not whether the verdict given in this case is not such as we ourselves should have given, but whether, having been given by a jury, to whom the whole case is left in point of fact, and to whom the law on the subject was distinctly stated, it ought, upon the grounds of argument suggested to us, to be now set aside, and a new trial granted." I see nothing in this to invalidate the doctrine of Lord Mansfield.

The only other English case to which I think it necessary to advert, is that of Belcher,² &c. The question was, whether a deed of assignment, made by a bankrupt to persons of his own family, was made spontaneously for a fraudulent preference, and in contemplation of bankruptcy. The cause was tried before Chief-Justice Tindal, who left that question of fact distinctly to the jury.

The jury found for the defendants, the verdict thus importing that the plaintiffs had failed to establish the case of fraud, which they undertook to prove. The Court refused to disturb that verdict. I see nothing in the law delivered which can at all interfere with the demand of a new trial as made in the present case. The whole judgment of Chief-Justice Tindal (p. 414) shows the principle in the clearest manner, (Lord Moncreiff read it,) and is in perfect harmony with Lord Mansfield's doctrine in the case of Bright. And upon the fact necessary to be proved, he is very strong as to the grounds which might warrant the verdict, especially in the point which I have mentioned as second.

Mr Justice Park does, indeed, make use of one strong expression, of which the pursuers here take advantage, that the Court must be satisfied that the jury were so diametrically wrong on both the questions, that they must necessarily send the cause to a new trial. I own I do not wonder at the strong expression employed in such a case as that was, more especially when I read his strong statement regarding the evidence on the question of contemplation of bankruptcy.

Mr Justice Bosanquet states the rule in more general terms, that the Court must be fully satisfied upon the two questions, that the present verdict is wrong before they can disturb it.

Mr Justice Alderson, again, says, that if he could have been satisfied that the

¹ 4 Maule and Selwyn, p. 191.

² 10 Bingham, 406.

deed was made in contemplation of bankruptcy, he would have given a new trial upon the other point; but, going into the evidence, he held that the jury were justified in holding the contemplation of bankruptcy not to be proved. No. 172.
July 25, 1845.
Waddel v.
Waddel's
Trustees.

And it is to be observed, that Mr Maberly having been examined upon oath, the jury could not have come to a different conclusion without convicting him of perjury, to which circumstance all the Judges attached weight.

I have gone, perhaps, more fully than necessary into these cases, because, from the manner in which they were pressed, I thought it my duty to study them carefully; but I own I do not think that they have much bearing on the present question.

But let us now look a little into the authorities in our own law.

In the case which I formerly mentioned, of *Clark v. Thomson*, a new trial was granted, simply on the ground, as I understand it, that it was necessary for the justice of the case, the pursuer having failed, whether by accident or neglect, to lay the case before the jury in a shape to entitle him to a verdict; and, in the new trial, he obtained a verdict for £6562.

In the case of *Baillie v. Bryson*,¹ the Court refused a new trial, the Lord Justice-Clerk and Lord Robertson making some observations, which were afterwards approved of by the Lord Chief Commissioner, "setting aside a verdict," &c., the technical ground being, that the verdict is contrary to evidence. I humbly think that this cannot be altered by the use of different terms thought to be distinct. But their Lordships were clear, that there is no rule against granting a new trial, though there has been evidence on both sides.

In the case of *Skene v. Maberleys*,² which was a case of nuisance, a verdict was given for the defender on the issue of nuisance or not. On the motion for a new trial it was granted, on the ground of the verdict being contrary to evidence, the Chief Commissioner stating that, "On the whole, without getting into any of the technicalities of the English law, we are of opinion that, in the exercise of a sound discretion, and applying the principles of right reason to this case, we have power to set aside the verdict, and that it ought to be set aside. We do not assume the power to set aside the verdict as contrary to the opinion of the Court, or of the Judge who tried the case." He then referred to the case of *Baillie v. Bryson*, and explained the progress of the English law; and being of opinion that there was nothing proved to contradict the evidence of the material fact in issue, that the stream was polluted, he held that it was the duty of the Court to grant a new trial, in the end observing—"The opinion of the Judge, who tried the case, being against the verdict, is not a sufficient ground for granting a new trial, but is certainly a very strong and important circumstance."

In the case of *Kitchen v. Fisher*,³ there was evidence on both sides; and the Lord Chief Commissioner, in addressing the jury, said, "Where there is contrariety of evidence, as on the present occasion, the case is peculiarly within the province of the jury, but I shall make such observations as may assist you in coming to a correct conclusion;" and, in the end, he stated, that the contradictions in the evidence were such, that there must be perjury on the one side or the other. The jury found for the pursuers. On a motion for new trial, his Lordship said, that

¹ 1 Murray, p. 341.

² Ibid. p. 352.

³ Ibid. p. 584.

No. 172. July 12, 1845. *Waddel v. Waddel's Trustees.* in the trial he had considered the case as one of contradictory evidence, and had so left it to the jury; and that in England the rule was, in such cases where there was reason to suspect false swearing, to leave it to the jury. "There are, however, exceptions to this, and, in the present case, where there are many circumstances to make it possible that justice has not been done, we are of opinion that the question should undergo further investigation." In the end a new trial was granted, on the simple ground that it appeared to the Court that "this case has not been sufficiently tried for the purpose of justice." On the second trial, the verdict was for the defender on all the issues.

Now that was a case of very strong contrariety of evidence, in which the whole had been most distinctly sent to the jury by the presiding Judge; and yet the Court, being of opinion that justice had not been done, had no difficulty in sending the case to a new trial.

In the case of *Clark v. Spence*,¹ there was evidence on both sides. It was a reduction of a deed of settlement. There were three issues, &c., but though the jury negatived the first and third, they found for the pursuer on the second, which was substantially a verdict for the pursuer, reducing the deed. A motion for new trial was made on different grounds. There was a point as to the admission of certain witnesses supposed to have an interest, but which was not sustained; but a new trial was granted. See p. 466, &c.

In the new trial, the case was tried on the first issue only by agreement, and the verdict was for the defender.

A new trial was granted, in a very remarkable case of *Miller against Fraser*,² where there had been evidence on both sides, and a verdict was given for the pursuers. But I am aware that there was a strong speciality in that case, it being stated that there had been a letter admitted in evidence which had borne a false date, shown by the nature of the paper on which it was written. A verdict was obtained for the defender.

But what appears to me to be the most important case on the subject, is that of *Hogg v. McGill*.³ The issue was the same as in the present case. It was a reduction of a testamentary deed of settlement. A verdict having been given for the pursuer, a motion was made for new trial. The Lord Chief Commissioner, in granting the rule, took occasion to observe, that "a deed of this nature does not require the same degree of mind as in making a bargain;" and, upon the facts, was of opinion that there was ground for a new trial. Afterwards, he observed, &c., and at last concluded in these words—"On the whole, it is important that the will of a person, not of a sound mind, should not stand, but it is equally important that the real will of a person, destining his property, should not be disturbed. The Court are of opinion, that this has not been taken into sufficient consideration by the jury, perhaps from its not having been so pointedly stated to them as it might have been. We think it has not received all the consideration which it ought to have done, and, therefore, that a new trial ought to be granted." I consider this as directly applicable to the present case.

On these various authorities, I hold it to be firmly settled, that there is nothing in law, and nothing in regard to the legal discretion to be exercised, which ought

¹ 3 Murray, p. 464.

² 4 Ibid. p. 112, &c.

³ 4 Ibid. p. 446.

to prevent the Court from granting a new trial in the present case, if they can see with sufficient clearness that the verdict is contrary to evidence, and that justice has not been done. No. 172.

July 12, 1845.
Waddel v.
Waddel's
Trustees.

I concur in the opinion delivered by Lord Medwyn, that the verdict is manifestly contrary to evidence, and that a new trial ought to be granted.

I proceed to state, but not at length or in detail, the views of the evidence which lead me to this conclusion. I do not think it either necessary or expedient to enter into a detailed discussion of the evidence; and it is the less necessary, as Lord Medwyn has gone pretty fully into it.

I must first direct attention to the nature of the case. It is not a case on personal injury or damages, which may be of an evanescent nature. It is not a case relative to mercantile transactions, which may reasonably be considered as so peculiarly fitted for the judgment of a jury, that if once a jury has judged of it, their judgment should not be interfered with. This is a question of property, and, to a considerable extent, of real estate, under which property, given by a very solemn deed to one man, by the undoubted absolute proprietor, is to be given to another, by one decision of a jury. It is a case of property, so settled by last will and testament, (always a favoured instrument in the law,) and impeached on the single ground of unsoundness of mind in the granter. I subscribe entirely to the doctrine laid down by the Lord Chief Commissioner in the case of Hogg, that if it is of importance that a deed executed by a man not of sound mind should not stand, it is of not less importance that a deed executed by a man of sound mind should not be disturbed without sufficient grounds. So strongly has this been held, that in a case of *Currie v. Jardine*, though the granter of a deed, by which she had excluded her own eldest son, had been regularly cognosed as insane by a jury, the jury having found that she had a lucid interval on one particular day, on which day that particular deed was executed, it was sustained.

Into the motives which may have influenced a testator in settling his property in a particular manner, or into the propriety or impropriety of the parties benefited by such deeds accepting of the benefits, it is not for any Court or for any jury to enquire, or even to speculate, except in so far as the rationality and consistency of the intentions expressed may enter into the question of soundness of mind or not. If the jury in the present case were at all influenced by any such views otherwise, it would be a misunderstanding of their duty, and a decision upon impression, and not upon the evidence as applied to the proper issue before them.

The next thing material to be attended to, is the true nature of the issue. It relates solely to the holograph writing of 3d January 1835. It is not at all connected with any other deed. The single ground of reduction in the summons is, that the deceased was of unsound mind at the time when that codicil (admitted to be holograph of the deceased) was written. There is no averment in the summons or record, that that writ was obtained from the deceased by fraud or undue influence, or any form of unfair means, and no plea in law to that effect. There is no averment, and not even an insinuation, of any such thing. It is a simple naked case of unsoundness of mind at the date of the writing alleged, with only this addition, that the deed, though probative of its substance as a holograph writ, does not by itself prove its date.

And I must observe, that when an issue under a summons so libelled, and a record so constituted, is taken by a pursuer, without any notice whatever of an

No. 172.

July 12, 1845.
Waddel v.
Waddel's
Trustees.

allegation or supposition of a case of fraud, undue influence or dictation, it would be a grievous injustice to the defender to have the simple issue, which, by the summons and record, is upon unsoundness only, turned, by argument and insinuation, into an issue of fraud and undue influence. If any other view were to be taken of the nature of such an issue, it would render the present form of our issues for the trial of such cases, a very dangerous system of practice, in regard to the property and the most important interests of the community.

Nevertheless, it will not be on this point that my opinion in the present case will be mainly rested:—because, from the view which I take of the evidence, there is not, in my apprehension, a vestige of evidence of any such undue influence, or even of the slightest interference with the free and deliberate will of the testator, in the simple matter which is here in question.

I have elsewhere explained fully the view which I take of the law applicable to the issue in this case. I shall not resume it. It is unnecessary, and could not be done without entering into all the details on which it depends. The material point is simply, that though it might be a doubtful question what should be the effect, in the case of alleged insanity or fatuity, if there were no evidence as to the date of the holograph writ, the one way or the other, the utmost that can be required of the holder of the writ is, that he should produce reasonable evidence, either direct, or by facts and circumstances of sufficient weight, to show that that writ either was executed of the very date which it bears, or had existence before the time when any state of insanity is proved to have existed.

Now, waiving any discussion of that doubtful question, on the hypothesis of there being no evidence at all the one way or the other, my opinion was and is, that the defenders adduced evidence abundantly sufficient to satisfy the very utmost demand which the law ever made on such a party, to support or adminiculate the date of the holograph writ.

Two points were granted in the argument, which seem to me to go a good way, 1. That William Waddel had the intention, when in sound mind, to settle the estate of Sydserrff on the Lord President; and 2d, That the pursuers could not carry the evidence of insanity so far back as the date which the holograph codicil of 3d January 1835 bears. But whether granted or not, these facts are certain, on the most unquestionable testimony.

If a matter of this kind is to be viewed in any light of common sense and reasonable attention to evidence, it would be a difficult matter, in any case where the deliberate intention is proved and admitted, and a writ probative in all but the date, precisely calculated to carry that intention into effect, is produced, to make any Court believe that that writ was executed in a state of insanity, or that without any evidence that it was executed after insanity, or of a different date from that which it bears, it must be taken as the deed of a man of unsound mind.

But the matter is not left in this case to rest in any such state of doubt. It appears to me that there is here an accumulation of evidence, real, written, and parole, proving incontestably, to my entire conviction, if not absolutely, that the deed was written of the very date which it bears, that, at all events, it existed long before the slightest pretence of insanity existed.

But before stating, very briefly, the heads of that evidence, (for I shall go no further,) I must observe, that we must judge of such evidence according to the common sense principles which are every day applied to any similar question. Is

the first place, we are not to take every one circumstance in the deduction by itself, as if it were the only matter in proof, but are bound to connect the whole facts together. The strength of the case of the defenders lies in a combination of such facts as no Court or jury can possibly resist without being in manifest error. In the second place, we are not to be misled (and if the jury were so misled, it is but an account of the error of the verdict) by mere surmises, suspicions, or insinuations of bare possibilities, of which there is no trace either in averment in the record, or in evidence in the trial. We are bound to look at the evidence as reasonable men, and see whether, taking it all together, it does not establish, to the conviction of any reasonable and candid mind, that this writ was executed of the date which it bears, or, at all events, at a time when the testator was of a perfectly sound mind. It is in vain to say, that the jury may draw a different inference. The question is, whether, if they did so, (having the power, no doubt, of giving a general verdict,) they were not in manifest palpable error.

Now, let us for a moment lay aside the multifarious evidence about insanity in February and March 1836, and all the transactions of that period—and lay aside every thing that concerns the disposition of 27th February 1836, and look at the evidence relating to the codicil of January 1835; and then enquire whether the adminicles are not superabundant as to its existence long before any allegation of insanity having existed. It is no matter at what end of the chain we begin. But the most natural course is to look first at the deed itself, in its connexion with the trust-deed, confessedly executed in a state of sanity.

The trust-deed is very particular, and shows that the testator was looking forward to various contingencies, but most particularly to the contingency of his nephew failing without issue. He did not merely reserve power to alter. He destined the estate, in that contingency, to any persons to be named by him by a writing under his hand. I think that the deed was so framed (according to a very common practice) for the very purpose of enabling him, upon that contingency, by a private writing of his own, without communication with any agent, to settle the fee of his property in another manner, by simple instructions to his trustees. Without going into the other details, which, however, are very important, the nature of the codicil is, that the contingency having taken place, he very soon after fulfilled his intention, by making a new destination, to satisfy the provision in the trust-deed, by a private writing of his own, which he immediately sealed up. If there were no interests to make a cause out of such an occurrence, this would be a simple matter of plain truth. But there is more in the matter; for the trust-deed having been sealed up in January 1834, under a cover which never was opened till after Waddel's death, there are various particulars in the codicil of 3d January 1835, having a precise reference to special provisions in the trust-deed, which could be known to no one but Waddel himself, and Mr Storie, who had no communication with him. But these things have been abundantly commented on, and I will not further enlarge on them.

2. There are three other codicils, written with Waddel's own hand, on the same sheet of paper, all of which in a very precise manner refer to one another, and through such reference to the first codicil, one of them being on the 5th February, only two days after the date of the first; and the connection in the details is so very particular, that a man must have a very suspicious imagination who can entertain the slightest doubt of the truth and reality of the whole

No. 172.
July 12, 1845.
Waddel v.
Trustees.

No. 172. together. Looked at with the eye of common sense, it is impossible to doubt it.

July 12, 1845.
Waddel v.
Waddel's
Trustees.

3. The last of the codicils on that paper, bearing the date of 9th October 1835, has always appeared to me to clench the whole matter. Meaning to provide for the testator's nieces, it makes reference to a negotiation for an agreement as then in progress, and makes the provision alternatively, according as that agreement should be completed or not. Now, by the testimony of Mr Fisher, and documentary evidence, it is proved that such an important agreement was then in preparation, but was delayed by a difficulty which had occurred; and it is also proved that that agreement was afterwards completed on the 30th November 1835, and a transfer of bank shares made in terms of it on the 6th January 1836. It is proved by Fisher, that Waddel was then of perfectly sound mind; and it is proved that the pursuers have taken the full benefit of the transfer down to the present moment.

The argument for the pursuers on this matter appeared to me to be of a very extraordinary nature—that, because the transaction was beneficial, the pursuers were entitled to take the benefit of it, without admitting that Waddel was then of sound mind. This is rather singular. It requires more mind to make a bargain, by which a man parts with his property in his lifetime, than to make a testament for succession after his death. And yet the pursuers' code of morality is, that they might take their uncle's property in his lifetime, because the transaction was beneficial to them, and yet allege that he was not of sound mind, either then, or when he made his testamentary codicils some time before.

But the closing point is this. The codicil of 9th October bears reference to the prior codicils on the same paper, and it speaks of an agreement then in progress, on the completion or non-completion of which its effect was to depend. That agreement was in dependence at the time, and it was completed afterwards, while Waddel is proved to have been of sound mind. But the codicil of 3d January 1835, must have been written before, that of 9th October 1835, and, consequently, it was written while Waddel was in a sound state of mind.

The only answer made to this appears to me to be of no weight whatever. It assumes influence and dictation, without a grain of evidence. It assumes a system of artifice and contrivance, so complicated and refined, and, in truth, impossible, as to render it altogether inadmissible in any fair consideration of evidence. It supposes that the codicil of 9th October only shows that the person who wrote or dictated it knew the state of the negotiation at the time. But this is mere imagination, for which there is no foundation, either in evidence, or in common sense and reason. The whole facts must be looked at together; and I apprehend that such a manner of explaining away a combination of facts of real and written evidence cannot be received by any court, and, if pressed upon a jury, could not fail to lead them into manifest error.

4. It is clear that the first codicil must have been written in the lifetime of James Waddel.

In the first codicil itself, the testator speaks of "his brother" in terms implying that he was then alive. But the second, executed on the 5th February 1835, is quite express—"In the event of my brother dying," &c. So that there can be no doubt that he had not died at the time when that codicil was written.

But James Waddel died in August 1835; and it is impossible to allege, and

has not been alleged, that the testator was not of sound disposing mind at that time. The evidence proves incontestably that he was perfectly sound then and long after.

No. 172.

July 12, 1845.

Waddel v.
Waddel's
Trustees.

5. The separate codicil, dated 21st January 1836, revoking the promise or bequest to Ann Waddel, plainly refers both to the first and the third codicils; and that, having been executed before witnesses subscribing it, there can be no reasonable question about the date of it. And I see no evidence of insanity prior even to that date. Dr Davidson saw none on the 20th January.

6. If there is faith in evidence, the receipt or acknowledgment by Henderson, dated 5th February 1835—(print, p. 103)—proves that this paper of codicil was put into Henderson's possession, sealed up, on that day. For, whatever the pursuers may make of the unexplained circumstance about another acknowledgment, there can be no doubt that that now referred to relates to the very paper on which the five codicils are written.

7. In October 1835, Waddel began to give instructions to Mr Storie to prepare a regular disposition of Sydserrf in favour of the Lord President; and it is to my mind utterly inconceivable, that the codicil under reduction could have been executed after that.

These are all facts of real evidence, all tending to one result, and demonstrating that the codicil must have been executed of the date which it bears, and, at all events, long before there is any evidence of insanity.

But to leave no room for any doubt as to the reality of that result, there is, besides, a great deal of extraneous evidence of a different sort, proving that Waddel spoke to various persons, not only of his intention to settle Sydserrf on the President, but of his having actually done it.

(Lord Moncreiff here referred to the testimonies of six witnesses, viz. Alexander, pp. 20-24—Henderson, p. 201, which is express that he was told by Waddel, some time in 1835, that Sydserrf was to go to the President—Fisher, pp. 207-208, that James Waddel told him early in spring 1835, that his brother had informed him that he either had made, or was to make, a settlement of Sydserrf upon the President—Forbes, pp. 211, 212, still more positive, that, in spring 1835, James Waddel told him that William Waddel had made him aware that he had already settled Sydserrf upon the President—that of Dr Watson, which, though not so distinct, is equally positive, that James Waddel said to him that he knew it had been arranged as to Sydserrf—and, lastly, the testimony of Mr Tyndal Bruce, p. 203, that, on the 27th January 1836, William Waddel communicated directly to himself the whole substance of the disputed codicil: That the pursuers had objected to this last evidence, first, by endeavouring to impeach Mr Bruce's credit, for which Lord Moncreiff thought there was no solid ground, although Mr Bruce might be in an error in allowing the disposition to be executed at the time and in the manner in which that was done: That it was objected to, second, on the ground that Waddel was then insane. Lord Moncreiff said he thought it very doubtful whether there was any ground for this as matter of fact, being founded on a single incident in the middle of the night, given with many qualifications, upon which Dr Davidson, the question being put to him, answered very solemnly, that all he could say was, that the occurrence might indicate that Waddel was then threatened with an attack of insanity; and there was no evidence that he had ever been under restraint up to that time. Lord Moncreiff then proceeded)—

No. 172.

July 12, 1845.
Waddel v.
Waddel's
Trustees.

But will this take away the evidence of clear and positive facts told to Bruce, with perfect clearness and self-possession, the day before, when that statement is found to correspond accurately with the actual fact in the existence of the codicil having these precise objects and effect? I cannot so deal with such evidence; and if the jury rejected it, agreeing as it does with all the other facts of the case, I think that they went against plain evidence, which they were bound to receive.

When I combine all this evidence, real, written, and parole, together, I think that it makes a case of fact proved beyond the reach of rational doubt. But I will not enlarge further.

Now, what evidence is there to set against this in regard to the material question of the time when this deed was executed? I must fairly profess that I can see none at all. There is not a shadow of evidence that even touches the point. Arguments, indeed, are used to induce a belief that, by possibility, through undue influence, dictation, or other means, the codicil may have been executed after Waddel was insane. I think this literally impossible, in the face of the evidence to which I have adverted. But, waiving any question as to relevancy or competency of such statements under the issue, where is the evidence of any such thing? I see none.

1. On the 28th of February 1836, this paper, with others, was put into the hands of Chalmers, and an inventory made of them, as they were afterwards deposited with the Sheriff; and we are now to take it that Waddel was insane on the 27th February. But though it is true that till then the codicil had not been produced or exhibited except to Henderson under cover, there is no doubt of its identity, and, if there is faith in evidence, it is proved that it existed long before, and even that Henderson got it on the 5th January 1834.

The mere insinuation, therefore, does not at all meet the facts in evidence.

2. It is said that Waddel did not mention the execution of the codicil to Bruce in February 1835, nor to the Lord President, nor to Storie.

This is a mere negative circumstance, which proves nothing positive. It is easily accounted for, but can be of no weight, when it appears that he did communicate what he had done to his brother, James Waddel.

The presumption is, that he made the deed in a holograph form on purpose, because he did not choose to make all his purposes in it known to others. How he came to mention it at last to T. Bruce, in a moment of confidence, is explained in the simplest manner, by the way in which the conversation began, and by the fact that he had already given instructions to Storie to prepare a direct disposition to the President, which he meant to deliver immediately. But nothing can be more natural than that he should not have thought of making any such communication of his private arrangements at an earlier period.

As to the President and Mr Storie, it is to be remembered, that the codicil contained a great deal more than what related to Sydaerff, which he might naturally not choose to disclose to them. And as to Sydaerff, it was unnecessary to mention it, when he was about to execute a regular deed for conveying it.

3. Much reliance is placed on certain statements in the memorandum of Henderson, his letter to Dickenson, and the unexplained circumstance concerning a certain receipt or acknowledgment.

Notwithstanding the importance which has been attached to these circumstances, and the extreme anxiety with which they are pressed on us, I cannot for my life

see how they can be regarded as evidence to affect the date of this deed, or to do away all the positive evidence concerning that date. Mr Henderson may have made mistakes in his memorandum, as it is clear that his memory was not very good; and it may be impossible, now when he is dead, to explain the meaning and history of the acknowledgment regarding a third paper referred to. But the paper of codicils is here, and the question is at what date it was executed; and how such an unexplained circumstance about something else can effect that question I cannot see. There is no case made of that deed having been revoked; and it could not possibly be so, seeing that we have clear evidence that Mr Waddel retained his full intention as expressed in it, and had preserved the instrument itself with great care. But there is no such case, and we must always remember what the true question in issue is. The pursuers may conjure up suspicions and imaginations of something they know not what. But the question always returns, how does this bear to meet or upset the accumulation of evidence concerning the actual date of this codicil?

No. 172.

July 12, 1845.
Waddel v.
Waddel's
Trustees.

With regard to the passage in Henderson's letter to Dickenson, it appears to me to have arisen from a very groundless jealousy of Mr Fisher. But as to the matter in hand, instead of proving that Henderson was intimately acquainted with Waddel's private papers, and knew of something to endanger the deeds which Fisher might discover, it appears to me to prove the very reverse. Long before either the memorandum or the letter to Dickenson was written, Waddel's repositories had been sealed up, and were under the command of the Sheriff. Henderson's groundless apprehension, therefore, evidently was, that there might be something among those private papers of which he had *no knowledge* at all. And as nothing of the kind has been found among them, this just demonstrates that Henderson was not in such a state of confidence with Waddel as to be admitted to all his private secrets.

The way in which these circumstances are attempted to be made available to the pursuers, is by making them the ground of a surmise or suspicion that Henderson may have employed undue influence, and by dictation, or otherwise, got the deed executed after Waddel was insane. If there is truth in evidence, this is impossible. But it is at best a mere suspicion of a possibility. And it is evidently groundless in its very basis. For Waddel was not fatuous, nor a man of easy disposition, to be led to such a thing by Henderson, or any one else. On the contrary, he is proved to have been rather irritable, and steady to his own purpose. But it is unnecessary to speculate about a thing of which there is no evidence. There is not a grain of evidence that Henderson ever exercised any influence over Waddel, though he was undoubtedly an intimate friend.

It is thought to be surprising, that no draft of the codicil has been found, and it is said that the deed is so framed, that some man of law must have been connected with it. I see nothing in either circumstance. When Waddel chose to write his codicil with his own hand, and then seal it up, it was evidently for the purpose of preventing the contents of it from being known. But with such a purpose, it would, indeed, have been the act of a madman to have kept the draft of such a paper lying open among his papers. And as to the form of the writing, it is proved that William Waddel was an acute, intelligent man, very well read, and had great experience in the world; and one witness says that he was the best man of business he ever did business with. What wonder, then, that he should

No. 172.

July 12, 1845.
Waddel v.
Waddel's
Trustees.

have known how to frame so simple an instrument as this is. But, in reality, unless the date of the instrument can be impeached, it signifies nothing by what means he got that knowledge.

I could say a great deal more upon this part of the case. But I abstain, and shall go no further.

Mr Rutherford was not wrong in expecting that I should at once state to the Court, that with the charge in law I did send the whole question of fact upon the evidence to the jury, with the observations which I thought it necessary to address to them. But notwithstanding this, it is still a perfectly competent and legal question, whether the verdict is not contrary to the evidence. In several of the cases which I have quoted, both English and Scotch, the same thing took place; and it occurred very remarkably in the case of *Skene v. Maberley*.

I am of opinion that this verdict is manifestly contrary to evidence. I think it contrary to all the material evidence in the proper question at issue, and therefore that it is necessary to justice that a new trial be granted. Though the case is perplexed by the quantity of matter brought into it, I have considered it all with as much care as I am capable of; and I have come to this opinion as deliberately as I ever did in any case within my recollection.

LORD MURRAY.*—I had the preparation of these cases when they were at a former occasion before the Court. There is only one before us now, and I entirely agree with what has been stated by Lord Moncreiff, that we have nothing to do with the other case. But I must say, that in preparing these two cases, I felt greater pain and difficulty than I ever experienced, than I hope ever to experience, or than I think it possible I shall do in any case. Certainly, when I found that in one of these cases there was a statement in the summons that a person of great distinction, and whose character was remarkable for being the reverse of avaricious or sordid—one who was so honourably known in the profession, and whose conduct I had observed for forty years—when he was accused on this occasion of having, by fraud and impetration, and other undue means, obtained a deed conveying an estate to him, to the injury of females committed to his charge—I certainly regarded the case with feelings of, I may say, more than dislike. And when an objection was stated, that this case was brought forward, and endeavoured to be supported, upon one plea which was not legal, I listened to that objection; and I have no hesitation in confessing, that I should have felt no small satisfaction if I could have seen legal grounds of altering this verdict. But, my Lords, I claim no more for myself. If, when such a case as this is before a Judge or jury, be or they are conscious of any thing that may give them the feelings of a partisan, or that may excite in their minds any personal feeling—whether arising from the recollection of the good conduct of persons whose generosity they have witnessed, or from any other cause—I am sure that any Judge or juror, who is conscious of that, will from that moment watch his own conduct. And, entertaining this conviction, I trust that the feelings with which I viewed this case at the outset, did not influence me in any subsequent part of the proceedings. I agree with your Lordship as to the duties and responsibilities of Judges and juries; but I consider that in such a case a Judge's is comparatively an easy duty, compared with that

* Lords Justice-Clerk and Cockburn were declined.

of a jury. He is to proceed upon general rules of law ; and may always know ' No. 172.
 whether he is following out these rules clearly and decidedly ; whereas a juror
 may find a difficulty in arriving at and weighing the facts, or he may be biassed July 12, 1845.
 unconsciously ; and I do say, that if I thought the jury in this case were subject Waddel v.
 to any sort of bias, I would at once go freely and entirely into the necessity for a Trustee's
 new trial. But as there is here no allegation of bias, I think that by the law of
 England, whatever the result of the trial before the jury may have been, it should
 be regarded as a matter calling for great caution and anxious deliberation, whe-
 ther in circumstances such as these a new trial should be awarded ; and I confess
 that, in this case, I am not favourable to a new trial. My learned brother has
 referred to a case which is also referred to by Lord Chief Commissioner Adam,
 namely, that of *Bright v. Manuel*, and also to other cases. Now, I cannot find
 any of these cases, whether occurring in England or in the courts here, in which a
 new trial was granted, on the ground of a verdict being contrary to evidence, where
 there was not some defect in the mode of trying the case—something imperfect,
 that might lead, on a new trial, to a different result ; and even when that imper-
 fection or defect was the fault of the party asking the new trial, I think he ought
 to be allowed another opportunity of showing the justice of his case ; and if there
 is a reasonable expectation that a new trial will lead to a different result, that it
 ought to be granted. Now, as regards the case of *Bright*, I do not think sufficient
 light will be thrown upon the matter, without seeing the real nature of the case in
 the excellent report which Burroughs has given. In that case the Chief-Justice
 said, the jury had drawn a wrong conclusion from facts admitted on both sides ;
 and therefore he thought the verdict ought to be set aside. There the jury had
 drawn a wrong conclusion, and this was admitted as a good ground for a new trial,
 as it was to be supposed that another jury would draw a right conclusion. This
 is very strongly stated by Lord Mansfield himself in a case of forgery. (After
 quoting Lord Mansfield's dicta in reference to the case in question, to the effect
 that, as he had not assisted the jury with a special direction, there was reason to
 believe that the same jury trying the case again would come to another conclusion,
 Lord Murray proceeded)—Now, if this were a similar case ; if the jury had not
 received the benefit of the best direction ; if they had not received the most effec-
 tual assistance from counsel, and from the Judge who presided, I should say that,
 from a regard to the merits and justice of the case, there should be a new trial to
 remedy the defects of the decision. No doubt I consider it of the greatest impor-
 tance that the learned Judge who presided is against the verdict—I consider it as
 most important ; but I would have considered it of greater importance to a new
 trial, if there had been any thing not stated to the jury that might have drawn their
 attention to the facts of the case ; if there had been any thing more to be applied
 —any thing, as in *Clark v. Thompson*, that was to be done and not done, then I
 should have considered that as throwing doubts upon the opinions of learned
 friends upon whose opinions I look with the greatest respect. Now, I do not mean
 to weigh the evidence, whether it is heavy on the one side or weak on the other.
 I only maintain this, that supposing it weak on the one side, and heavy on the
 other, and supposing the learned Judge who summed up was against the verdict,
 yet, as the trial was complete, full, and deliberate, and no promise of further evi-
 dence held out, I hold it is the jury alone who, in these circumstances, are to de-
 cide upon it. It may appear very perverse to say, that, in a case in which the

No. 172. July 12, 1845. *Waddel v. Waddel's Trustees.*

jury went against the direction of the Judge, a motion for a new trial ought to be refused. But the jury are the judges of the facts, as the Judge is of the law. If a Judge weighs the law, and, with every argument before him, decides the case, then no argument can be urged for his hearing it again. In the same way, if there is no specialty in a case, and every thing has been brought forward that is essential to a complete knowledge of the facts, I think there is no ground for a new trial. As regards a trial like this, lasting for days, it is a totally different case from those in England, where there may be fourteen or fifteen cases tried in one day, where there may consequently be omissions, and where a Judge, from the pressure of business, may not give a good direction. That defect seems to me to pervade those cases tried in England, and others also in this Court, particularly that of Hogg, to which your Lordship referred as one of great importance. In that case, the Lord Chief Commissioner said, that the settlement of a person of sound mind should be respected, and the facts before the jury duly considered. But he said, in that case, they had not been sufficiently considered, arising, perhaps, from the case not having been so well stated as it ought to have been, and therefore a new trial was granted. If there is any thing that can be stated better, or more pointedly, or more sufficiently to the jury, I should consider that a stronger ground for a new trial than any other. (After referring, in support of the same view, to another case tried by Lord Mansfield, his Lordship alluded to the fact that, in that case, there was contrary swearing, and said)—But where a case has been in preparation for a long time, and no reason is tendered on the ground of bias in the jury, I should think with great apprehension and dread on the consequences of granting a new trial, and I should have felt it my duty to state, that, if it is allowed in this case, it will not be followed much out—(for it is always a matter of discretion, not of law)—that the same course will not be often followed in other cases. My Lords, I certainly say, that if it does not come to be a balance of evidence, if there is no evidence on the one side which is palpably contradictory to that on the other, and, more especially, if, on the general issue which was tried, the jury have taken it upon them to decide a point of law, I would take that as an equally good ground against the verdict, because it is not their province to decide upon a point of law; and I am anxious to see whether there is any ground for holding that the jury have in this case done so. If the jury have said, as proper judges of the fact—this is the true road, and that not the true road, then I say they are the supreme Judges of the matter of fact, and I think it extremely dangerous to set their verdict aside. I do not intend to go into detail, but shall only ask, is there evidence on both sides, and what is its nature? There is certainly important evidence as to the codicil, and which I do not think it necessary to go over, as it has been ably and fully stated by Mr Rutherford, then by the Solicitor-General, next by Lord Medwyn, and by Lord Moncreiff to-day; and if all these circumstances were not told before the jury, in the same manner and with the same advantage as they have been stated to the Court, then I would say the verdict should be set aside. But there was no omission; there was every thing done on both sides for the trial, during which the case must have been fully and fairly stated to the jury; and if so, their verdict is unobjectionable. (His Lordship then went on to consider the point, whether the jury had proceeded upon a rule of law, and set upon a matter of fact; and for this purpose reviewed the evidence on both

sides at some length. He referred to a case in Professor More's notes, in which the evidence of two persons, being contrary, was not received, and said,)—I think it rested with the jury in that case to believe those two witnesses or not believe them. Perhaps few juries would be justified in going that length; but where there is contrary evidence, who is to judge? (With respect to the evidence tending to adminiculate the deed, he referred first in order to that of Mr Tyndal Bruce, and said,)—It is stated there are insinuations thrown out against Mr Tyndal Bruce's evidence. It is stated that he consented to be a witness to the signing of a deed when Waddel was actually in a state of insanity. Now, I think he might do so, and be perfectly innocent. Waddel was evidently in that state of insanity that he might have said he saw the head of his friend Smellie on a post at Wright's Houses, and that he had received much instruction from what the head had said to him; and yet a person doing business with him, without actual knowledge of the state of his mind, except what appeared from his conduct at the moment, might honourably say that he was not insane. I know the high character of Mr Bruce, but that is not the province of the jury, who are entitled to say they will believe or not believe the evidence, just as in the case of Braidie, in which the judge said the same thing. (Quoting the evidence of Mr Henderson, Mr Forbes, Mr Fisher, and Mr Watson—); these are all witnesses entitled to great credit, and their evidence to the deepest deliberation; and I think if they had been slightly treated, if they had not received every advantage from the statements of the learned judge, and his charge to them to consider that evidence deliberately, then I think there might be ground for a new trial. (After further remarking upon the evidence, his Lordship said, in reference to Mr Storie's,) what possible motive had Mr Waddel when he went to Mr Storie's in the month of October 1835, and called for the trust-deed he had executed? He then told Mr Storie that he now wished to alter the destination in that deed, and to make a new one; and that he meant to settle Sydaerff upon the Lord President, stating that his Lordship had befriended him. It is surely very odd, that in referring to that deed, formerly made, he did not say this much—"I have already made a codicil conveying Sydaerff to the Lord President." It was not foreign to the business, but quite applicable to it, and he was not speaking under restraint of any kind, but speaking freely. Was then the deed of 3d January 1835 existing in the month of October, when this trust-deed was requested, that deed of Mr Storie? Then he came back in November, and renews his instructions, with the addition that the liferent of Sydaerff was to be given to the Lord President's unmarried daughters. He next came (quoting Mr Storie's evidence) in the end of December or beginning of January, "and directed me to prepare a deed, giving the fee to the President, and the liferent to his unmarried daughters," &c. &c. I cannot conceive that the case can be laid before a jury, without asking them to consider whether at this time the deed of 3d January was executed or not. After further quoting evidence, his Lordship stated, as the conclusion to which he came, that even in a case where the opinion of the judge was against the verdict, and although the evidence on one side was weak, and on the other side strong, the jury were the judges of the fact, and their verdict should not be set aside. What I am anxious to find is this—was there not evidence that the jury should have weighed—have they performed their proper functions—and are there such grounds as that the Court should set aside their judgment, where there was so much deliberation, and in a case which lasted for a long time, and

No. 172.

July 12, 1845.

Waddel v.
Waddel's
Trustees.

No. 172. without, so far as I have heard, any ground of suspicion assigned as to there being any thing that could bias the jury on one side or the other? If there were a conspiracy of witnesses, or if the case had been imperfectly stated, instead of expressing doubts, I would express a clear and decided opinion in favour of a new trial. As it is, I must say it is a matter of regret to me that I cannot concur with those two judges to whom I look up with respect and deference.'

July 15, 1845.
Munro v.
Budge.

THE COURT accordingly granted a new trial, on payment of costs.

JOHN CULLEN, W.S.—W. and J. COOK, W.S.—HOPE & OLIPHANT, W.S.—Agents.

No. 173. DONALD MUNRO, Suspender.—*E. S. Gordon.*
SIR PATRICK MURRAY THRIEPLAND BUDGE, Bart., Respondent.—*Whigham.*

Process—Reclaiming Note.—A reclaiming note against an interlocutor of a Lord Ordinary, pronounced in consequence of a remit from the Inner-House, held competent, to the effect of enabling the Court to determine whether the interlocutor had been pronounced in terms of the remit or not, but to no other.

July 15, 1845. DONALD MUNRO brought a suspension of a charge at the instance of Sir P. M. Thriepland Budge against him, finding caution in the usual way; but, after the record was closed, the cautioner died. The respondent presented a note to the First Division, in terms of the Act of Sederunt, 11th July 1828, § 118, praying that the suspender might be ordained to find new caution; but though an order to this effect was pronounced, and twice renewed, he failed to implement it.

1ST DIVISION.
Ld. Robertson.
N.

The Court then pronounced an interlocutor, remitting to the Lord Ordinary to find the letters orderly proceeded, with expenses, in respect the suspender had failed to find caution. The Lord Ordinary accordingly, in terms of the remit, found the charge orderly proceeded, and the suspender liable in expenses.

The suspender reclaimed against this interlocutor.

The respondent pleaded, that the reclaiming note was incompetent, because, as the interlocutor was pronounced in terms of the remit, it must be considered as a judgment of the Inner-House.

The suspender pleaded, that the reclaiming note was competent, and that it would be necessary to have an interlocutor of the Inner-House, in the event of his appealing from the judgment of the Court of Session.'

THE COURT held, that as the Lord Ordinary might have mistaken

Sands v. Meffan and Others, Jan. 20, 1829, (7 S. 290.)

the terms of the remit, and pronounced an erroneous interlocutor, No. 173. it was competent to reclaim, in order that the Court might determine whether it was correct in terms of the remit or not; but as ^{July 15, 1845.} Lockhart v. it was not disputed that the present interlocutor was in terms of Lockhart the remit, the reclaiming note was dismissed simpliciter, with expenses.

Horne and Rose, W.S.—G. L. Sinclair, W.S.—Agents.

ALEXANDER MACDONALD LOCKHART, and OTHERS, Pursuers.— No. 174.

Rutherford—Marshall.

SIR NORMAN MACDONALD LOCKHART, Bart., Defender.—

Sol.-Gen. Anderson.

Process—Stat. 6 Geo. IV. c. 120, § 10—Abandonment of Action—Expenses.—
A pursuer abandoning an action, in terms of the act 6 Geo. IV. c. 120, § 10, is liable for expenses as between party and party only.

ALEXANDER MACDONALD LOCKHART, and certain other parties, raised July 15, 1845. an action of declarator of non-entry against Sir Norman Macdonald Lockhart, Baronet, which, after various procedure, they were allowed to abandon before judgment, under § 10 of the Judicature Act. ^{1st Division.} W.

The interlocutor of the Court allowed the pursuers, “on payment of full expenses to the defender, to abandon the cause, agreeably to the terms, and under the reservation of the statute 6 Geo. IV. c. 120, § 10,” and appointed an account of expenses to be lodged, and remitted to the auditor, to be taxed, and report. In taxing the account, the auditor allowed certain charges which were proper between agent and client, but not between party and party.

The pursuer objected to the auditor's report as allowing these charges; and pleaded, that the provision contained in the 10th section of the statute, that a pursuer, on abandoning an action, should pay the “full expenses” to the defender, meant only full expenses as between party and party.

The defender pleaded, that under the interlocutor of the Court, the auditor was authorised to allow all expenses *bona fide* incurred in the litigation.

LORD JEFFREY.—A defender cannot be in a better situation when he is merely to be indemnified by the pursuer against loss, and when it is not decided whether he is in the right or not, than he would be if he had got a decree of absolvitor,

No. 174. finding that he was in the right. The defender here cannot have more expenses than he would have got had he been victorious in the suit.
 July 15, 1845.
 Johnstone v.
 Owen.

LORD PRESIDENT.—I am of opinion that it was not the intention of the legislature, nor do the words of the statute bear, that, when the pursuer abandons the action, the defender should have more than full expenses as between party and party. In order to put an end to all question as to the interpretation of the statute in future, it may be proper to pronounce an express finding, that expenses given to defenders, in such cases, shall be taxed and allowed only as between party and party.

LORD MACKENZIE.—I concur. A defender may, from over anxiety, incur a great deal of unnecessary expense to his agent, but it would be very hard to make the pursuer pay for that. Where a pursuer has abandoned an action, in terms of the statute, he cannot be in a worse position than if he had gone on with the case, and a decision had been pronounced, finding that he was in the wrong; but the law allows expenses as between party and party only, even where the losing party has been found to be in *mala fide*.

LORD FULLERTON concurred.

THE COURT pronounced the following interlocutor:—"Find, that under the statute 6 Geo. IV. c. 120, § 10, the pursuers are not liable for any charges which are not proper charges as between party and party in a suit; and remit to the auditor to revise his report, and to tax the account of expenses in conformity with the above finding."

LOCKHART, HUNTER, and WHITERHEAD, W.S.—CUNNINGHAMS and BELL, W.S.—Agents.

No. 175. WILLIAM JOHNSTONE (J. and H. Smith's Trustee), Pursuer and Advocate.—*Sol.-Gen. Anderson—Mackenzie*.
 JACOB RICHARD OWEN, Defender and Respondent.—*Graham Bell—Hector*.

Cautioner—Guarantee.—Terms of a letter recommending a purchaser to a seller, which, in the circumstances of the case, were held not to constitute a guarantee.

July 15, 1845. On 8th October 1841, James Linton, merchant in London, wrote to Messrs J. and H. Smith, merchants in Glasgow, requesting to know whether they would give him credit for a certain quantity of whisky, "provided I give you a respectable reference." Messrs Smith answered, that they would supply him upon his "procuring a letter of unexceptionable reference." On the 15th, Linton wrote again, requesting that some samples of whisky might be sent him; and stating, "My references are, J. R. Owen, Esq., Town and County Bank, Aberdeen; Mr Henry Edwards, Liverpool; but you will please not apply to these gentlemen until I send you an order, as it will be requisite to write to them first."

1st Division.
 Lord Ivory.
 N.

On receipt of this Messrs Smith sent it to their law-agent in Aberdeen, to whom they wrote in these terms:—"We annex a letter, which please peruse. We consider the request of Linton calculated rather to make us anxious to consult the references, and that without loss of time. If you could therefore oblige us by ascertaining from Owen a confidential opinion respecting this gentleman, and advise us in course, as we have occasion to advise him with samples; and in these times we wish to be 'doubly armed.'" Nicol replied, in course, as follows:—"I am this moment in receipt of your favour, and have since seen Mr Owen, who is secretary to the Town and County Bank. Mr Owen is very honest and respectable, and I should be inclined to receive his statement as fully entitled to every credit. He says that Mr Linton is a very respectable young man, of excellent character, and for whom he feels much interested, and that he, Mr Owen, would credit Mr Linton in any reasonable way which he might require in the way of his business. That he does not think you could be wrong in doing so, but that Mr Owen's position precludes him from any guarantee, and that you will understand that the statement now made gives none such. On the whole, I should think you run little risk in trusting Mr Linton to any reasonable extent in due course of business."

No. 175.
July 15, 1845.
Johnstone v.
Owen.

The samples of whisky were sent to Linton on the 25th, and on the 29th he wrote to Owen:—"As Smiths are willing to do business with me, provided I can furnish them with a respectable reference, I shall be most exceedingly obliged, and in your debt for years to come, if you will be so good as write to them, and beg you will excuse the liberty I thus take in making such frequent calls on your goodness, and sincerely hope that this will be the last time that I shall have to annoy you with such things. Mr Edwards has given them a splendid letter, and one from you would seal the matter."

On the 1st November, Owen wrote to the Messrs Smith the following letter:—

GENTLEMEN,—Having been requested by Mr James Linton, of High Holborn, London, to state to you my opinion of him, I have much pleasure in stating that I have been acquainted with Mr Linton for a number of years, and have the highest opinion not only of his integrity, but his knowledge of mercantile affairs and his habits of business.

"I can, therefore, confidently recommend him to your notice, and you may rely upon his being trustworthy to the amount of any obligations he may come under."

On the 3d, the Messrs Smith replied to him:—"We are this morning favoured with your letter of the 1st November, and beg to express our thanks for the opinion you communicate to us of Mr Linton. Your letter is the more to be appreciated as we have not the pleasure of know-

No. 175. ing Mr L. and the nature of the transactions—viz. shipping whiskies in which so much is paid for duties to the English market—makes your testimony to his character highly valuable.”

July 15, 1845.
Johnstone v.
Owen.

Linton gave three different orders to the Messrs Smiths during the month of December, for the prices of which three bills were drawn upon him by them, and accepted. When the first fell due, Linton failed to retire it, and it was in consequence taken up by the Messrs Smiths; but, before they had done so, Linton remitted them a sum of money in part payment, and two bills indorsed in their favour. These bills, however, were dishonoured. When the second bill accepted by Linton became due, he failed to retire it also, and it was taken up by the Smiths; but shortly afterwards they received from Linton its amount in cash. Before this payment had been made, Messrs Smith, on 17th February, wrote to Owen as follows:—

“ Our object in writing to you, upon the present occasion, is to inform you how we are situated with Mr Linton of London, who you recommended in such strong terms to us, and on the faith of which we have had two or three transactions in Islay aqua, and credited him to a very respectable amount. We shall show you, however, how far Mr Linton has merited your recommendation and our confidence.

“ Our first transaction fell due on 5th January, £88, and it was not paid, although accepted payable at the London and Westminster Bank. We paid it here, with expenses. After it was dishonoured, Mr Linton sent us £35, and two acceptances indorsed to us—£35 at one month, and £25 : 10 : 6 at two months. These bills we declined to receive as payment of the returned bill, and wrote to Mr L. to that effect. He stated he would send us the money for them, but this he has not done. The one month bill we sent through the Royal Bank, to be presented when due: it has also been returned to us, with expenses. Such a result will likely attend the other bill due 20th February, £25 : 10 : 6.

“ Our next transaction falls due on the 13th February, £93 odds. We advised Mr L. to be prepared for it, but we are to-day presented with this bill returned unpaid; and, most unaccountably to us, we have a letter from Mr L., dated 14th February, to this effect—‘ Smith, Payne, & Co. will advise the British Linen Co. to pay you £86 to-morrow; the remainder and other matters shall have my immediate attention. I may write you again to-morrow.’ This money will be here to-morrow if sent, which we very much doubt.

“ There is another transaction due on 25th March, £121, 8s., which shows you the credit he enjoyed, and we must say altogether on the faith of your recommendation.

“ Mr Linton may be quite good at bottom, but we submit the above to you as an idea of his ‘ attention to business.’ For those repeated irre-

gularities we cannot account, unless there be something not right in his matters. No. 175.

"We request you will write us more particularly as to his means; for, under the circumstances stated, we feel very dissatisfied with such conduct; and in the event of any loss occurring we hold you responsible." July 15, 1845.
Johnstone v. Owen.

Owen returned the following answer in course :—

"I beg to acknowledge receipt of your letter of yesterday's date, and I assure you I am no less surprised than grieved at its contents.

"I hope you will believe me when I state, that the opinion I gave you of Mr Linton was from a firm conviction, founded upon long personal observation of his character; and although I should be far from justifying his conduct, in regard to the transactions you have had with him, as stated in your letter, yet I cannot bring my mind to alter my former opinion of his principles at least, before obtaining an explanation from him, relative to the irregularities of meeting your demands upon him. I have, therefore, written to him demanding such an explanation, and have also requested him to make a similar communication to you, which I trust will be found satisfactory.

"As to his means, I am not at present in possession of sufficient information to acquaint you on the subject, but as soon as I can do so with sufficient confidence, I shall have much pleasure in putting you in possession of it.

"I am glad to state that I do not apprehend the smallest danger in regard to payment of your outstanding claims upon Mr Linton."

The Messrs Smith wrote to Linton on the 21st February, that they had instructed their solicitor to ask an explanation of his conduct, and adding, "We do not question but you are able to produce sufficient guarantee, so as to prevent the immediate adoption of measures which would be better avoided both on your own account as well as ours."

When the third bill accepted by Linton became due, it was dishonoured, and no part of it was ever paid by him; and, on this being communicated to Owen by the Smiths, he, on the 31st March, replied—"I am in receipt of yours of yesterday, informing me of the non-payment by Mr James Linton of his acceptances to you, at which I am much annoyed.

"I have by this post written to Mr Linton on the subject, and trust that he will discharge your claim immediately.

"I deeply regret the annoyance my introduction has caused you."

Linton having absconded, without the Messrs Smith having obtained any further payment, they raised an action against Owen in the Sheriff-court of Aberdeen, narrating in the summons his letter of 1st November

No. 175. 1841, and concluding against him for the balance still due to them by Linton.

July 15, 1845.
Johnstone v.
Owen.

Owen pleaded in defence, that, in the circumstances of the case, the letter in question was merely a confidential opinion of Linton's character, given at the request of the pursuers, and did not amount to a guarantee; and that as there was no allegation that he had made a fraudulent misrepresentation in it, no liability could be inferred against him.

The Sheriff-substitute sustained the defences, and assolized the defender with expenses.*

The Messrs Smith having become bankrupt during the pendency of the action, William Johnstone, the trustee on their sequestrated estate,

* "NOTE.—The Sheriff-substitute thinks that it is legitimate to consider the letter founded on as the ground of this action in connexion with the facts established by the correspondence in process.

"If the construction put upon the letter by the pursuers is to be adopted, it means that the defender guaranteed the engagements of Linton to any amount. Can this be the meaning of the letter? From the correspondence, it appears that Linton was desirous to commence an extensive trade in whisky, and applied to the pursuers to be supplied with that article. They agreed to do so, on his giving a reference as to character, as he was a stranger to them, and he referred them to the defender, who, on being applied to by Mr Nicol, the pursuers' agent, stated that he would credit Linton in any reasonable way that he might require; that he thought the pursuers would not be wrong in doing so, but that his situation prevented him from becoming Linton's guarantee. This was about the 18th October, and immediately the pursuers sent samples of whisky to Linton, and solicited his orders. They say that they furnished no whisky till after receipt of the defender's letter. But it is clear from their letter of 12th October, offering to supply whisky on Linton's procuring a letter of unexceptionable reference, and their letter of 25th October, sending him samples, suggesting that he should sell the whisky, and desiring him to be very particular as to instructions when he sent orders; that they were satisfied with the opinion of the referees, and resolved to trust Linton without the defender's guarantee. But Linton, ignorant of the pursuers' application through Mr Nicol, applied to the defender for a recommendation, and the letter of 1st November was sent to the pursuers. How did they, on receipt of it, interpret this letter? They knew that Linton would apply to the defender for a letter of recommendation, because he was ignorant of their own confidential enquiry, and they had only a few days previously been informed by Mr Nicol that the defender's position precluded him from granting any guarantee. Did they then consider this letter as a guarantee of all obligations to be undertaken by Linton? If they had, would they not have said so? After Mr Nicol's information, were they not bound to have intimated to the defender that they had viewed his letter as a guarantee, if they so viewed it? But they did not; for they merely convey their thanks for the opinion expressed of Mr Linton, which was the more to be appreciated, as they did not know him, and the nature of their transaction made the testimony to his character highly valuable. These facts demonstrate the meaning of parties, and show, as the Sheriff-substitute thinks, that neither the one party nor the other considered the letter founded on as any thing more than a mere recommendation; and it was only after Linton's insolvency that the pursuers thought that it might be read as a letter of guarantee. And when read alone, it appears to warrant this signification, but, read along with the correspondence referred to, it can only be viewed as a letter of recommendation; and, after considerable hesitation, the Sheriff-substitute has given it this construction."

was sisted as pursuer in their stead, and appealed to the Sheriff, who adhered to the judgment of his substitute.* **No. 175.**

July 15, 1845.
J. Houston v.
Owen.

The pursuer advocated.

The Lord Ordinary pronounced the following interlocutor :—“ Having regard, more especially, to the terms of the defender’s letter of 1st November 1841, on which the action is libelled, finds that the said letter, inasmuch as it imports a representation of, and vouching for, the credit and pecuniary trustworthiness of James Linton, must be held (in conformity with a *series rerum judicatarum* of this Court) entitled substantially to the same legal effects as a letter of guarantee—Therefore advocates the cause, recalls the interlocutor submitted to review, and decerns in terms of the libel : Finds the pursuer entitled to expenses, both in this Court and the court below.” †

* “ NOTE.—This cause is by no means free from difficulty, but the Sheriff agrees in opinion with the Sheriff-substitute.

“ It may be true that the writing libelled on would, in certain circumstances, be held to amount to a letter of guarantee ; but, in judging of such questions, the Supreme Court is accustomed to consider whether such letter were given spontaneously by the writer, and presented by the purchaser seeking credit, or whether it was in answer to enquiries by the seller, and to be guided by these circumstances. The Sheriff, therefore, is not only warranted, but bound to look to the circumstances under which the letter was granted, in judging of its import.

“ It happens that the defender was first applied to on the part of the pursuers by their agent, Mr Nicol, making enquiries, not whether a guarantee would be granted, but under a reference, which the Sheriff considers to be a very different thing ; and, from what is detailed in Mr Nicol’s letter to them, the defender not only did not come under a guarantee, but expressly told them that his situation precluded him from doing so. Now, did the pursuers declare that they would not deal without a guarantee ? Quite the reverse. They went on sending samples of spirits to Linton, and, when he applied to the defender as a referee, the letter in question was written ; but it was not because they had ever expressed themselves dissatisfied with what had been said to Mr Nicol, which was a clear declaration of any guarantee. The Sheriff must, therefore, hold, that neither party at the time considered the letter to be a guarantee, and which he believes to be the truth.”

† “ NOTE.—The Lord Ordinary does not very well see how the Scotch and English authorities are, in point of principle, to be reconciled ; but both parties having declined the opportunity which he offered them, of bringing the point by report under the consideration of the Inner-House, with a view to a general reconsideration of that important question, he is bound to decide according to our own precedents, and he has so decided. It may be that the operation of the English statute of frauds will be found, in certain respects, to account for the apparent discrepancy of decision in the two ends of the island ; though even where writing has intervened, so as to take away, in some sort, this ground of difference, there has been no English case, so far as the Lord Ordinary is aware, decided to the like effect as in our Courts, with reference to any such form of letter as has given rise to the present question. Be this as it may, however, looking to the question as a purely Scotch question, the Lord Ordinary, as an individual judge, does not feel at liberty to treat the point, in the face of the Scotch authorities, as any longer open.

“ Adopting the Scotch rule, the Lord Ordinary does not think that any effect can be given to the verbal communication which took place between the defender

No. 175. Owen reclaimed.

July 15, 1845.
Johnstone v.
Owen.

At the first advising, on the 11th June 1845, the Court was equally divided in opinion—the Lord President and Lord Jeffrey holding that the letter of the 1st November constituted a guarantee, and Lords Mackenzie and Fullerton that it did not. The case in consequence stood over for consideration.

At advising of this date,

LORD PRESIDENT.—After having seriously reconsidered this case, I have seen nothing to change the opinion I expressed when it was formerly before us. On the first occasion that Owen was asked for his opinion as to Linton, he gave it,

and Mr Nicol on the pursuers' part, prior to the date of the letter libelled. That communication, certainly, having been sought entirely on the pursuers' application, and for their own ends, from a party whom they were not entitled to place in a position of the smallest personal responsibility, would not, even if it had resulted in a statement of Linton's credit as broad as is contained in the subsequent letter, have practically availed, unless indeed the *bona fides* of the defender's statement could have been impeached. But all hesitation on this head was cleared; for it resulted in an express declaration of refusal by the defender to become bound, in any sense, as guarantee, and so for the time the matter closed. The chequer, in short, was wholly shut, so far as the verbal communication is concerned. But standing the case, and when the defender must thus have known himself to be absolutely free, he, of his own accord, as regards the pursuers, and no longer for their ends, but for the ends and at the express instance of Linton as the party to be accredited with them, comes forward anew, and without reference to any thing that had previously taken place, but, on the contrary, as an entirely fresh and independent proceeding, volunteers the letter in question, in which he now, for the first time, and in direct contrast, as it were, with what had previously occurred, vouches for the pecuniary trustworthiness of his friend. The Lord Ordinary cannot mix up these two things together. The letter ultimately granted must stand or fall by itself. And (regarded in this light) as a document voluntarily tendered by the defender, with a view to accredit Linton—not confidentially granted for the pursuers' guidance, on their own application—it appears, according to all authorities, to be conclusive. The defender attempted to treat it as a mere letter of introduction, embodying his opinion as to Linton's general character and business habits. But the Lord Ordinary cannot so read it. Had the letter stopped at the first paragraph, indeed, such possibly might have been held its import. But when it proceeds to recommend Linton to the pursuers' notice, adding, 'You may rely upon his being trustworthy to the amount of any obligation he may come under,' it plainly implies (and in terms far stronger than occurred in some of the former cases) a positive vouching for Linton's pecuniary circumstances and credit, upon the faith of which, accordingly, as their inducement for dealing with him, the pursuers are called on to rely.

"If the letter be thus to be construed, there seems no room for doubt that it must be held to cover all the four transactions which the pursuers had with Linton. There was nothing unreasonable or out of the way in the course or extent of dealing. The credit given was no more than, in the circumstances in which Linton was represented as standing, might naturally have been looked for. And as regards the pursuers' whole conduct, both towards Linton and the defender, there is nothing, as far as the Lord Ordinary can see, in any respect open to censure. To use Lord Corehouse's words, in *Kembles*, 31st May 1831, 'they acted with due vigilance, both for their own interest and that of the defender; but, at the same time, with the caution and delicacy requisite in the circumstances of the case.'"

stating at the same time, however, good grounds for not giving any guarantee; No. 175. and no credit was given upon the faith of that opinion, for no whisky was sent to Linton at that time. But then Linton applies to Owen for a letter, and referring to the "splendid" one which he had got from Edwards, adds, "one from you would seal the matter." It is upon this direct application that Owen writes the letter of the 1st November. If he had written nothing else than the first paragraph of this letter, it could not have been held to amount to a guarantee; but then follow the words, "I can, therefore, confidently recommend him to your notice; and you may rely upon his being trustworthy to the amount of any obligation he may come under." These words are of a character altogether different from the statement of his opinion as to Linton's integrity, his knowledge of mercantile affairs, and habits of business. They are essentially different from a mere general statement, that Linton was a trustworthy person; they are, that he may be relied upon as trustworthy to the amount of any obligation, and that I think amounts to a guarantee—a guarantee for the amount of any obligation he might come under to the parties to whom the letter was addressed. And then the answer to this letter is very important. The Messrs Smith, in their letter to Owen of 3d November, say, "Your testimony to his character is highly valuable." Now a testimony given to the character of a party with whom a merchant proposes to deal, seems to imply something more than a mere opinion that he is honest; it means that he may be trusted in his transactions, and therefore I do not think that the explanation attempted to be given of the way and extent to which this testimony was intended to be granted, and the manner in which it was received, is enough to change what was in its terms a guarantee. It has been said that the Smiths never supposed that they had got a guarantee; but the letters to Linton after the dishonour of the first bill, seem to imply that it was on the strength of Owen's recommendation, and on his credit, that the dealing had commenced. But then comes the letter of the Smiths to Owen of the 17th February, which is quite unambiguous. Now what might naturally have been expected to be the answer to a communication of this kind, if Owen had supposed that he had given no guarantee? Would he not have taken his stand on that ground, and said "I never gave, and never intended to give, any guarantee?" But he says nothing of the kind in his reply; for he seems to have felt that he was committed, and did not venture to declare off.

We must take the whole of the correspondence together, and gather the intention of the parties from it; and, looking at it in that view, I am of opinion that the letter of the 1st November does amount to guarantee, and that the interlocutor of the Lord Ordinary ought therefore to be adhered to. The case, however, is undoubtedly one of nicety, and is of a very special nature.

LORD JEFFREY.—On reconsideration, I have seen great reason to doubt the soundness of the opinion I formerly expressed; and, on the whole, I am now inclined to differ from the view taken by your Lordship. There seems to me to be a radical difference between a voluntary expression of willingness to guarantee the responsibility and credit of another, and an expression of opinion as to his responsibility and credit given when asked by a third party. The question, when we come to distinguish between these two cases, is, whether it has been said, in effect,—the character and means of the party render the risk of dealing with him so small, that I am willing to take that risk upon myself; or merely, his character and

July 15, 1845.
Johnstone v. Owen.

No. 175.

July 15, 1845.
Johnstone v.
Owen.

means are such, that the person inquiring as to them need not hesitate to deal with him? I have come to the conclusion at which I have now arrived in the present case, by putting this hypothetical case,—suppose a reference made for information as to the propriety of dealing with a party, and the answer given to the applicant is, “you may safely deal with him, because he has command of £50,000, and is a person of the greatest prudence.” That would be stronger than what is contained in Owen’s letter. In both cases reasons are given for the opinion expressed. These assigned in the hypothetical case being wealth and character. Now, suppose that the facts upon which the reasons were founded were true at the time when the information was given, but that, within a short time afterwards, the £50,000 was lost through some unforeseen misfortune, would the informant be answerable as a guarantee? I don’t think he would; though, no doubt, if the reasons given had no foundation in fact—if the party had neither character nor fortune, and if the information had been rash or false, the case might be different. But if, on the other hand, in answer to the information asked, a guarantee of the party’s credit had been added, then neither the truth of the statements on which the opinion was founded, nor the *bona fides* of the informant, would be sufficient to remove his liability.

With regard to the present case, I quite agree with your Lordship, that testimony as to the character of one merchant given to another, means his credit and responsibility as a merchant, and not merely his honesty as a man; but then it means his credit at the time the information is asked and given, and does not extend to his credit for the future. We must therefore look to the whole correspondence here, to see whether there was at any time a change from a simple representation of present, to a guarantee for future credit; whether any guarantee of that kind was asked, tendered, or actually given; and doing so, I think that there was no transition here, at any time, from a simple representation to a guarantee. We find that, at first, a guarantee is explicitly declined, for Nicol expressly states that Owen refused to become a guarantee. Then Owen in his letter undoubtedly says, “Linton is trustworthy to the amount of any obligations he may come under;” but does he say, “I take the risk of his responsibility for all such obligations,” or any thing that is equivalent to it? But then there is his answer to the Smiths’ letter informing him that they hold him responsible; and, undoubtedly, that letter, and his answer to it, creates the greatest difficulty in the case. But it is to be observed, that the Smiths’ letter may have been written under the idea that Owen’s recommendation had been so rash or so unfair, as to render him responsible; and had it necessarily implied an assertion that he had become guarantee for Linton, would not his answer naturally have been, that he had never come under any such obligation? But his answer is just an assertion that the information he had given as to Linton’s character was correct. And then it is very important to look to the last letter of the Smiths to Linton, after the correspondence which had taken place with Owen, in which they call upon him to get a guarantee—thus evidently implying, that they did not suppose that at that time they had one. Upon the whole, then, I doubt whether this letter, though a positive testimony to Linton’s character and credit, taking these terms in their widest meaning, can be held to amount to a guarantee, though Owen was undoubtedly bound for the truth of his information as at the time he gave it. In order to con-

stitute a guarantee, I think explicit language must be used, though it is not necessary that it should be expressed in any particular form of words. No. 175.

The cases which have been cited cannot form any authority in a case like the present, which depends on a course of correspondence. The English law upon the subject has not been prominently brought before us; but if it were clear, as the Lord Ordinary seems to hold in his note—and I have no doubt rightly—that by the law of England there would have been no guarantee here, I should not, notwithstanding my respect for the recent decisions of our own Courts, be inclined to hold that the law merchant was different in this end of the island. Upon the whole, then, I am of opinion that the interlocutor of the Lord Ordinary ought to be altered. July 15, 1845.
Johnstone v. Owen.

LORD MACKENZIE.—After a further consideration of this case, I am more than confirmed in the opinion I formerly expressed. Were it necessary to lay down any general rule of law as to the constitution of guarantees, I should be inclined to concur in that stated by Lord Jeffrey. I should have liked to see a statement of the law of England upon the subject. I am not satisfied that we can extend a mere expression of opinion into a guarantee, except upon the authority of the understanding and practice among merchants themselves, for I think such a construction would be a very hard one, and likely to be productive of both discomfort and danger in trade. I should, therefore, be unwilling that any such rule should be recognised; and I do not think that, in the special circumstances of this case, it is necessary to lay down any general rule at all. The letters founded upon do not seem to me to amount to a guarantee. It was “a reference” which Linton originally offered, and a reference is a different thing from a guarantee; and it is “an inexceptionable reference” that is asked in answer to this offer. Owen is named as the referee, and Nicol is told to get, not a guarantee, but a confidential opinion from him.

The opinion which he gets is coupled with an express refusal of a guarantee; and for that a permanent reason is given, that Owen held the situation of bank agent. After having got this opinion, the Smiths send the samples to Linton, and thus showed that they were ready and willing to trade with him upon the strength of the information that they had got. Then Linton writes to Owen, and what does he ask? “A respectable reference.” “The splendid letter,” which Linton says had been granted by Edwards, has been much founded upon; but that very expression—splendid letter—appears to me to show that it could not be a guarantee, and I therefore suspect that the “splendid letter” was not a guarantee at all. If it had been, I have no doubt we should have seen it here. In compliance with Linton’s request for a reference, the letter of the 1st November is sent. That letter contains in its first paragraph a statement of opinion, and in the second, no doubt, a conclusion is drawn inferentially from that opinion, and a recommendation of Linton’s trustworthiness is given. But then this recommendation cannot be taken by itself, and separately from the chain of circumstances in which it was given. The Smiths knew that, when Owen had given a favourable opinion of Linton before, and said that there was little risk in trusting him, he had accompanied that opinion with a refusal to give a guarantee, because he was a bank agent. But he continued to be a bank agent when he wrote the letter; and if the Smiths, therefore, expected a guarantee, should they not have asked him whether he still declined to give one, when there was nothing more in

No. 175.

July 15, 1845.

Johnstone v.

Owen.

the letter than had been already stated by their agent Nicol? But they not only do not do that, they do more than not doing it, for they thank Owen for his opinion—not for his guarantee, but for his opinion of Linton's character. Now of what importance was a character if they had got a guarantee? In their subsequent letter, they blame Owen for having given them a false character; and it is evident, from his reply, that that was the meaning he attached to it; but nothing whatever was then said about his being a guarantee; and there is no question here as to his *bona fides* in giving the information that he did. In the last place, the Smiths write to Linton, after their correspondence with Owen, and ask him for a guarantee. Now, why should they do that, if they had a guarantee already? Why should they ask for another, if they believed that Owen was really bound?

On the whole case, then, I adhere to the opinion which I expressed when the case was formerly before us, and think that the interlocutor of the Lord Ordinary should be altered.

LORD FULLERTON.—Taking the whole of the very special circumstances of this case together, I adhere to the opinion I formerly expressed. That opinion has been strengthened by those stated by Lords Jeffrey and Mackenzie, which embody my own so fully, that it is unnecessary for me to add any thing to what they have said.

THE COURT pronounced the following interlocutor:—"Alter the interlocutor of the Lord Ordinary submitted to review; assoilzie the defender from the whole conclusions of the original action, and decern; find the pursuer liable to the defender in the expenses incurred both in the inferior court and this Court," &c.

J. F. WILKIE, S.S.C.—SCOTT and BALDERSTON, W.S.—Agents.

Advocator's Authorities.—Rankine, May 15, 1812, (F.C. ;) *Ross v. Lindsay*, Dec. 1820, (Hume, p. 116, note ;) *Kembles v. Mitchell*, May 31, 1831, (9 S. 648.)
Respondent's Authorities.—Bell's Prins. § 280; 1 Bell's Com. 371-2.

JANET HALLIDAY and MARY HALLIDAY, Advocators.—*More—
A. C. Ritchie.*

THE HERITORS AND KIRK-SESSION OF BALMACLELLAN, Respondents.—
Whigham.

No. 176.

July 16, 1845.
Halliday v.
Heritors and
Kirk-Session of
Balmaclellan.

Poor.—Circumstances in which two aged paupers (sisters) were held entitled to the sum of 3s. 6d. each per week from the heritors and kirk-session of the parish for their needful sustentation, and not bound to accept an allowance of provisions, clothing, &c., instead of money.

SEQUEL of case reported ante, Vol. VI. p. 1133.

July 16, 1845.

On the 11th July 1844, the Heritors and Kirk-Session pronounced the following deliverance :—"The meeting, taking into consideration that the Court of Session have not condescended to name any sum which, in their opinion, would be adequate to afford needful sustentation to the paupers in question, nor to state what further allowance 'may, under the whole circumstances of the case, be deemed reasonable,' they resolve, under the difficulty in which they are thus placed, to provide for the paupers by a liberal board; but, in the first place, they insist that the paupers shall consent to be removed to the house prepared for their reception, and remit to the Minister and Kirk-Session, with Mr Murdock of Drumwhirn, Mr Joseph Black, feuar, and Mr Bell, tenant in Hardland, to make the necessary arrangements for carrying out this resolution, and to see that there the paupers are, in all respects, properly attended to."

1st DIVISION.
Lord Murray.
W.

An advocacy of this deliverance was brought by Janet and Mary Halliday, on the ground that it was an evasion of the remit by the Court; and the note of advocacy prayed that they might be allowed three shillings and sixpence a-week each, or such other sum as might be deemed reasonable, for their needful sustentation.

When the record was closed, upon the 21st December 1844, the Lord Ordinary pronounced an interlocutor, allowing the advocators three shillings and sixpence each weekly, in addition to the house and fuel which had been provided to them, till the 1st of February following.

From the record, it appeared that both of the advocators were above eighty years of age, that one of them was bedrid, and the other in a very infirm state of health. It was proposed by the Kirk-Session to remove them from the house in which they then lived to another, of the sufficiency of which a certificate by certain tradesmen was produced, and to procure a female to attend them, which, in their state, was alleged to be necessary. The Kirk-Session stated, that they were willing to carry the remit of the Court into effect; but they were satisfied, on looking to the whole circumstances, that it would not be for the advantage of the

No. 176. paupers, considering their state, to give them money, and that the committee appointed on the 10th July 1844, had been instructed to see that they were supplied with the necessaries of life, at the cost of the session, and without any restriction as to expense.

July 15, 1845.
Halliday v.
Heritors and
Kirk-Session of
Balmacellan.

The respondents pleaded;—

1. That as they had neither evaded the remit made to them by the Court, nor by their minutes and procedure proposed or done any thing contrary to law, and as they had, on the contrary, tendered to the advocates what would amply satisfy the remit, and what was in itself legal, and was within their competence, as guardians of the poor, the advocacy ought to be dismissed.

2. That they were entitled, in respect of the refusal of the advocates to accept of the lodging, and sustentation and clothing offered to them, to refuse to comply with their demand for an increased payment in money. The law did not oblige the respondents to pay money, but only provide “needful sustentation,” which they might competently and more beneficially afford by means of lodging and board to persons like the advocates.

The advocates averred, that this was the first case in which it had been proposed to board or lodge paupers in the parish of Balmacellan; and that it would be painful to their feelings, as they had always been accustomed to live by themselves, to be removed to a house where they would be obliged to live with other persons. That, although one of them was bedridden, the other was able, with the assistance of neighbours, to attend to the wants both of her sister and herself; and that a female attendant was therefore unnecessary.

They pleaded;—

That the Heritors and Kirk-Session having failed to fix any increase of aliment, in terms of the final judgment in the former action, and still insisting on making an arrangement which should leave the amount to be paid or expended for them altogether indefinite, they were now entitled to have the same fixed by the Court; and that the sum of 3s. 6d. per week to each of the advocates was not more than reasonable to provide house rent, food, fuel, and clothing, and the other items for their needful sustentation. That if a separate sum was to be allowed for house rent, 2s. 6d. a-week for each of the advocates should be allowed for aliment.

The Lord Ordinary pronounced an interlocutor reporting the case to the Court, and continuing the weekly payment which had formerly been allowed to the advocates, till the case should be disposed of by the Court.*

* “NOTE.—When the case was formerly before the Court, the following

When the case came before the Court, the Heritors and Kirk-session No. 176. were allowed to lodge a minute, stating the nature and extent of the allowance which they proposed giving to the advocates. A minute was accordingly lodged, in which they stated, 1st, That they had secured a house, which had been reported, in terms of a previous remit by the Lord Ordinary, to be suitable for the accommodation of the paupers. 2^d, That they had secured the services of a female attendant to take charge of them. 3^d, That meal, potatoes, and milk, would be supplied from time to time in such quantities as they might require. 4th, That fuel and clothing would be provided for them; and also tea and sugar, and animal food and cordials, if their condition should be such as to render animal food and cordials necessary. The whole of these articles, it

July 15, 1845.
Halliday v.
Heritors and
Kirk-Session of
Balmacellan.

judgment was pronounced:—‘The Lords having considered the reclaiming note for Janet and Mary Halliday, advocates, and having heard the counsel for the parties, find that the present allowance to the advocates does not afford the needful sustentation to which they are entitled, therefore recal the interlocutor of the Lord Ordinary reclaimed against, and remit to the respondents, the Heritors and Kirk-Session of Balmacellan, to reconsider their deliverance of 4th September 1843, and to award such further allowance as may, under the whole circumstances of the case, be deemed reasonable, and decern: Find the advocates entitled to expenses, so far as hitherto incurred; appoint an account thereof to be given in, and remit to the auditor to tax the same, and to report.’

“The present advocacy was brought, on the ground that the Heritors and Kirk-Session had, instead of obeying the judgment of the Court, evaded it, by attempting to remove the advocates to a place which would have been very injurious to their health. As the parties differed, both as to the state of the facts and the law, as laid down by the Court, it appeared of importance to ascertain the state of the facts. The Lord Ordinary pronounced the following interlocutor:²—‘The Lord Ordinary having heard parties’ procurators, and thereafter made avizandum, and considered the whole cause, remits to the Sheriff-substitute of Kirkcudbright to enquire, and report *quam primum*, how far the accommodation provided by the Heritors and Kirk-Session, for Janet and Mary Halliday, in the village of Balmacellan, is sufficient, taking into view the state of their health, age, and infirmities, and how far they may be affected by the change of residence proposed, and that a person of the name of Mary Hyslop was to be in the room with them, to take charge of them.’

“It appears from the report of the Sheriff, that the arrangement formerly made by the Heritors cannot now take effect, but they propose that the advocacy should be refused, and they should be allowed to provide for these paupers as they think most suitable in the circumstances of the case, in another house, which they had provided for that purpose, with a proper attendant. The advocates, on the other hand, contend that there ought to be a further allowance given in money or provisions, and that they are not bound to go to any residence appointed by the Heritors, and that the advocates do not desire a greater allowance than the expense which the Heritors would be put to by the arrangement which they propose to make. They further state, that one of the advocates has since become bedridden, and cannot be removed without inconvenience.”

¹ June 11, 1844.

² Jan. 21, 1845.

No. 176. was stated, were to be supplied under the superintendence of the Kirk-session, and the committee appointed on the 11th July 1844; and the probable expense of maintaining the paupers in this manner was estimated as follows:—

July 16, 1845.
Halliday v.
Heritors and
Kirk-Session of
Balmaclellan.

House rent,	£1	5	0
Margaret Brown for attendance,	5	4	0
Thirty stones of meal, at 1s. 5d. per stone,	2	5	0
16 cwt. of potatoes, at 1s. per cwt.,	0	16	0
Milk, one halfpenny per quart,	0	15	0
Butter, at 7d. per pound,	1	5	0
Loaf bread,	1	6	0
Tea,	1	10	0
Fuel, &c.,	1	10	0
	£15 16 0		

or at the rate of *Three Shillings* per week for *each* of these two paupers.

The case was this day advised.

LORD PRESIDENT.—I am not prepared to lay it down as a general rule, that where heritors are ready to give such an allowance as is necessary for needful sustentation, they are precluded from administering it in such a way as seems to them most fitting. They are bound to give adequate support; but that does not entitle the paupers to say that that can only be given in money. But this is a very special case, and I do not think we are in a situation to sanction this particular table. From the minute we find that the largest item is the sum to be paid for an attendant on these old women, who say that they do not require one; and if we deduct that, and the expense of fuel, then the actual sum proposed to be given is scarcely larger than that which was formerly held to be unsatisfactory. I think, then, in order to prevent any complaints in future, we should fix the amount of aliment in money.

LORD MACKENZIE.—I am of the same opinion. The heritors and kirk-session have a right to administer the adequate aliment, which they are bound to give either in money or provisions, as may seem to them to be best in the circumstances of the case, but then we have found that hitherto they have given too little. We must give a remedy for that, either by giving more money, or by fixing a dietary; and I think the only convenient way here is to give money.

LORD FULLERTON.—Concurred.

LORD JEFFREY.—We are called upon to make an inadequate aliment an adequate one, and we can't do that by saying to the heritors, aliment the paupers properly; the only practicable way of doing so is to fix the aliment at a sum of money. The heritors are not *suspicionē majores*, for they have been convicted already of having given these poor old women inadequate sustentation, and it is impossible now to leave them at their mercy.

The Court pronounced the following interlocutor:—"In the special circumstances of the present case, ordain the Heritors and Kirk-session to pay to each

of the advocates the sum of 3s. 6d. per week, for their needful sustentation, while in indigent circumstances, and decern: Find the advocates entitled to expenses, subject to modification," &c.

No. 176.
July 16, 1845.
Lord Belhaven
v. Presbytery
of Hamilton.

CHARLES SPENCE, S.S.C.—WALTER DICKSON, W.S.—Agents.

THE RIGHT HON. LORD BELHAVEN AND STENTON and OTHERS, No. 177.
Petitioners.—*Cowan.*

THE PRESBYTERY OF HAMILTON, Respondents.—*Inglis.*

Parish—Schoolmaster—Presbytery—Statute 43 Geo. III. c. 54, §§ 14 and 15.
—Circumstances in which held that a presbytery was bound to apply to the Commissioners of Supply to fill up a vacancy in the office of parish schoolmaster, in terms of the act 43 Geo. III. c. 54, § 15.

By section 14 of the statute 43 Geo. III. c. 54, it is enacted, "That from and after the passing of this Act, in case of vacancy in the office of schoolmaster by death or otherwise, the minister of the parish shall, within fifteen days, intimate, or cause to be intimated, from the pulpit, immediately after divine service, in the forenoon, the vacancy which has taken place, and communicate the knowledge of the same by letter to such heritor or heritors as may be non-resident; and the heritors possessed of the qualification required by this Act, with the minister of the parish, are hereby appointed to hold a meeting, of which intimation shall be given by the minister by edictal citation, and circular letters to such as are non-resident, at least thirty free days before it takes place; and such meeting, or adjourned meeting, shall elect a person to the vacant office of schoolmaster; and in the event of the parish being vacant, the Presbytery shall appoint some one of their number to make the intimations and give the notices which, according to the provisions of this Act, the minister is required to do." July 16, 1845.
1st Division.

By section 15, it is provided, "That if the heritors, qualified as is hereby required, and minister, shall fail to elect a schoolmaster within four calendar months from the time the vacancy shall have taken place, then the Presbytery within the bounds of which the parish is situated shall apply to the convener of the Commissioners of Supply of the county or stewartry, who, or any five of them, at a meeting to be called by the convener upon thirty days' notice, shall have power *jure devoluto*, and are hereby directed, to elect a person to supply the vacancy."

The office of schoolmaster in the parish of Cambusnethan became vacant on 25th April 1844. At that time the Rev. Mr Livingstone, the minister of the parish, had been deposed from the office of the ministry by sentence of the General Assembly, which sentence, however, he had

No. 177. made the subject of an action of reduction. The Presbytery of Hamilton, on the assumption that Mr Livingstone was no longer minister of the parish, proceeded to make the statutory intimation, directed in that event by the 14th section of the statute, with a view to the election of a schoolmaster.

July 16, 1845.
Lord Belhaven
v. Presbytery
of Hamilton.

The meeting appointed by the Presbytery took place on 19th June; but in the mean time Mr Livingstone had obtained an interdict, prohibiting the Presbytery and the Heritors of the parish from holding any meeting, or taking any other proceeding for filling up the vacancy in the office of schoolmaster, without his concurrence and approbation. They were further interdicted "from doing any thing whatever to the prejudice of the complainer's status, rights, privileges, duties, and interests, as minister of the said parish of Cambusnethan." The meeting, in consequence, did not proceed with the election of the schoolmaster.

Mr Livingstone thereafter summoned a meeting of the heritors, for the purpose of supplying the vacancy, which was held on 8th August, but was with his consent adjourned till the 29th.

When the adjourned meeting was held, more than four months had elapsed from the time when the vacancy took place, and it was in consequence agreed that the matter should be "simply remitted to the Presbytery of Hamilton, to proceed towards the electing of a schoolmaster for the parish in terms of the Act of Parliament."

The Presbytery having taken the matter into consideration, resolved to delay proceeding in the case, till the heritors of Cambusnethan should get the interdict removed, or become bound to relieve the Presbytery from all responsibility.

A petition was then presented by Lord Belhaven and Stenton, and certain other heritors of the parish, praying the Court "to find that the said Presbytery have done wrong in refusing to apply to the convener of the Commissioners of Supply, as directed by the 15th section of the statute 43 Geo. III. c. 54, to proceed to the election of schoolmaster for the parish of Cambusnethan, and to ordain them forthwith to make such application in terms of the statute."

The Presbytery gave in answers, in which they stated that they were not satisfied that if, in the circumstances of the case, they proceeded to elect a schoolmaster, in terms of the requisition of the petitioners, they would not be involved in a breach of the interdict obtained by Mr Livingstone in June 1844; and that they were certain that any step they might take would be met either by a petition and complaint or a suspension and interdict at his instance.

An opinion was expressed by the Court, that the compliance of the Presbytery with the request of the petitioners would not constitute a breach of interdict, and the following interlocutor was accordingly unanimously pronounced:—

“ Ordain the respondents to give immediate notice to the Commissioners of Supply, as directed by the 15th section of the statute 43 Geo. III. c. 54, as to filling up the vacancy in the office of schoolmaster of the parish of Cambusnethan; find no expenses due to either party, and decern.”

No. 177.

July 16, 1845.

Buxton v. Buxton.

DUNDAS and WILSON, W.S.—WILLIAM YOUNG, W.S.—Agents.

BUXTON, Pursuer.—*Inglis*.

No. 178.

BUXTON, Defender.—*Shaw*.

Process—Consistorial—Summons—Statute 1 Will. IV. c. 69, § 40.—After a proof had been reported in an action of divorce, it was discovered that the summons had passed the signet, as in an ordinary action, instead of being signed by a clerk of Session, as required in consistorial causes by the Act 1 Will. IV. c. 69, § 40;—Held, that the error was fatal to the whole proceedings, and that the objection founded upon it could not be waived.

LORD WOOD reported the following case verbally to the Court for directions:—

An action of divorce, after defences were lodged, was remitted to the Sheriff Commissaries, and a proof taken and reported. After this, and before further procedure, the clerk to the process observed that the summons, instead of being signed by one of the principal or depute clerks of Session, as prescribed in consistorial causes by the Act 1 Will. IV. c. 69, § 40, was signeted as a summons in an ordinary action. The clause of the Act is in these words:—“ Summonses in maritime and consistorial causes, instituted in the Court of Session, shall be signed by one of the principal or depute clerks of Session, and it shall not be necessary that any such summons should pass the signet, or require any concurrence for the public interest.”

July 16, 1845.

1st Division.

Lord Wood.

The defender did not take the objection, but on the contrary expressed his readiness to waive it. The question on which Lord Wood asked the directions of the Court were, whether the error was radical, rendering the whole proceedings null *ab initio*, and whether the objection upon it could be waived by the defender. His Lordship stated his own opinion to be, that the objection was fatal, and could not be waived.

Inglis, for the pursuer, argued. The provision of the act that summonses in consistorial causes should be signed by a clerk instead of passing the signet, was for economy merely. It was not an imperative, but a directory provision, giving a privilege to such cases, leaving it still open to resort to the other course. At all events, the privilege might competently be waived.

No. 178. *Shaw*, for the defender, stated, that he had no interest to take the objection, and was ready to waive it if competent for him to do so.

July 16, 1845.
Buxton v.
Buxton.

LORD PRESIDENT.—It is of no consequence that the objection is not taken by the defender. The statute establishes a new code with regard to consistorial and admiralty cases. This Court had formerly only a power of review in such cases, which, under the statute, are now brought directly here. If Mr Inglis had made out that the provision of the statute, that summonses in such cases should be signed by one of the principal or depute-clerks of session, was merely a directory provision, his argument would have been good. In the case of Maxwell and Stevenson, we were taught the law as to directory statutes in very strong language by the Lord Chancellor. But I hold it to be an enactment of the most distinct and imperative kind. It makes signing by the clerk fundamental as to the process itself. It is a strong circumstance, that before the act, when this class of cases originated in the Consistorial Court, the summonses bore the signature of the clerk of that court. If something is required by statute as indispensable to the validity of a particular process, it cannot be waived by parties. Suppose a summons in this court for a sum before the statutory amount allowed to be sued for here, could the consent of parties allow it to go on? I am clear that the waivers of parties cannot obviate the objection here. It is important to observe, that by a subsequent act (1 & 2 Vict. c. 118, § 29), it is provided, “that summonses in admiralty causes may be raised, and pass under the signet, in like manner as other summonses before the Court of Session would do.” Here is no such provision as to consistorial causes.

LORD MACKENZIE.—I have very great difficulty. Abstracting from the consideration that this is a consistorial case, suppose an ordinary case, where the defenders had an opportunity of being heard on dilatory offences, if they chose to state any, and that the Lord Ordinary proceeded to make up a record, in respect no dilatory defence was stated. Suppose then a record made up, and that the case went on to verdict and decree, could one of the parties come forward after that with a reduction, upon the ground that the summons had not been signeted; supposing there was no signet, or an incorrect signet upon it. It would require a deal of consideration before I held that. Still more where the objection is not stated by the party, but the Court notices it, I would hesitate to hold that this as in the case of want of a stamp, annuls the proceeding?

I think the Judicature Act stands in the way. It provides, that if no dilatory defence is stated, a record shall be made up, and that it shall not be competent to state a dilatory defence after. How, then, can you go back to the want of the signet? It is a mistake to suppose that the signeting gives jurisdiction. Jurisdiction must exist before signeting. If there is no jurisdiction there can be no signeting. Signeting is to force the party into Court. The Court has jurisdiction before either signeting or signing, and these are merely an explication of it.

Then if want of the signet in ordinary cases would not operate in this way, is there any difference here? Is a difference made by the substitution of a clerk's signature for the ordinary signet? I cannot see how it should have a different operation. I think the object of the provision was to save expense. The clerk has no duty to look after collusion or any thing else. His signature was to have no greater effect than the signet for which it was substituted.

LORD FULLERTON.—The case is very much where Lord Mackenzie has put it. No. 178.
 The words of the statute are quite imperative. I think the true reading is, that in
 writ and consistorial causes, the proper form of authenticating the summons July 16, 1845.
 shall be by the signature of a clerk instead of the signet. I rather agree that the Buxton v.
 the forms are exactly the same in their nature and effect where they respectively Buxton.
 are proper; and that the question here, therefore, just comes to this, How shall
 we deal with an action which has gone a certain length, when it is discovered that
 there is an error in the signeting or signing of the summons? The question is quite
 new to me, and I have great difficulty in holding that the whole proceedings are
 null, the hardship is so great. The signet or signature of a clerk is not a warrant
 of citation so much as a test that the document is in the form the law has
 required.

LORD JEFFREY.—I feel the importance of the question, and, in one sense, the
 derivableness of our being called on to determine it. I concur in the views of
 your Lordship, and on grounds that appear to me sufficient. We are all agreed,
 that the idea of signeting coming in place of the clerk's signature, is not admissi-
 ble, and that this summons wanting the signature is in the same position as a sum-
 mons in an ordinary case which had never passed the signet. Signing, in this
 class of cases, is in all respects parallel to signeting in ordinary cases. Then, would
 it be competent for parties to go on in this Court without a signed summons?
 Could an unsigned summons be looked at as constituting parties in this Court?
 Summons run in name of the sovereign, and there must be some public autho-
 rity for setting this formidable machinery in motion. If there is no mark of this
 public authority, which is the *primum mobile*, there is no action in Court. It ap-
 pears to me that the defect is radical and incurable. Suppose a person writes a
 letter to another, saying, "You owe me so and so, hold this as a summons,"—and
 is willing to do so, and comes into Court, could it be maintained that this was
 competent? A party has no right to enrol a cause and call himself *actor*, unless
 he has come into Court by public authority. The objection goes as deep as that—
 to the sisting of parties. I would prefer further argument and consideration,
 at the same time, I would not do much violence to my conscience by deciding
 the case now.

LORD FULLERTON having concurred with the LORD PRESIDENT and LORD
 JEFFREY,

THE COURT instructed the Lord Ordinary to find the objection insuperable,
 and dismiss the action.

—Agents.

No. 179.

July 16, 1845.
Johnstone v.
Maxwell's
Trustees.

ROBERT JOHNSTONE, Complainer.—*Inglis*—*E. Fraser*.
SIR J. H. MAXWELL'S TRUSTEES, Respondents—*G. G. Bell*—*Swinton*.

Lease—Removing—A. S. 10th July 1839, c. 7, § 34.—A tenant, who had come under an obligation to remove from his farm without any warning, stated as defences to an action of removing, that he had received no warning, and that he possessed by tacit relocation;—Held, that these were not defences excluding the action, capable of being instantly verified, so as to exempt him from finding caution for violent profits under the A. S. 10th July 1839, c. 7, § 34.

July 16, 1845. THE farm of Branteth had been let by Sir John Maxwell's trustees to William Johnstone, and, failing him, to Robert Johnstone, for a period of fifteen years, from Whitsunday 1835. In April 1844, an agreement

2D DIVISION.
Ld. Robertson.
T.

was entered into between the parties, with the view of putting an end to various disputes which existed between them. One of the articles of this agreement was, that the trustees thereby acknowledged Robert Johnstone as tenant of the farm, but that only up to the term of Candlemas then next, 1845, as to the arable land, and the term of Whitsunday 1845 as to the houses and grass; and Johnstone thereby bound and obliged himself to remove from the farm at the said term of Candlemas as to the arable land, and Whitsunday as to the houses and grass, and that without any warning or process of removing to that effect; and thereby consented, that upon the arrival of the said respective terms of removal, the trustees should be entitled to eject him from the possession.

Upon the 30th May 1845, Maxwell's trustees, without having given any warning, presented a petition for removing against Johnstone to the Sheriff of Dumfries. Upon this petition the Sheriff pronounced a deliverance, appointing Johnstone to lodge answers, and to find caution for violent profits, in terms of the Act of Sederunt, 10th July 1839, cap. 7, § 34. Upon this Johnstone presented a reclaiming petition, setting forth the defences he meant to found upon, viz., that he had received no warning to flit, and that he possessed the farm by tacit relocation, and praying the Sheriff to relieve him from finding caution.

After hearing parties, the Sheriff refused to allow the paper to be received until caution had been first found, in terms of his deliverance; and Johnstone having failed to find caution and lodge answers, he pronounced decree of removing, and, of a subsequent date, granted warrant for ejectment.

Johnstone having upon this presented a note of suspension and interdict, offering juratory caution, the Lord Ordinary passed the note, and granted commission to take the suspender's oath as to juratory caution.

Maxwell's trustees reclaimed and argued, inter alia, That the suspender having failed to lodge answers and find caution for violent profits, in terms of the Act of Sederunt, 10th July 1839, and not having offered instantly to verify a defence excluding the action, the Sheriff had proceeded properly in pronouncing decree of removing. No. 179.
July 16, 1845.
Johnstone v. Maxwell's Trustees.

Johnstone answered, that the defence which he had proposed to state to the removing, and which the Sheriff had refused to receive, was, that he had received no warning to sit, and that he possessed the farm by tacit relocation, the respondents having allowed him to retain peaceable possession up to the 30th of May, and after Candlemas, the first term of removal stipulated in the agreement; and, as these were defences capable of being instantly verified, the suspender was not bound under the Act of Sederunt to have found caution for violent profits.

LORD MONCREIFF.—I do not know to what case the Act of Sederunt could be applied, if it does not apply to this one. The defence of possession by tacit relocation, is one which can only be made out by proof. It is not a defence which can be instantly verified, in the meaning of the Act of Sederunt.

The other Judges concurred.

LORD MEDWYN was absent.

THE COURT accordingly pronounced this interlocutor:—"Recal the interlocutor complained of, and remit to the Lord Ordinary to allow the note of suspension to be amended as to the offer of caution, and to pass the same on caution, in terms of the Act of Sederunt, within ten days; and, if caution be not found within that period, with instructions to refuse the said note of suspension, with expenses."

MACKENZIE and SHARPE, W.S.—ANDREW DUNLOP, W.S.—Agents.

No. 180.

MESSRS FORBES and COMPANY, Raisers and Claimants.—*Moir.*

July 17, 1845. RICHARD CAMPBELL, W.S., (Judicial Factor on Janet Blair's Estate)
 Forbes v. Campbell.
 Claimant.—*Rutherford—Patton.*

Agent and Principal—Process—Multiplepointing.—Instructions were given to a mercantile firm in Bombay to take out letters of administration in the Court of Bombay to the estate of a person who had died there, but instead of doing so they obtained payment of the funds, which they remitted to this country, by granting a bond of indemnity to the Registrar of the Court, who had taken possession of them in his official capacity: In a multiplepointing raised for the distribution of the estate, a claim was made by the Bombay firm, that the parties preferred to the fund *in medio* should give them security against liability under the bond for indemnity:—The Court refused the claim.

July 17, 1845.

1st DIVISION.
 Lord Murray.

JAMES BLAIR died at Bombay intestate, and without issue, and, having left no acting executors, his estate was taken possession of and intromitted with by the Registrar of Bombay. His next of kin, (his aunt), Janet Blair, thereafter died in this country, leaving a trust-disposition in favour of William Cowan. In order to obtain possession of James Blair's property, which he claimed in his character of trustee, Cowan entered into a correspondence with Forbes and Company of Bombay and London, in which he learned that it was necessary to take out letters of administration in the Court of Bombay, and for the attorney doing so to enter into bond for the due administration of the effects. Forbes and Company having expressed their disinclination to act as his attorneys under such a responsibility, Cowan suggested that, to remove all risk, that a multiplepointing should be raised in their and his joint names, by which the rights of the different claimants under the trust-deed might be decided.

Forbes and Company consented to this arrangement, and accordingly Cowan transmitted to them a power of attorney for enabling them to take out letters of administration in his favour.

Instead of expediting letters of administration, and entering into the relative bond, Forbes and Company gave a bond of indemnity to the Registrar, under which they obtained possession of James Blair's property. The funds were transmitted to this country, and consigned in the Bank of Scotland, and the process of multiplepointing raised.

Cowan having died, Richard Campbell, W.S. was appointed judicial factor on the trust estate, and in that character claimed the fund *in medio*; and, the other claimants having withdrawn, he was ultimately left the only party claiming it.

In these circumstances, a claim was given in by Forbes and Company, the joint raisers of the multiplepointing, that, before decree of prefer-

ence was pronounced, and the fund *in medio* paid over, security should be given them by the parties who should be found entitled to it against any liability which they might incur under the bond of indemnity.

No. 180.
July 17, 1845.
Forbes v.
Campbell.

The Lord Ordinary reported the case upon minutes of debate.

The judicial factor pleaded ;—

1. That the effect of granting the security asked would be, that the fund would remain consigned in the bank for ever, as the beneficiaries under the trust-deed were too poor to find caution ; and he being merely an officer of Court, and having no personal interest in the matter, declined doing so ; and that thus the whole proceedings in the action, as a process of distribution, would be nullified.

2. That the demand was made in face of the judicial contract entered into by the raising of the action to which Forbes and Company were parties ; and that payment, on personal security only, was contrary to the very nature of the process, the object of which was to give, by the judgment pronounced, a security which could not be obtained extrajudicially.

3. That the fund was no longer under the raiser's control, as it had been consigned by order of Court, and was payable simply and absolutely to the party who should be preferred, without any condition of finding security against claims of repayment ; and that this condition could not now be introduced.

4. That the apprehensions expressed by Forbes and Company of a subsequent challenge, in consequence of payment under a decree in the multiplepoinding, were unfounded ; and, at any rate, they would clearly have been so, had Indian letters of administration been taken out.

Forbes and Company pleaded ;—

1. That the trustee must be understood to have concurred in raising the multiplepoinding on the footing that, if the Scotch Court could not give a direct discharge of the bond of indemnity in an action of multiplepoinding to which the Registrar of Bombay was not a party, they should be protected from responsibility by obtaining caution from those to whom the fund *in medio* was paid, to repeat the money in the event of a preferable claim being made out to it.

2. That although a decree of exoneration would protect them so far as regarded all parties who had made appearance in the multiplepoinding, yet it could not protect them against parties who had not appeared ; that claims might yet be made by other parties, alleging a nearer relationship to James Blair than his aunt, Janet Blair, or by creditors who were minors when the money was paid away by the registrar ; and, if these claims were made, he must protect himself under the bond of indemnity.

3. That letters of administration could have been obtained only upon a bond of guarantee being granted to the registrar ; and it had not been

No. 180. shown that such a bond would have been different in its nature or effect from that actually granted.
 July 17, 1845. *Forbes v. Campbell.*

4. That as no condition as to finding caution could have been introduced into the summons of multiplepoinding, as that would have been contrary to its style and structure, there was no inconsistency in now demanding that the decree of preference should be accompanied with the condition of security.

LORD PRESIDENT.—I am clearly of opinion that we have no right to impose any such restriction as that asked ; the decree must just go out in the usual way, I cannot think we are entitled to impose the burden of finding security on the claimants, who may be preferred in this multiplepoinding.

LORD MACKENZIE.—I entirely concur. If Forbes and Company had been properly authorized to do what they did, they might perhaps have had some claim, but, on the contrary, they were directed to do a different thing altogether. If they had done as they were told, they would not have required to ask for any security ; and I do not think they are now entitled to ask more than they could have done, if they had acted according to their instructions.

LORD FULLERTON concurred.

LORD JEFFREY.—I am of precisely the same opinion. I am satisfied that these parties are contending against unreal perils ; but even were they certain, I should agree with your Lordships that they must bear the consequences of their breach of orders.

THE COURT accordingly repelled the claim of Forbes and Company for security, and found them liable in the expenses of the discussion upon that point.

A. J. RUSSELL, W.S.—J. M. LINDSAY, W.S.—Agents.

THE MAGISTRATES AND TOWN-COUNCIL OF LINLITHGOW, Pursuers.— No. 181.

T. Maitland—Moir.

THE EDINBURGH AND GLASGOW RAILWAY COMPANY, Defenders.—

Rutherford—Penney—Sandford.

July 17, 1845.

Magistrates of
Linlithgow v.
Edinburgh and
Glasgow Rail-
way Company.

Burgh—Customs.—Terms of royal charters and grants ratified by Parliament in favour of a royal burgh, which being followed by possession, were held to give the magistrates a title to levy certain dues upon all goods, &c. carried through the territory of the burgh, and passing across a river within the limits prescribed by the charters and grants, by means of a railway, sanctioned by act of Parliament, except where, in the latter case, a right of free passage could be proved to have existed for forty years.

By a charter, dated 23d October 1389, King Robert II. gave and granted to the burgesses and community of the burgh of Linlithgow “burgum nostrum predictum, una cum portu de Blaknes, firmis burgi, et parvis custumis ac toloneis, cum curiis et curiarum exitibus, et ceteris justis pertinentiis quibuscunque.”

July 17, 1845.

1st Division.
Lord Wood.
W.

By a charter of confirmation, or precept of infeftment containing a precept of sasine, dated the 24th day of May 1593, granted in favour of the Provost, Bailies, Council, and community of the burgh of Linlithgow, and their successors, King James VI. confirmed the charter granted by Robert II., with the haill privileges therein expressed, and granted the same of new to the burgh “de novo, presentium tenore, pro nobis et successoribus nostris, infeodamus, erigimus, damus, concedimus, disponimus, et pro perpetuo confirmamus, dicto burgo de Linlithgow, burgensibus, inhabitantibus, et communitati ejusdem, Totum et integrum dictum burgum cum dicto portu de Blaknes, firmis burgalibus, parvis custumis, et tholoneis supra specificatis, et cum reliquis particularibus privilegiis et libertatibus supramentionatis, una cum omnibus aliis et singulis libertatibus, privilegiis, immunitatibus, liberis nundinis, custumis, privilegiis, proficuis, commoditatibus, et devoriis quibuscunque dicto burgo de Linlithgow prius spectantibus, et que et quas prepositus, ballivi, consules, et communitas ejusdem, vel eorum predecessores, quovis tempore preterito possidebant et gaudebant. Et similiter damus, concedimus, disponimus, et pro nobis nostrisque predictis imperpetuum confirmamus, preposito, ballivis, consulibus, burgensibus, et inhabitantibus, et communitati dicti burgi de Linlithgow, et eorum successoribus, burgensibus et inhabitantibus ejusdem, Totam et integram communem moram et communes terras pertinentem et spectantes dicto burgo de Linlithgow, per omnes bondas et limitas prout prepositus, ballivi, con-

No. 181. *sules, et communitas ejusdem, et eorum predecessores, pacifice gavis*
 July 17, 1845. *sunt et perambularunt annuatim temporibus elapsis, una cum dicto portu*
Magistrates of de Blacknes, viridario eidem adjacente, ac domibus et hortis in Blacknes
Linlithgow v. ab antiquo dicto burgo spectantibus, et quas ipsi et eorum predecessores
Edinburgh and pacifice ultra hominis memoriam omnibus temporibus preteritis posside-
Glasgow Rail- runt; cum omnibus custumis, anchoragiis, et omnibus aliis casualitatibus
way Company. libero portui spectantibus; una cum fructibus, redditibus, terria, profi-
cuis et emolumentis quibuscunque spectantibus ad capellaniam nuncupe-
tam capella Sancti Niniani in dicta villa de Blaknes situatam, cujusqui-
dem capellanie patronatus et donatio preposito, ballivis, consulibus, et
communitati dicti burgi, per infeofamentum ipsis desuper per predeces-
sores nostros confectum, spectabat, per omnes bondas, metas, et divisas,
prout dictus burgus semper in usu fuerunt, et pacifice prius possiderunt,
unde dictus burgus possit melius sustinere ministros verbi Dei et paupe-
res infra eundem."

Infestment was taken on the precept and sasine contained in this charter in favour of the burgh, on 4th December 1593.

This charter was ratified by an Act of Parliament, passed in the year 1594, by which it was declared that the King, with the consent of the Estates of Parliament, ratified and approved the charter of confirmation already granted, "of tua auld infestmentis grantit of auld be his hienes predecessouris to y^e burgh of Linlithgow, quhair of the ane is maid of the said burgh, with the small custumes and port of Blacknes, the uthir of the frie custumes off certane wearis, without any deutie to be payit thairfoir, as the said charter of confirmatioun in the self at mair lenth beiris. In the quhilk our said Soverane Lord hes of new diaponit to the said burgh the said point of Blacknes, with the small custumes, landis, liberties, commodities, privileges, dignities, and immunities quhatsumevir, pertening to the said burgh, as the provest, ballies, counsall, and communitie thair of, and their predecessours, hes occupiet and possess of befoir, as ar particularlie expressit in the said charter."

By another Act of Parliament, passed in the year 1661, King Charles II. again ratified and confirmed the two charters mentioned, along with others, in favour of the burgh.

By royal grant, dated 23d March 1677, Charles II. "being informed of the great charges and expens debursd be umq^{le}

Earle of Linlithgow in founding and building the bridge of Linlithgow; and that in consideration thereof there were only granted to him ane tack of the custumes and other dewes payable att the said bridge for the space of nynteen yeares, which is now long since elapsed, the benefite whereof the saids yeares being very small, and far short of the expenss expended in building of the foirsaid bridge. Therefore, witt ye us from our royall favour which we bear to our right trustie and well beloved cusing and counseller George, now

Earl of Linlithgow, sone to the said umq^{le} Earle of Linlithgow, with advice and consent of the Lords Commis-ioners of our Thesaurarie, and remanent Lords of our Exchequer, to have given, granted, and disposed, likeas we be thir our letters, with advice and consent fairsaid, give, grant, and dispoine to the said George Earle of Linlithgow, his aires and assigneyes, the customes, casualities, imposts, proffits, and emoluments of the said bridge of Linlithgow, now and formerlie in use, to be payit thereatt by the passengers, travellers, merchants, and uthers lyable in payment of the fairsaids customes and casualities, att any tyme heretofore, for whatsomever bestiall, goods, merchandice, commodities, or others, coming, going, or passing by the said bridge of Linlithgow, and that for the space of nynteen yeares, and immediatlíe subsequent and following the eleventh day of November Jm. vj^e eightrie-one yeares, which is the time of the elapsing of our former gifts thereof, with power to the said Earle of Linlithgow, and his fairsaids, during the space above written, to intromit with and uplift the saids customes, proffits, imposts, and emoluments of the said bridge, be himself, his factors, servitors, and uthers in his name, having his power and warrant to that effect, and thereupon to dispoine att his pleasure, sicklike, and in the same manner, and also fullie and freelie in all respects as his said umq^{le} father, or any uthers since his deceis, was in use to doe the samen of before.”

By deed of gift dated 30th November 1681, the Earl of Linlithgow assigned the right thus conferred upon him to the town of Linlithgow, the deed bearing that, “ We, George Earle of Linlithgow, above designed, for the love, kyndnes, and respect which we have and bear to the good town of Linlithgow, doe, be thir presents, freelie gift, quat, and dispoine to the magistrats, for the touns use, the above-written gift, granted be his Majestie to us off the customes of the bridge above-mentioned, togither with all right and tittill which we or ours may clame or pretend to the fairsaids customes heirefter be the same gift.”

When the nineteen years, for which the right had been conferred, were about to expire, the Magistrates of Linlithgow presented a petition to Parliament, praying that it might be prorogated, continued, and perpetuated in all time coming; and, accordingly, an Act was passed on 16th June 1685, by which it was declared that the Parliament “ proro-gates, continues, and perpetuates, in all time coming, the foresaid imposition formerly granted, as it is now paid by all passengers and travellers with pack-loads, cart-loads, cattle, horse, and others, conform to use and wont, passing the river of Avon betwixt the West bridge and mouth of Avon, after the expiration of the foresaid gift, and that for the sustentation and reparation of the said bridge, from time to time, at the sight, and by the advice of the Magistrates and Council of the said burgh for the time being.”

On the 4th of November 1699, the Magistrates of the burgh rectified and set down a custom-table, setting forth the dues payable on all goods

No. 181. brought within the burgh, called in the table the Town-custom; and also the dues payable under the Act of Parliament 1685, entitled the Bridge-custome, and which, it was declared, were "not only to be paid at Linlithgow bridge, but also betwixt the West bridge and the mouth of Avon, conform to Act of Parliament in favour of the town;" and this table was then declared to be the only rule for exacting custom in time to come.

July 17, 1845.
Magistrates of
Linlithgow v.
Edinburgh and
Glasgow Rail-
way Company.

The Edinburgh and Glasgow Railway, which was opened for traffic in February 1842, passes within the boundaries of the burgh, and crosses the river Avon, between the West bridge and its mouth, by means of a viaduct, above Linlithgow bridge.

By the 237th section of the Company's Act, it is provided, "That nothing in this Act contained shall extend, or be construed to extend, to take away, abridge, or diminish any rights, privileges, jurisdictions, or powers, which at present belong to and are enjoyed, or which are claimed in virtue of Acts of Parliament, royal charters, immemorial usage, or otherwise, by the Magistrates and Town-Council of the royal burgh of Linlithgow, or by the said Magistrates, or by any of them, to demand, take, receive, or levy customs upon any cattle, carriages, goods, or any other thing whatsoever passing, led, driven, or carried over the water of Avon, Torphichen mill, or at any other part of the said water of Avon, by any ford or bridge, or by any viaduct or other bridge that may be built or erected across the said water of Avon by the said Company; and if any act, matter or thing, shall be done in virtue of this Act, whereby such customs shall be diminished, or such act, matter or thing, when done, shall have the effect to diminish the same, then the said Magistrates and Town-Council shall and may receive such indemnification from the said Company as shall and may be agreed upon between them, and in case they cannot agree, as shall be settled by a jury, in the manner in which satisfaction is directed to be made by this Act, for lands taken or used under the powers thereof: Provided always that the validity and discussion, in the competent courts of law, of such rights, privileges, jurisdictions, and powers so enjoyed or claimed, with all defences which any of the inhabitants of the counties of Linlithgow and Lanark, or any other person or persons, can or may plead against the same, shall be, and the same are hereby reserved to all parties interested, any thing herein contained to the contrary notwithstanding."

The Company having refused to pay to the burgh any dues for the goods and commodities carried along the railway, and passing through the burgh, either as town or bridge custom, the Magistrates of Linlithgow raised an action of declarator, and count and reckoning, in order to establish their right to demand them. The summons proceeded on the narrative of the charters and Acts of Parliament before-mentioned, and, that under their authority, and in conformity with the table of dues also mentioned, the magistrates have been accustomed regularly to levy

the rates therein set forth—that is to say, the town custom on all goods bought into or passing through the burgh, and, *separatim*, the bridge custom on goods carried across the Avon at Linlithgow bridge, or betwixt the West bridge and the mouth of Avon, and that from and after the time when the said custom table was framed and set down—at all events for the period of forty years past, or from time immemorial, and concluded for declarator, that, by virtue of the charters and acts of Parliament, above mentioned, and of the immemorial usage following thereon, the pursuers, as representing the community of the burgh of Linlithgow, were, and are, entitled to exact and levy, from the said Edinburgh and Glasgow Railway Company, the dues as rectified and set down in the table of customs framed in the year 1699, above referred to—that is to say, to levy the dues therein described as burgh customs, on all goods transported along, or brought by, the said railway within the said burgh, whether for sale, use, or consumption, within the burgh, or carried out of or through the same—and, separately, to levy the dues, described as bridge customs, on all goods carried across the Avon, by the viaduct erected by and belonging to the said company, or by any bridge or crossing between the West bridge over the Avon and its mouth, all conform to the said table of customs, charters, and acts of Parliament, and to immemorial usage and wont, prior to the formation of the said Company's railway.

No. 181.
July 17, 1815.
Magistrates of
Linlithgow v.
Edinburgh and
Glasgow Rail-
way Company.

The summons also contained conclusions, that the Railway Company should pay to the town such sum as should appear, from an examination of their books, to be the amount of the arrear of dues from the time of the opening of the railway.

The defenders denied that the pursuers had been in the immemorial custom of charging dues on cattle and commodities passing through the town, or passing the river Avon, in the manner claimed. With regard to the town customs, it was averred that the pursuers had not been in the use and wont of exacting duties on goods and cattle simply passing through the town, according to the table of 1699, and that the commodities brought into, or carried out of it, by the railway, had always paid duties according to use and wont, but that these duties were paid by the receivers or senders of them.

With regard to the bridge customs, it was averred, that between the West bridge and the mouth of the Avon, before the viaduct was made, there were eleven different bridges, fords, and aqueducts, across the river, and that no dues had been regularly exacted at any places except at the West bridge and Linlithgow bridge; and that the customs in use to be paid at these were not levied according to the table of customs libelled.

They pleaded,—1. That the charters and acts of Parliament founded upon did not support the claim made to customs or dues upon cattle, sheep, goods, or other commodities conveyed along the railway. 2. That the statutes and charters founded on applied only to goods, cattle, &c.

No. 181. passed through the town, or across the Avon, according to the then existing means and mode of transit, and were not applicable to goods, cattle, &c. passed through the burgh and across the Avon by means of machinery, &c., according to the improvements and scientific inventions of modern times. 3. That the pursuers were only entitled to levy dues in such places, in such manner, upon such articles, and of such amount, as they had been in use and wont to do from time immemorial; and there had been no use and wont to sanction the present claim. 4. That dues being *ex concessu* of the pursuers, leviable upon the goods, and the pursuers having failed to levy them, they were not entitled to claim these dues from the defenders personally, who were not the owners but merely the carriers of the goods. 5. That even supposing the pursuers' right to customs, as in a question with the defenders, were to any extent well founded, the pursuers were only entitled to claim from the defenders indemnification for loss actually sustained; and being restricted to a particular mode of redress prescribed by statute, they were not entitled to insist, in their present conclusions, for accounting and payment in this Court.

July 17, 1845.
Magistrates of
Linlithgow v.
Edinburgh and
Glasgow Rail-
way Company.

The Lord Ordinary pronounced the following interlocutor:—"Finds that the charter, of date the 23d October 1389, the charter of confirmation, or precept of infeftment, containing precept of sasine, of date the 24th May 1593, the ratification thereof in Parliament in 1594, and the ratification of the aforesaid charters and others in Parliament, dated 20th May 1661, afford a sufficient title to the pursuers not only to levy dues or customs on goods and other things brought within the burgh of Linlithgow, for sale, use, or consumption, within the burgh, or carried out of the said burgh, but—if so explained and supported by usage—to levy dues or customs on goods or other things passing, or carried through the said burgh; and therefore finds, that prior to the passing of the Edinburgh and Glasgow Railway Company's Act, the pursuers had a sufficient title to levy such dues and customs, and on such goods or other things, whether brought within, or carried out of, or passing, or carried through the said burgh, as they had been in the practice of levying for time immemorial, or at least for forty years prior to the passing of the said Act: And further finds, that goods or other things transported by the railway of said Company, are not by the foresaid Act exempted from liability for said dues or customs: And finds that the pursuers, in virtue of the foresaid title, have right to levy the same dues or customs, and on the same goods and things brought within, or carried out of, or passing, or carried through the said burgh, by the railway of the said Company, as in any other case: Finds, that by the Act of Parliament passed on the 16th June 1685, a grant is made in favour of the Magistrates of Linlithgow, and their successors in office, empowering them to levy certain dues or customs, as then 'paid by all passengers and travellers with pack-loads, cart-loads, cattle, horses, and others, conform to use and wont, passing the

river of Avon, betwixt the West bridge and mouth of Avon:’ Finds, No. 181. that by said Act the pursuers have a right and title to levy the duties or customs therein referred to, to the extent to which they have been in the practice so to do, and that at any point of passage across the Avon, whether formerly in use, or when brought into use, within the bounds mentioned in the Act, except at any point where an exemption or immunity is established by the existence of a contrary use; that is, by evidence of its having been used for forty years or upwards, as a point of passage across the Avon within the foresaid bounds, for goods or other things, without any dues or customs having been exacted or levied by the pursuers: Finds, that in so far as in any other mode of transit, goods or other things passing the Avon, at the point where it is now passed by the viaduct erected across it by the said Railway Company, would have been liable to the payment of dues or customs, the same are equally liable thereto, when passing the said water of Avon by the said viaduct in the carriages of the said Company, and that in that case the said dues or customs are leviabie accordingly by the pursuers: Repels all the defences in so far as inconsistent with the preceding findings; and, in particular, repels the fifth defence and plea in law, and decerns: And, before further answer, appoints the cause to be enrolled, with a view to such order being made as may be necessary for disposing of the case in accordance with the said findings, in respect of parties being at issue upon matters of fact or otherwise.”

July 17, 1845.
Magistrates of
Linlithgow v.
Edinburgh and
Glasgow Rail-
way Company.

The defenders reclaimed, and pleaded;—

1. With regard to the town-customs, it was not disputed that the Magistrates had a right to levy dues upon things brought into the burgh for sale, use, or consumption, but this right did not extend to things merely passing through it; and it had been held, that, that was not the meaning of the grant, and was contrary to public policy.¹

2. With regard to the bridge-customs, they were not evading the bridge-toll, because the bridge would not serve them for crossing the Avon. The clause in the Company’s Act settled nothing in favour of the Magistrates, but just left them the rights which they formerly had. No dues were ever exacted for goods carried by the canal, which passes the Avon between the points mentioned in the grant. The grant conferred a right to levy dues only according to use and wont; and in order to entitle the Magistrates to levy them at any particular place, besides the bridge of Linlithgow, they must prove that they have been in the habit of doing so for forty years.²

The pursuers pleaded;—

1. With regard to the town-customs, the meaning of the word

¹ Town of Linlithgow v. Fleshers of Edinburgh, Nov. 15, 1621, (M. 10886.)

² Mitchell v. Magistrates of Linlithgow, Dec. 20, 1820, and June 21, 1822, (2 Murray, p. 374; 1 Shaw, p. 515—Jinkabout case;) Anderson v. Magistrates of Linlithgow, June 28, 1826, (4 Shaw, p. 767.)

No. 181. "*toloneis*," in the original charter, was toll, or custom upon things passing through the burgh.¹ That the case with Fleshers of Edinburgh did not form *res judicata*, because it was a question between private parties in a suspension; and whatever authority it might have had was taken away by subsequent decisions.²

July 17, 1845.
Magistrates of
Linlithgow v.
Edinburgh and
Glasgow Rail-
way Company.

2. With regard to the bridge-customs, the terms "use and wont" in the grant applied to the articles upon which dues were to be paid, and the rates to be charged, and not to the places where the dues were to be levied. As the grant conferred a right to levy dues betwixt the West Bridge and the mouth of the Avon, and it was admitted that this right had been exercised at certain places, that preserved a right to collect them at any place where convenient and profitable,³ except where it could be proved that there had been a free passage for forty years.

At advising,

LORD PRESIDENT.—I have seen no reason for altering the Lord Ordinary's interlocutor, which appears to me to be well founded in both of its branches.

1. As to the customs, I cannot agree to hold that the decision in 1681, between the fleshers of Edinburgh and the town of Linlithgow, can be viewed as an authority negating the right to levy dues and customs on goods or other articles passing through the burgh or its territory, 1st, Because it was only a case of suspension, and confessedly does not constitute a *res judicata*, and has not been regarded as an authoritative decision in the two cases of Lauder in 1757, and in *McGowan v. Burgh of Wigton*, (12 Shaw, p. 289,) in both of which it was referred to. 2dly, These cases establish clearly that such grants of customs as the present, levied on articles passing through the territory of a burgh, if confirmed by usage, are legal, and must be supported.

2. With regard, again, to the duties leviable on the passage of the river Avon within the limits of the grant, the terms of which, confirmed and ratified by the statute in 1685, are clear and precise, I think the point has also been correctly disposed of by the Lord Ordinary, and that the decision in the *Jinkabout* case, which was explained in the argument for the respondents, and relieved from the obscurity appearing in the short reports in Shaw and Murray as to the jury-trial, cannot be considered as hostile to the finding of the Lord Ordinary. The nature of the issue in that case shows that the defenders had set up the defence of exemption, and, having succeeded in regard to the particular place under the issue, they were properly assoilzied.

But, looking at the terms of the grant, I think the Lord Ordinary has properly found that exemption, or immunity from its operation must be established, in order to liberate the defenders from its operation. I must, therefore, be for adhering to the interlocutor.

¹ Ducange, Glossarium, voce TELON.

² Town-Council of Lauder v. Brown, Nov. 15, 1754, (M. 1987; 5 Brown's Sup. p. 819;) Magistrates of Wigton v. McClymont, Jan. 15, 1834, (12 Shaw, p. 289.)

³ Magistrates of Edinburgh v. Scott, June 10, 1836, (14 Shaw, p. 923.)

LORD MACKENZIE.—With regard to the first point, there is no reservation of the rights of the town of Linlithgow in the Railway Company's act, and a question may therefore be raised, whether the constitution by act of Parliament of this railway does not by its nature exclude the operation of a right of toll on goods entering, or going out of, or passing through the burgh or its territory? I am, however, inclined to think this question must be determined in the negative. The railway is given in property to the company, as a public company, to be used for the carriage of persons and things; and certainly it is made to differ much from the streets, and even the ordinary territory of the burgh; but still it seems to be within the burgh, or its territory. It is so in jurisdiction; it is so in ordinary language; and therefore, though there is no reservation of the rights of the burgh, I do not think that we can hold that things passing by the railroad do not pass through the burgh and its territory. I agree also, that we cannot go on the authority of the old decision of 1621. As to that first point, then, I concur with the opinion of your Lordship.

July 17, 1845.
Magistrates of
Linlithgow v.
Edinburgh and
Glasgow Rail-
way Company.

In regard to the second point, there are two allegations as to the town's right. The first, that stated by the town, is this, that they have a general abstract right to demand a toll from every person or thing which passes the river Avon at any point whatever below the West bridge; that an exception from this right may be pleaded by any person who can prove a positive practice of passing free for forty years, but that otherwise the right is absolute. On the other hand, the Railway Company plead, that this right of the town is only to tolls as used and wont, and that these words apply to the locality of the transit of the river, as well as to the rate of tolls, or matters liable to toll; and that therefore the town have right to take tolls only at Linlithgow bridge, and at any other place where they can show there has been a custom of taking them, but not at any other parts of the river.

Certainly the right alleged by the town is of a very unusual nature, for it extends to every thing passing the river, within seven miles from its mouth; and it must apply to every person who passes the river, or sends things across it any where, even though it may pass through his own property lying on both sides. Now, I cannot think that the case of Jinkabout is any thing else but a decision against the right claimed by the town. There were two ways in which the question might have been put in that case; first, whether the parties, claiming the exemption from toll, had been in the habit of passing free for forty years? And, second, whether the town had been in use to collect tolls at the particular spot? But it was in the last way that the issue was put, Whether the Magistrates had been in possession? And as they could not show that they had, they lost their case. Then there is the case of the canal. If the Magistrates had got a decision in their favour in the case of Jinkabout, holding that every person must make out an exemption, how should they have allowed the canal people to pass free? For these reasons, I am rather inclined to adopt the view maintained by the Railway Company as to the second point, that the Magistrates must show that they have been in the custom of levying dues so as to affect the place where the railway passes.

LORD FULLERTON.—I am inclined, on both points, to adhere to the judgment of the Lord Ordinary. In the first place, with regard to the goods brought within the burgh, I agree entirely, that the Acts of Parliament, combined with the avowed usage, are quite sufficient to support the claim of the town. I cannot consider

No. 181. the question as decided against the town, by the decision in 1621. If the question had then been as to the true construction of the grant, although it might not have formed *res judicata*, it might have been of some authority; but that was not the question. It was—whether, admitting the grant, it could, on considerations of public policy, be sustained? And then this decision was brought under consideration in the subsequent cases of *Lauder and Wigton*, and its authority disregarded.

July 17, 1845.
Magistrates of
Linthgow v.
Edinburgh and
Glasgow Rail
way Company

It is quite true that there is no reservation of the Magistrates' right in the Railway Act; but I think that this was not necessary, for the fact of goods being carried by a railway cannot take them entirely out of the grant. With regard to the second point, the toll for passing the river, we are relieved from one difficulty, for this is an express reservation as to it in the Railway Act. The words of the grant and its ratification are very peculiar; they not only confer the right, but state that it was *de facto* enjoyed before, for it is granted "conform to use and wont." It is quite clear from this, that there was at that time use and wont to charge on every thing passing the Avon between the points mentioned in the grant. But I do not think that the words "use and wont" apply to the particular places at which the river was then passed, but to the amount of the toll to be paid. I think the words of the statute are perfectly clear as to this—that the Magistrates were to be entitled to levy the same dues as they had previously been in use to do. I have difficulty in holding that this right is touched upon by the case of *Jinkabout*. All that was found there was, that the Magistrates had not been in the habit of collecting dues at that particular place; if it had been found that they had been in the habit of taking toll at *Jinkabout*, and at no other place, it might have been a judgment in favour of the defenders. I rather think the Lord Ordinary has taken the sound view of this matter. But there may be some difficulty in applying his subsequent findings. How are the same duties as have hitherto been charged, to be charged on things which are not carried in the same way? I would like to see how the amount of duties to be exacted is to be fixed.

LORD JEFFREY.—This is a case of some nicety; but, on the whole, I concur with the views of the Lord Ordinary on both points. As to the transit duties, I think that these not being affected by any thing in the Railway Act, must stand upon the old charters and the rules of common law, and must be paid upon goods entering the burgh by the railway, according to use and wont. If I could go on the view hinted at by Lord Mackenzie, that, by the Railway Act, the ground upon which the railroad is constructed is carried out of the territory of the town, a point of great importance would be raised; but I cannot adopt that view, and Lord Mackenzie did not seem to rely upon it. The Magistrates undoubtedly continue to have jurisdiction at the station; and I suppose the minerals under the railway remain their property. I suspect, then, that the railway remains within the territory of the burgh to all intents and purposes. As to the transit duties being illegal, *in se*, on the authority of the old decision in the suspension, I shall say nothing, for the ground of that decision has been utterly discredited in the after cases, and was not in principle defensible.

As to the other point, and particularly the case of *Jinkabout*. In that case the question was ultimately limited to whether a right of exemption had not been acquired by certain parties, from having passed toll-free at the ford of *Jinkabout* for more than forty years; and an issue having been framed to try that question, a verdict was returned, finding that the right of the town to levy dues

there had been lost by prescription. But I am not inclined to go into the nicety of the application of that case, as the actual position of the railway viaduct, in relation to Linlithgow bridge, brings this into a case of evasion of the bridge duty. It comes just to be the case of a new bridge, leaving the old one standing. No passage is alleged to have existed before at the place where the viaduct crosses the river, but a new passage is created; so that there cannot be any question raised upon that ground. The reason why dues have not hitherto been demanded on the canal may, perhaps, be, that the Magistrates have been prevented by some circumstance from trying the question; and, at any rate, the immunity of the Canal Company is not established yet. I am not moved, as indeed none of your Lordships are, by the argument founded on the concluding part of the clause of reservation in the Railway Act—that the town can obtain indemnification for the loss of the dues only by ascertaining the actual damage by the verdict of a jury. The leading words of the clause must be attended to. On the whole, I am for adhering, although not without difficulty, to the principle laid down by the Lord Ordinary; reserving my opinion, however, as to the application of his findings.

THE COURT adhered, reserving all questions of expenses.

WOTHERSPOON and MACK, W.S.—SMITH and KINNEAR, W.S.—Agents.

MRS ANNE MONTGOMERY OF HART, Claimant.—*Marshall*—J. F. Mont- No. 182.
gomery.

MONTGOMERY JAMES HART and OTHERS, Claimants.—*Sol.-Gen. Anderson*—*Penney*—W. S. Walker.
Competing.

Obligation—Husband and Wife—Legacy—Bankruptcy—Ranking.—Where a wife gave up to her husband certain paraphernal jewels, and he granted to her an obligation, pledging himself that, in the event of the jewels being disposed of, "the amount thereof should be inserted as codicil to his will as her own private property, and that she should be entitled to such amount at his death;"—Held that the wife was entitled, in respect of this obligation, to rank as an onerous creditor upon her deceased husband's estate.

THE trustees of the late Major Thomas Hart brought a multiplepoint- ing of his estate, in which claims were lodged for Mrs Hart, his widow, and for Montgomery James Hart, Mrs John Hotchkis, and Mrs James Hotchkis, his children. Major Hart's estate was inadequate to pay the liabilities attaching to it.

Mr M. J. Hart and Mrs John Hotchkis claimed upon the fund in medio, in respect of the provisions to the children of the marriage, contained in Major Hart's antenuptial marriage-contract. Mrs James Hotchkis claimed under the above marriage-contract, and also under her own ante-

No. 182. nuptial marriage contract, to which her father, Major Hart, had been a party, and in which he had bound himself to pay a specified sum to his daughter.
 July 17, 1845. Montgomery v. Hart.

Mrs Hart, the widow, also lodged a claim, in which, *inter alia*, she founded upon the following holograph letter, which had been addressed to her by her husband in December 1814, and claimed the value of certain pearls and other trinkets, which had been disposed of by her for the purposes there mentioned :—

“ To Mrs Anne Hart.—If we should at any time be under the necessity of disposing of your pearls or other valuable trinkets belonging to you, in order to defray our expenses abroad, or my suit with the India Company, I do hereby pledge myself that the amount, whatever it may be, shall be inserted as codicil to my will as your own private property, and you shall be entitled to the amount thereof at my death, to dispose of it as you may judge proper.

(Signed) “ THOMAS HART.”

In reference to this point, she pleaded ;—

That the trinkets in question, which had been disposed of to meet her husband's exigencies, were proper paraphernal goods, and her own separate estate. As there were no preferable creditors claiming upon the estate, she was entitled to be preferred for the amount, in respect of her husband's obligation to repay their value.

The opposing claimants answered ;—

That the trinkets had been disposed of for her benefit, as well as for her husband's. The obligation founded on was not an obligation for their value, but its terms were, that Major Hart pledged himself to insert them as a codicil to his will. The amount was to be left to her as a legacy, by a writ of a testamentary nature, and not during his lifetime. Had this been done, her claim could only have stood upon the codicil, and the amount would have fallen to be dealt with as a legacy. The case was not altered by the fact of the codicil not having been executed. She was not, therefore, entitled to compete with the onerous provisions in favour of the other claimants.

It was not maintained at the debate, that the trinkets in question were not proper paraphernal articles, and her separate property.

The Lord Ordinary pronounced this interlocutor :—Finds that the claimant, Mrs Anne Montgomery or Hart, widow of the deceased Major Hart, and the claimants, Mr James Hotchkis and Mrs Margaret Hart or Hotchkis, and their children, are entitled to be ranked *primo loco et pari passu* upon the fund in medio, the first for the provisions made for her in her contract of marriage with the said deceased Major Hart, and the second for their respective interests in the sum of £5000 sterling, secured

upon them by the said deceased Major Hart in the contract of marriage of the said Margaret Hart or Hotchkis, his daughter, with the said James Hotchkis, and which the said Major Hart bound and obliged himself to pay in manner mentioned in said contract: Finds that the said Mrs Anne Montgomery or Hart is further entitled to a similar ranking upon the fund in medio for the value of the pearls and other trinkets given up by her to her husband, upon the faith of the holograph obligation granted by him to her, quoted in the fifth article of her revised condescendence and claim, as the said value may be agreed upon or ascertained: Further, finds that the claimants, Montgomery James Hart, and Mrs Anne Hart or Hotchkis, wife of John Hotchkis, and he for his interest, fall to be ranked for the sums claimed by them *secundo loco* only upon the fund in medio: Finds the whole claimants entitled to the expenses hitherto incurred by them from the fund in medio.

Mr M. J. Hart and Mrs John Hotchkis reclaimed.

LORD JUSTICE-CLERK.—With regard to this matter as to the trinkets:—We have not to inquire whether they were the lady's property—the opposing claimants do not propose to prove that they were not her property in 1814. The letter founded on states them to have been her property. Substantially the claimants admit they were. Insolvency as at that date is not averred. The letter, or acknowledgment, is an obligation to leave a paper that should recognise a sum of money in lieu of them, as her private property, at her husband's death. It is an acknowledgment that a part of his property belonged to her, which was to be separated as distinctly as if the trinkets had been still in existence. Had the trinkets not been sold, they would have remained her separate property till her death. I therefore think she is entitled to compete for their value with the other onerous creditors. There might have been considerable difficulty, had it been averred that these jewels were not her own separate property.

LORD MONCREIFF.—It is not disputed that these jewels were amongst this lady's paraphernalia, and her property at the time; and they are of a description which is recognised by law as such. If bankruptcy had occurred at that time, it is clear that no creditors of her husband could have touched them. Then as to the terms of the writing; it is an obligation to replace the value, which was to be her property. There is certainly a little nicety, seeing that it speaks of a codicil; but I think it is to be construed as an obligation to declare that they were not his property, and that the value of them belonged to her. I think she is entitled to be preferred.

LORD COCKBURN.—I am of a different opinion. It seems to me that all these jewels may have at one time belonged to this lady, yet that when she allowed them to be appropriated for her husband's purposes, with only this writing, that it was to be stated in his will that they were her private property, she cannot compete with onerous creditors. I think it can only mean, that she was to have payment if he should leave effects; but that if all the effects were taken away by creditors, she was to get nothing.

No. 182.
July 17, 1845.
Montgomery v.
Hart.

No. 182. LORD MEDWYN was absent.

July 18, 1845.
Cruikshank v.
M'Kay.

THE COURT adhered.

DAVID WELSH, W.S.—J. and W. JOLLIE, W.S.—Agents.

No. 183.

GEORGE CRUICKSHANK, Pursuer.—*Shaw*.

MRS MACKAY OF EWING, and HUSBAND, Defenders.—*Arkley*.

Process—Decree in Absence—Reclaiming Note—Act of Sederunt, 11th July 1828, § 72.—Objection to the competency of a reclaiming note against a decree in respect of non-appearance at the debate, on the ground that the party had previously been reponed against a decree in absence, repelled.

July 18, 1845. In this case, decree in absence was pronounced against the defenders, against which they were reponed. Thereafter, decree was again pronounced against them, in respect of non-appearance at the debate.
1st Division.
Ld. Robertson.
N.

A reclaiming note against this decree being presented by the defenders, the pursuer objected that it was incompetent, under the 72d section of the Act of Sederunt, 11th July 1828, by which it is provided that, after a party has been once reponed against a decree in absence, all future proceedings and interlocutors shall be held to be *in foro*, and to be final.

The defenders answered ;—The clause of the Act of Sederunt related only to decrees in absence, whereas the decree against which they reclaimed was one by default, and not in absence.

THE COURT thought the reclaiming note competent, and that it was within their discretion to repon the defenders. They accordingly remitted to the Lord Ordinary to repon, on payment of such expenses as his Lordship should think reasonable in the circumstances of the case.

JOFF and JOHNSTONE, W.S.—JAMES BURNES, S.S.C.—Agents.

URGESS, Pursuer.—*Maidment.*

[‘INTOSH, Defender.—*Hector.*

No. 184.

July 18, 1845.

—A. S. 16th February 1841, §§ 10 and 11.—Held, that the Act of Sederunt, 1841, c. 1, § 10, which provides that the Lord Ordinary shall have the exclusive power, under the Act of Sederunt, 1841, c. 1, § 11, of giving notice of trial, except in the case provided for by the Act of Sederunt, 1841, c. 1, § 11, is valid and binding.

Burgess v.

M. Into h.

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Sinclair

Sinclair v.
Dubar.

ed in this case, in January, but no notice of trial July 18, 1845.

suer. On 20th June the defender gave notice of the end of the summer session, and the case ap-
1ST DIVISION.
Jury Cause.

. The pursuer gave notice on the 17th July, that to trial at the ensuing sittings.

1 for an order, that the case should stand on the
been set down ; and pleaded that the Court had
tion, on account of the delay of the pursuer to fix

ed, that he had the exclusive right to give notice
h section of the Act of Sederunt, 16th February
ase provided for in the 11th section; and that, if
have a day fixed, he should have made a regular
rt for the purpose.

ed the defender's motion.

ACE, W.S.—H. MEIKLEJOHN, W.S.—Agents.

and OTHERS (Wemyss's Trustees), Pursuers, No. 138.

Rutherford—Marshall.

BAR, Defender.—*G. G. Bell—E. S. Gordon.*

Marriage-Contract.—

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to be

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No. 185. Duffus, and of obtaining payment of it from Sir George Dunbar, his eldest son, as heir of line and provision to his father, and also as having incurred a passive title.

July 18, 1845.
Sinclair v.
Dunbar.

The facts of the case, and the nature and extent of the defence, are sufficiently explained in the following interlocutor of the Lord Ordinary: —“ Finds, that by deed dated the 11th day of October 1707, purporting to be a deed of entail, and executed by Sir William Dunbar, the estate of Hempriggs was conveyed in favour of Dame Elizabeth Dunbar, his daughter, and certain substitutes: Finds, that by the said deed it was provided that the heirs thereby called ‘ shall be allowed to provide their younger children to two years’ rent of the said estate as it shall be for the time, and that no succeeding heir shall be allowed to grant any provisions to children until the provisions granted to the former be satisfied and paid, and the estate disburdened thereof:’ Finds, that on the day of

Sir William Dunbar, the heir then in possession, granted a provision in favour of his daughter, Miss Elizabeth Dunbar, for the sum of £2000 sterling, which was made a real burden on the said estate in terms of the said deed of entail, and which debt still remains unpaid: Finds, that by the contract of marriage libelled on, dated the 8th January and 17th and 19th March 1810, between the late William Sinclair and Miss Henrietta Dunbar, second daughter of the late Sir Benjamin Dunbar Lord Duffus, son of the last-named Sir William Dunbar, the said Lord Duffus, for certain onerous considerations, bound himself and the heirs succeeding to him in the said estate of Hempriggs, to content and make payment to the trustees therein named, or those who might be assumed, an equal share or proportion along with his other children, ‘ of such a sum as may amount to two full years’ rent of the whole entailed estate of Hempriggs, as the amount thereof shall be ascertained by a regular rental at the time of his death:’ Finds, that on or about the 11th day of July 1838, the pursuers raised an action in this Court against the said Sir Benjamin Dunbar Lord Duffus, concluding that he should be ordained to implement or render effectual the foresaid provision in his daughter’s contract of marriage, either by making payment thereof to the pursuers, or by satisfying the provision above-mentioned in favour of Elizabeth Dunbar, and relieving the entailed estate and the heirs of entail thereof, or otherwise to grant in favour of the pursuers an heritable security for the trust provisions in their favour: Finds, that by interlocutor of Lord Murray, Ordinary, of date 25th June 1839, and adhered to by the Court on 21st January 1840, it was fixed and determined that the defender was bound to fulfil and render effectual the aforesaid obligation undertaken by him in favour of the pursuers, as trustees under the marriage articles libelled on, and that he was further bound immediately to relieve and disburden the said lands and estate of Hempriggs, and the heirs of entail succeeding thereto, of the aforesaid provision of £2000 sterling, and of all interest due thereon; and, therefore, the defender was

ordained to report discharges of the said bond of provision for £2000, No. 185. with interest, on or before the fifth sederunt day in November then next, July 18, 1845. to the effect that the provisions conceived in favour of the pursuers, as *Sinclair v. Dunbar.* trustees under the aforesaid marriage articles, might become a valid and effectual burden on the said estate: Finds, that the said Benjamin Dunbar Lord Duffus failed to implement the said judgment, or to discharge the said provision of £2000 in favour of the said Elizabeth Dunbar, his sister, and that the same still affects the said estate: Finds, that on the 6th day of July 1838, the said Lord Duffus executed a disposition, whereby he propelled the fee of the said estate to the present defender, as next heir of entail, under the reservation of his own liferent, and on which disposition the defender was infeft; and that the said liferent was afterwards renounced, and the defender entered into possession of the estate of Hempriggs, and continued in possession thereof during the lifetime of the said Benjamin Lord Duffus, and after his death, which took place on the 27th of January 1843, and up to the present time: Finds, that by interlocutor of the Lord Ordinary, in an action at the instance of John Martin and others, against the present defender, dated the 9th of February 1844, and adhered to by the Court on the 17th of July¹ of that year, it has been found—1st, ‘That the deed purporting to be a deed of entail of the lands of Hempriggs and others, dated the 11th day of October 1707, and executed by Sir William Dunbar of Hempriggs, Knight and Baronet, does not contain an effectual irritant clause against contracting debt, sufficient to protect the estate from the diligence of creditors, and therefore, that in so far the estate is not held under a deed of entail framed in conformity with the provisions of the Act of Parliament 1685, c. 21, entitled “Act concerning Tailzies.”’ 2d, That the defender being now infeft in the said estate, conform to infeftment proceeding on a disposition dated 6th July 1838, granted by his father the late Sir Benjamin Dunbar Lord Duffus, conveying the fee of the said estate, under reservation of his liferent use and possession; which liferent interest was afterwards discharged and renounced by the said Lord Duffus, is liable, to the extent of the value of the said estate, in payment of the just and lawful debts of his father, and that the pursuers of the said action, creditors of the said Sir Benjamin Dunbar Lord Duffus, are entitled to decree against the defender to that effect; which decree was pronounced accordingly: Finds that the pursuers, as trustees now acting for the said Henrietta Dunbar under the said contract of marriage, are entitled to decree to the amount of the equal share or proportion along with the other children of the said Sir Benjamin Dunbar Lord Duffus, of such sum as may amount to two full years’ rent of the whole estate of Hempriggs, as the amount shall be

¹ Ante, Vol. VI. p. 1320.

No. 185. ascertained by a regular rental at the time of his death ; and in respect the said Benjamin Lord Duffus had three younger children, that the pursuers are entitled to decree for one-third of the said whole rental, and that the said estate is liable therefor, and the defender is also personally liable, as representing his father, and as having obtained possession of the said estate, in manner foresaid, to the extent of the value thereof: And of consent, finds that the pursuers do not insist for any personal decree beyond the said value: And to the extent of the whole of the foresaid findings, repels the defences, and decerns: Finds that, in ascertaining the amount of the said rental, the defender is not entitled to any deduction, either—1st, in respect of the foresaid provision of £2000 in favour of the said Elizabeth Dunbar, or interest thereof; or, 2dly, of the rents of the locality lands, possessed by the widow of the said Benjamin Lord Duffus; or, 3dly, of the interest of any sums secured as debts upon the estate by wadsetts or heritable securities, or of the interest of debts contracted by the said Lord Duffus: And finds that the proper period for fixing the said rental is the date of the death of the said Benjamin Lord Duffus: Finds that the rent of the shootings on the said estate must be included in the said rental, in the event that such rent was payable for the year in question: But, in respect this fact is not admitted by the defender, appoints him to state in a minute, to be lodged within eight days, the facts which he avers with respect to the said game, and the amount of the rent payable, if any."

The defender reclaimed, but

THE COURT adhered.

G. L. SINCLAIR, S. S. C.—HORNE and ROSE S. S. C.—Agents.

No. 186. JOHN GALLOWAY, (Marshall's Trustee,) Pursuer — *Ingls.*
WILLIAM MOFFAT, Defender.—*Rutherford—G. Grant.*

Bill of Exchange—Prescription Sexennial—Qualified Admission—Intrinsic or Extrinsic.—The acceptor of a bill, who was sued upon it after prescription had run, qualified the admission of his acceptance, on record, by the statement that the bill had been granted on the understanding and arrangement, that as soon as a heritable security was given for it by a co-acceptor, (which had been done,) his own obligation should thereby be extinguished:—Held that this qualification was intrinsic.

July 18, 1848 JAMES NICHOLL and WILLIAM MOFFAT accepted a bill for £400, dated 14th September 1826, drawn on them by David Marshall, and payable at sight. Moffat transmitted the bill to the drawer, with the following letter of the same date with the bill:—

1st DIVISION
Lord Wood.
N.

“ Leith, 14th September 1826. No. 186.

“ I received your letter yesterday, and Mr Nicholl went to the bank to-day and lifted the money. You will receive enclosed our bill for the amount. I have not heard any word from Mr Wishart yet about the report.—I am, &c.”

July 18, 1845.
Galloway v.
Moffat.

Although the bill was accepted, jointly and severally, by Nicholl and Moffat, the money was advanced for behoof of the former alone.

On 2d March 1831, Nicholl granted a bond and disposition in security over certain subjects in Leith for £400 to Marshall. After granting this security, he made over the management of his property to Moffat, who, on 16th February 1835, wrote a letter to Marshall with reference to a proposed sale of the subjects by a party holding a preferable security over them, which contained the following statement :—“ You state, that should there be any shortcoming it will fall upon me ; but I beg to state, very differently, that whether you make more or less of the property when sold than what you have upon it, if less, the shortcoming will never fall upon me after you took a bond over it for security to yourself ; for, by so doing, you took the property, and thereby relieved me, and I think it proper to state so to you, so as there may be no further mistake.”

After the bill was prescribed, Marshall raised action, in which Galloway was afterwards sisted, as trustee for his creditors, against both Nicholl and Moffat, for payment of the debt contained in it. Nicholl did not appear, but a record was made up with Moffat, in which he admitted that he had signed the bill as an acceptor along with Nicholl, but averred that the joint-acceptance had been granted on the understanding and arrangement, that as soon as an heritable security was given for it by Nicholl, his own obligation, which was merely a cautionary one, should *eo ipso* be extinguished ; and, accordingly, that the debt now existed only in the bond as against Nicholl and his property.

He pleaded ;—

1. The bill was prescribed.
2. The obligation under the bill had been extinguished by novation on the principle, that the creditor consented to accept of a new and a different security, without any reservation of his right under the bill.
3. According to the express agreement of parties at the time the bill was granted, he became released from his obligation as soon as heritable security was given by Nicholl over the subjects for the sum contained in the bill.

The pursuer, on the other hand, averred and pleaded, that the bond and disposition in security granted by Nicholl was intended as a corroborative security for the benefit of Moffat ; that there was no extinction or change of the debt by *novation* ; and that prescription of the bill was elided by writ and the judicial admissions of the defender. The nature and contents of the writings on which he founded, are sufficiently explained in the note subjoined to the following interlocutor of the Lord

No. 186. Ordinary :—" In respect that six years from the date of payment of the bill founded on by the pursuer had expired without diligence having been raised, or action commenced thereon, and that the debt therein contained has not by the writs produced been proved to be owing by the defender, William Moffat, assoilzies the said defender from the conclusions of the action, and decerns ; and finds the pursuer liable in expenses." *

July 18, 1845.
Galloway v.
Moffat.

* " NOTE.—There was a former case between the parties which related to the competency of summary diligence on the bill for £400, referred to in the present summons. 13th January 1838, (16 Shaw, 406.)

" It being there held that the bill was payable on the 14th September 1826, and the protest not having been recorded within six months of that date, and no diligence having been raised till more than six years thereafter, it was decided, both on the Act 1696, c. 36, and the Act 1772, c. 12, that the proceeding was incompetent. But the question whether prescription was obviated, or the debt proved to be resting-owing by the writ or oath of the defender, was not touched by the judgment. It was left entirely open.

" The present action (in which John Galloway has been sisted as pursuer, as trustee for the creditors of the original pursuer, David Marshall) is libelled as an action for the payment of the debt which was contained in the bill granted by the defender, along with Nicholl, for whose use and behoof alone the money was confessedly advanced by Marshall, the original pursuer, and concludes for payment of that debt, the pursuer contending that the debt is still due, and that the security which was taken by Marshall from Nicholl in 1831, for the sum in the bill, was merely corroborative, and did not import a *novatio* and delegation, by which the obligation of the defender was discharged and renounced, and Nicholl made to stand as the sole debtor. The defender's averment and plea is to the directly opposite effect. (Defender's statements, 1st, 2d, and 3d, and pleas, 2d and 3d.) But further, and prejudicially, he states that the bill is prescribed, the six years from the date of payment having expired in September 1832, and that there is no legal proof that the debt as a debt by him is resting-owing.

" In reference to the defence of prescription, the pursuer has declined to take any further diligence for recovery of writings, but he has not renounced further probation, as respects the question of novation, while, on the other hand, the defender has stated his readiness to do so in relation to the whole cause. It is in this state of the process that avizandum has been made, and therefore it is only upon the point of prescription that a judgment can be at present pronounced ; but the decision of which, in the view taken of it by the Lord Ordinary, supercedes any remaining point in the cause ;—seeing that if (apart from the bill which he undergone the sexennial prescription) there be no instruction of the debt against the defender, then the consideration of whether the security given by Marshall was merely corroborative, or extinguished the debt by novation, is obviously rendered unnecessary.

" In March 1831, when the security from Nicholl was obtained, the six years from the date of the payment of the bill had not expired. The bill was therefore then in full force. It may or may not be, that by the security the obligation by the bill against the defender was renounced and given up ; and had the question occurred during the currency of the six years from the date of payment of the bill, and while therefore the bill as a document of debt was not cut off by prescription, the point at issue would have been whether, notwithstanding the granting of the security by Nicholl, Marshall continued to have a claim upon the bill against the defender. But although it might be that the claim on the bill against the defender was not affected by Marshall having got security from Nicholl, the proper debtor, still it is conceived that security having been granted, never could *per se* have the effect of preserving the obligation in the bill beyond the six years. It might have the effect of extinguishing it, but it, could not preserve it, or put Marshall, as the creditor of the

The pursuer reclaimed, and pleaded ;—That the qualification with No. 186: which the defender's judicial admission of having accepted the bill was

July 18, 1845.
Galloway v.
M. Rat.

defender by the bill, in a question with him in any better situation than if no security had been obtained. And the six years having more than elapsed, without either action or diligence having been commenced or raised on the bill, and the bill itself being now no evidence of the sum for which it was granted being really owing by the defender, the point arises whether the plea of prescription is obviated by the debt contained in the bill being proved by any of the writings founded on, or by the judicial admissions of the defender, to be due by him.

"1st, The judicial statements of the defender in regard to the debt are so qualified, that they cannot, it is conceived, be taken as proving resting-owing by him. On the contrary, they import a distinct averment that the defender's obligation was extinguished in the way in which, from the first, and as a part of the original arrangement upon which the defender gave his name to the bill, it was agreed that it should terminate, viz., by security being obtained from Nicholl, as a temporary substitute for which the defender had subscribed the bill as an acceptor. This is not a statement of opinion, or that, as matter of law, the superinduction of the security liberated Marshall, but of matter of fact. It is therefore an intrinsic quality; and, if the defender's statement is founded on, it must be taken as a portion of that statement, requiring no proof on his part. Holding, then, that the plea of prescription is not obviated by the defender's judicial admissions, has the pursuer instructed by other evidence that the defender is debtor in the sum sued for?

"2d, The letter which accompanied the bill when sent to Marshall, and the other writings bearing date during the currency of the prescription, do not, any of them separately, or all of them together, in the opinion of the Lord Ordinary, amount to such a written acknowledgment of the debt as to form a valid obligation by the defender, in virtue of which the debt, as being thereby proved to be resting-owing, could be recovered from the defender, apart from the bill, and notwithstanding that the claim on it is cut off by the lapse of six years.

"3d, If this is the state of the case so far, then there only remain two writs, by which it can be maintained that the plea of prescription is obviated, and the debt in the bill proved to be still resting-owing by the defender. The one is the account (No. 62 of process) extracted from the defender's books. The other is a similar account (No. 7 of process) sent by the defender to Marshall apparently in the beginning of 1835.

"The first is an account current between the defender and Marshall. It appears from it that they had various transactions with each other, by some of which Marshall was debtor to the defender, which are entered to Marshall's debt, while, on the opposite side of the account, Marshall is, *inter alia*, credited half-yearly, from November 1829 to January 1833, with the interest on the £400 debt. For the year 1833 no interest is credited. Then, in 1834, a half-year's interest is credited in the month of May. The credit, when given, is entered thus:—'By cash for Mr James Nicholl on £400, £10;' or, 'By interest on £400 for Mr Nicholl, £10;' or in similar terms. And this stands in contrast with entries of the same dates of a credit of interest on £100, a debt of the defender's own to Marshall, which is entered thus:—'By interest on £100, £2, 10s.; or, 'By interest on £100, for self, £2, 10s.' The second account, being the one sent by the defender to Marshall, is also stated as an account current between them, and very nearly corresponds with the other. The interest on the £400 is credited in it thus:—'By allowance for James Nicholl's interest;' or, 'By half-year's interest allowed for James Nicholl.' And the interest on the £100 thus:—'By cash for half-year's interest on £100;' or, 'By half-year's interest for myself.'

"The last-mentioned account was not rendered to Marshall till after 26th February 1835, as appears from the closing articles in it, which bear that date; and this, it will be observed, was long subsequent to prescription having run upon the bill. In this situation, it is contended by Marshall that, being debtor to the

No. 186. coupled, was extrinsic; that the averment of compensation, and of the acceptance of a composition-contract, had been held to be so;¹ and that

July 18, 1845.
Galloway v.
Moffat.

defender—as is proved by the items put to his (Marshall's) debit in the account—he was entitled to hold that payment was not demanded in consideration of the interest due by the defender to him. And further, that you must look at the account as it stands in the defender's books, and take the entries as they there appear at their dates; and that, in that view, it instructs payments, or, what is the same thing, credits of interests by the defender on the debit in the bill after the six years, which expired in September 1832; that the entries, after the date of the security by Nicholl, are in the same form as those by which they are preceded, and that it is no answer to refer to any arrangements which may have existed between the defender and Nicholl, by which the defender may have got from Nicholl either the means of paying, or crediting the interests, or repayment of them, after they had been paid or credited.

“It may be that, in some cases—and where there are entries in terms explicitly importing that the interests founded on as paid, or credited, as due by the party—the plea of Marshall would be well founded; that the payments, or credits, must be held as an acknowledgment of the debt, and that their effect could not be taken off by reference to other entries in the books of the party, showing that they had truly been made from the funds of another party, who was also bound for it, and was, in reality, the proper debtor. But the Lord Ordinary does not think that, in the present case, that view can be adopted.

“In the first place, the entries are not explicit, and they stand in direct contrast with other entries of payments or credits of interest on a debt in which the defender was the proper debtor, which are made in the usual way. In the second place, before the account rendered was sent to Marshall, viz. on the 17th February 1835, the defender had written to Marshall the letter No. 26 of process, in which he states that he was not liable for the debt, and that the payments or credits of interest were made out of the rents of Nicholl's property, of which he had the charge, which shows what the defender himself meant by the entries, crediting, at least, interest after a certain date. It shows that the entries were not credits by him, as debtor in the £400 debt, but as holder of the funds of the party who alone was the debtor. In the third place, the pursuer admits on the record (Revised Condescendence, Art. 14) that Nicholl, after the security was granted for the £400 debt, made over the management of his property, including that over which the security extended, to the defender, with power to draw the rents, and pay out of them the feu-duties, taxes, and interest of debts; and he follows up this by stating, that the defender applied the rents, *inter alia*, in relief of his obligation to Marshall, and paid Marshall annual sums ‘of interest on the debt in respect of the obligation by Nicholl,’ and it is added, ‘and himself as debtor in the bill.’

“Now, turning to the other accounts in the books in which that in question was entered, it appears from them (see Account No. 63 of process) that the defender had the management of Nicholl, the real debtor's property, including that covered by the pursuer's security, the rents of which, after its date, were liable for the interest, and that, of equal dates with the credits of interest in the foresaid accounts with Marshall, the account with Nicholl is debited with the amount, the credit being in fact allowed to Marshall in respect of funds for payment of the interest drawn by the defender, or expected to be received, and which were received from the property of Nicholl.

¹ Brown v. M^cIntyre, June 26, 1828, (6 S. 1022); M^cDonald v. Crawford, March 7, 1834, (12 S. 539.)

no allegation was intrinsic, as a qualification of an admission, but that of No. 186. payment.

The defender pleaded, that his qualification of the admission of the constitution of the obligation went to this—that it was not an absolute, but a conditional one, it being *pars contractus* that the obligation was to continue only till a security was granted.

July 18, 1845.
Galloway v.
Moffat.

LORD PRESIDENT.—I have come to the conclusion that the Lord Ordinary's interlocutor should be adhered to. The admissions founded on must be taken with their qualifications; these are intrinsic, and would have been held to be so had they been contained in an oath of reference; and that being the case, there does not appear, independently of the bill, which is no longer available as proof of the debt, to be any sufficient evidence, either in the letters or the other writs referred to, of its being still resting-owing. Concurring in the views expressed by the Lord Ordinary in his note, I must adopt his interlocutor.

LORD MACKENZIE.—I also concur with the Lord Ordinary, and hold that the qualification of the admission is intrinsic, showing that, the condition of the original obligation having been fulfilled, the debt is extinguished. It is clearly an intrinsic qualification, and is quite different from an averment of compensation or

“The account begins in 1830—the security was granted in March 1831—at Whitsunday 1832, after the interest was credited, the defender appears to have been short of funds by £5:10:6. At 11th November 1832, taking in all the sums placed to Nicholl's debit of that date, but of which the interest stands first, the funds in the defender's hands were more than exhausted by £16:8:7. At Whitsunday 1833, the defender had funds to pay the interest, all but £2:13:9½. At Martinmas he had no funds, but it will be found that, while the interest in 1833 is put to Nicholl's debit in the defender's account with him, no interest is credited by the defender in his account with Marshall. Then again, on 30th May 1834, when interest is debited to Nicholl on the one side, and credited to Marshall on the other, the defender, according to the account with Nicholl, had in his hands £4:18:6½ more than was requisite to meet the said interest, if the said account is corrected by withdrawing from the debit side of the two sums of interest in 1833 which are there debited, but which are not credited to Marshall. And taking the whole account with Nicholl from its commencement in November 1838, down to 30th May 1834, as it stands, with the two sums of interest debited to Nicholl in 1833, the funds received by the defender are within £14:1:5½ of the sums debited as paid, and at the close of the account £4, 7s. remains at Nicholl's credit. And while this is the state of the case, it further appears that, as already mentioned, Marshall was aware that the defender was in the management of, and drawing the rents of, Nicholl's property.

“In such circumstances, the Lord Ordinary is, upon the whole, of opinion, that entries of interest, after the expiry of the six years from the date of payment of the bill, which entries are subsequent to the date of the security, the security having been granted in March 1831, and the six years having expired in September 1832, cannot be held to prove resting-owing by the defender of the debt in the bill: And this although these entries may be in similar terms to an earlier entry, or earlier entries, anterior in date to the security. And having come to this result, which, if correct, affords a complete answer to the pursuer's demand, he has assolized the defender from the conclusions of the action.”

No. 186. novation. As to the proof by writ, I cannot hold it to be sufficient, and therefore I agree with your Lordship and the Lord Ordinary.

July 18, 1845.
Learmonth v.
Patton.

LORD FULLERTON.—A difficulty which I felt arose from the first letter by Moffat to Marshall, as showing that the debt had been constituted against the defender; and, as he himself had not paid the bill, was he not to be held bound by it still? But I am now satisfied that there is not sufficient evidence as to the constitution of the debt independently of the prescribed bill; and that the qualification of the defender's admission is intrinsic. The letter which forms the strongest proof of the constitution of the debt, does not disprove, and is not inconsistent with his statement. I am therefore for adhering.

LORD JEFFREY.—I am of the same opinion. I think there is a failure in the proof of the constitution of the debt, as the amount of the bill is not mentioned in the letter. And then, even suppose the constitution of the debt had been established, there is no sufficient proof that it still continues due. The qualification of the defender's admission, I think, is plainly intrinsic.

THE COURT adhered to the Lord Ordinary's interlocutor, with additional expenses.

JAMES F. WILKIE, S.S.C.—SHIELDS and FORREST, S.S.C.—Agents.

No. 187.

JOHN LEARMONTH, Petitioner.—*T. Mackenzie.*

DAVID PATTON and OTHERS, Objectors.—*Marshall—Pattison.*

Bankruptcy—Sequestration—Stat. 2 and 3 Vict. c. 41.—Objections were stated to sequestration of the estates of a deceased debtor being awarded, that the petitioning creditor had not in his oath specified certain securities, which it was alleged (but disputed) that he held over the estate of the deceased—that while he claimed interest upon his debt, he had not specified the amount, and the accumulated sum of principal and interest claimed as due—and that upon an adjustment of the mutual claims of the parties, he was not a creditor of the deceased;—these objections repelled.

July 18, 1845. **MR JOHN LEARMONTH** of Dean presented a petition for the sequestration of the estates of the late John Patton, builder in Edinburgh, setting forth that he was a creditor of the deceased to the extent of £1661, 1s. 1d., conform to oath and vouchers produced. This sum was stated in the affidavit and state of debt to be the balance due on a bond and disposition in security by Patton to Learmonth, and which was granted in the following circumstances:—

2d Division.
Ed. Robertson.
T.

Mr Learmonth and Patton had been jointly engaged in a feuing speculation of the lands of Dean, and they had been engaged in various other joint building speculations, the accounts of which were in great part unsettled, a balance being claimed by Patton as due to him.

A part of the agreement between Patton and Learmonth, and the supe-

rior of the lands of Dean—viz. that they should erect a bridge over the No. 187.
 Water of Leith—had been implemented by Mr Learmonth. The bond
 and disposition in security founded on, as the ground of debt contained ^{July 18, 1845.}
 in the affidavit, was for a sum of £1873, 18s., being the balance which ^{Learmonth v.}
 had been found to be due by Patton of the share of the expense of build- ^{Patton.}
 ing the bridge effeiring to his interest in the Dean speculation, as ascer-
 tained under a submission to the then Dean of Faculty (Hope.) This
 balance was brought out by the referee after crediting a portion of Pat-
 ton's claims against Learmonth, arising out of prior transactions; and
 the further claims of Patton, in relation to these prior transactions, were
 reserved. Under this submission the interests of the parties in the Dean
 speculation were fixed. Patton was appointed to execute the bond and
 disposition in security in question; and they were both ordained to enter
 into an agreement to give effect to the various findings of the arbiter. By
 an agreement between Mr Learmonth and the Cramond road trustees, a
 part of the expense of building the bridge was to be paid by the latter in
 successive yearly instalments. An agreement was accordingly entered
 into between Learmonth and Patton, which was specially referred to and
 narrated in the bond for £1873, 18s., in terms and implement of this de-
 cree-arbitral, by which it was agreed, inter alia, that the proportion of
 the instalments from the road trustees effeiring to Patton's interest in
 the Dean speculation should be paid to Learmonth, and imputed pro
 tanto in liquidation of the £1873, 18s. There was also a reservation in
 favour of Mr Learmonth to impute towards payment of the above sum
 the proportion of subfeu-duties to become due to Patton from houses to
 be built upon the lands of Dean: and, in reference to the various other
 outstanding claims between the parties, it was arranged by said agree-
 ment that Mr Learmonth should pay the feu-duties to the superior, and
 make all other advances connected with the Dean speculation, other than
 the building of the bridge, until those advances exhausted the balance
 due to Patton, before any claim for over-advances could be made by
 Learmonth against Patton. It was alleged by Learmonth that, upon
 these subsequent advances, a large balance was due by Patton to him;
 while Patton's representatives said, on the other hand, that the balance
 was due by Learmonth to them.

Mr Learmonth had agreed to purchase from Patton's representatives
 certain ground-rents which had belonged to him, at a price of £851 : 15 : 4,
 Mr Learmonth having claimed right to retain the price of these ground-
 rents, in extinction, pro tanto, of his other claims against Patton, his re-
 presentatives refused to deliver to him the disposition, unless the stipu-
 lated price were paid over to them, or at least applied to the debt in the
 bond for £1873, 18s.

Mr Learmonth, in his affidavit, stated, that the deceased was, at the
 time of his death, resting-owing to him the sum of £1663 : 8 : 2, being
 the balance of the sum contained in the above-mentioned bond; and also

No. 187. the sum of £74, 10s., being the legal interest of this sum, from Whitsunday 1841 till 13th April 1842, (the date of Patton's death,) amounting together to £1707 : 18 : 2, but under deduction of certain sums (which were specified) received by the deponent from the trustees of the Cramond district of roads on account of the said John Patton, and which were stipulated by the bond to be imputed pro tanto of the sums thereby due, leaving a balance of £1661 : 1 : 1 owing by the said John Patton to the deponent under the bond, on the 13th April 1842, "besides the interest of the said principal sum from that date till paid:" that no part of the said sums had been paid or compensated to the deponent, and that he held no other person than the said John Patton bound for the debt, and no security than that above specified, and a claim against the Cramond Road Trustees for Patton's share of the balance of the four instalments agreed to be paid by them towards the expense of erecting the Dean bridge, as mentioned in the said bond and disposition in security.

July 18, 1845.
Learmonth v.
Patton.

Patton's representatives objected to sequestration being awarded.

They pleaded ;—

1. The petitioner is not entitled to insist in the present petition, in respect that he has not produced such an oath as is prescribed by the statute 2d and 3d Victoria, cap. 41.

2. The oath produced is defective and irregular, inasmuch as the petitioner omits to specify therein certain securities which he holds over the estate of the late John Patton, or others, and particularly,

(1.) The petitioner's right to retain and impute towards payment of the debt referred to in the oath, the proportion of feu-duties, &c., falling due to the said John Patton and his estate, from the houses built, and to be built, upon the estate of Dean, and properties connected therewith, and otherwise from the said estate and properties.

(2.) The security of the sum, with interest since Whitsunday 1843, which is owing by the petitioner to the objectors, as the price of the ground-annuities purchased from them by the petitioner in March 1843, and which sum is retained by the petitioner in his own hands.

3. The oath is further irregular and defective, inasmuch as the petitioner claims interest in his affidavit up to the date thereof, but does not specify the amount of said interest, and of the accumulated sum of principal and interest claimed as due at said date.

4. The petitioner not being a creditor on the late Mr Patton's estate under the bond and disposition in security founded on, as will appear on the mutual claims of the parties being adjusted, he is not entitled to insist in the present application.

5. In respect of the offer of payment of the sum in the bond now made, the sequestration ought not to be granted.

Mr Learmonth pleaded ;—

1. The respondent, Mr Learmonth, being a creditor of the late Mr Patton at the time of his death, on the 13th April 1842, for the balance

of £1661 : 1 : 1, due under the bond and disposition in security referred to in the affidavit, is entitled to insist in the petition for sequestration of Mr Patton's estates under the bankrupt statute. No 187.
July 18, 1845.
Learmonth v.
Patton.

2. The affidavit produced in support of the petition is, in all respects, formal and regular, and the respondent has therein specified all the securities held by him over the estate of Patton the bankrupt, and other obligants, as required by the 9th section of the bankrupt act.

3. As the respondent holds no conveyance or security over the proportion of feu-duties falling due to Mr Patton from the estate of Dean, and properties connected therewith, he was not bound to specify these feu-duties as a separate security in his oath, especially as the bond, containing the clause of reservation, was produced and referred to.

4. Further, as Mr Patton's trustees never granted any disposition to the ground-annuals, and still retain the property in their own possession, the respondent does not hold, and never held, the price as a security, and is not bound to impute it towards payment of the debt in the bond.

The Lord Ordinary reported the case.

LORD JUSTICE-CLERK.—A party cannot stop sequestration by alleging that all the securities are not specified. If we were at present to go into the question of what were securities, this would be a long and tedious investigation to be gone into in the shape of objections to a sequestration. If the creditor's oath is clear, that he holds certain securities, and none other than those specified, he has complied with all that is required by the act. We give no opinion upon the merits. With regard to the objection, that the amount of interest is not specified, and also the accumulated amount of principal and interest stated, the creditor was not bound to state it unless he pleased.

LORD MONCREIFF.—A party objecting to a sequestration must do so on clear grounds; it must not be a disputed matter.

LORD COCKBURN.—The objections resolve into the merits. The more the objectors went into the objections, the more I became convinced that they were not the sort of objections that should be allowed to prevail.

LORD MEDWYN was absent.

THE COURT pronounced this interlocutor :—" Repel the pleas of the objectors to the sequestration, and remit to the Lord Ordinary to proceed accordingly, reserving all questions of expenses; and also reserving Mr Learmonth's claim for the expense of this discussion against the funds of the sequestrated estate.

MACRITCHIE, BAYLEY, and HENDERSON, W.S.—JOHN ROGERS, S.S.C.—Agents.

No. 188.

JOHN ALEXANDER LONGMORE, Suspender.—*Tennent.*DONALD LINDSAY, Respondent.—*Rutherford.*

July 19, 1845.

Longmore v.

Lindsay.

Stamp—Assignment—Writ.—A transfer was written on paper, bearing a stamp-duty of sufficient amount, but on which another deed had been previously engrossed, though never executed. The testing clause of the transfer bore, that all the words on the sheet other than those contained in the transfer should be “held *pro non scripto*, and as erased.” Held that the transfer was valid.

July 19, 1845.

JOHN ALEXANDER LONGMORE, W.S., accepted an offer from Donald

Lindsay, trustee on the sequestrated estate of the Marquis of Huntly, to sell him ten shares of the North of Scotland Assurance Company.

1ST DIVISION.

L.d. Robertson.

W.

The transfer of these shares, in Mr Longmore's favour, was written upon paper bearing a stamp-duty of sufficient amount, but upon the paper a lease had been previously engrossed, which, however, was unexecuted. The testing clause of the transfer bore, “that all the words on this sheet, other than those contained in this present assignment, are and shall be held *pro non scripto*, and as erased.”

Longmore presented a note of suspension, of a threatened charge for the price, on the ground, that the transfer being written on stamped paper, on which another deed had been engrossed, was a violation of the stamp laws.

The Lord Ordinary pronounced the following interlocutor:—“In respect that the stamped paper on which the assignment is written bears a stamp-duty of a sufficient amount, and that no other deed appears ever to have been executed on the said paper, and that all the words written thereon, other than those composing the assignment, are held as erased, and also in respect no caution is offered, refuses the note.”

Mr Longmore reclaimed, and pleaded, that the stamp was exhausted and spoiled, by having a lease written upon it, whether executed or not. The respondent might have availed himself of the remedy afforded by the stamp act in the case of spoiled stamps, by returning the spoiled stamp to the stamp-office within six months, in which case he would, according to the provisions of the act, have got a new one issued; but he was not entitled to take a remedy not allowed by the act, by using the stamp for the purpose of another deed.

THE COURT, on the 9th inst., ordered intimation to be made to the Commissioners of Stamps, and they having declined to appear, this day adhered to the Lord Ordinary's interlocutor.

JOHN MACKENZIE, W.S.—WALTER DUTHIE, W.S.—Agents.

SAMUEL TREACHER and MANDATORY, Advocators.—*Rutherford*.
GALLOWAY and ANDERSON, Respondents.—*G. D. Fordyce*.

No. 189.

July 19, 1845.

Treacher v.
Galloway

Expenses—Auditor's Report.—The Court, approving of the auditor's report, disallowed to the successful party, 1. The expense of printing certain documents, with a view to debate in the Outer-House, written copies of which for counsel had been charged for, and allowed, and the opposite party, as the reclamer, having printed them for the Inner-House: 2. A charge for a new memorial to senior counsel, after a partial debate in the Outer-House, which was continued in consequence of his absence, informing him of what had taken place, and for fresh fees to both counsel, both having been previously instructed.

THE advocator, who was found entitled to expenses, objected to the July 19, 1845 auditor's report, on the ground that certain items of his account were disallowed, as not being proper charges against the respondents.

1st Division
Lord Irvine

The Court remitted to the auditor to assign his reasons for disallowing the items objected to. The nature of these items and objections is explained in the following report returned by the auditor:—

1st, The expense of printing the documents under date 10th March, amounting to £8 : 3 : 1, was disallowed because charges were previously stated in the account, and allowed, for written copies of them for counsel, and it is well known that the printing of papers with a view to a debate before a Lord Ordinary is not sanctioned either by any rule of Court or by practice. Such a proceeding is accordingly hardly ever resorted to, but in any case in which it may have taken place, the expense has uniformly been disallowed as a charge against the losing party. In many cases it might probably be very expedient that the record and relative documents should be printed at the mutual expense of the parties, for the purpose of saving the expense of copies for the counsel on both sides and the Lord Ordinary; but where written copies have already been made and charged for, it is surely out of the question that one of the parties should be allowed the expense of printing over and above. The other reasons assigned in the objections for this expense being allowed appear to the auditor to be unsatisfactory, because the Lord Ordinary's interlocutor having been against the respondent, and he having reclaimed to the Court, he was entitled to print such documents as appeared to him proper as an appendix to his reclaiming note, and he accordingly did so, so that the print by the advocator was of no avail to him.

2d, With regard to the articles under date 30th May, it would appear that the advocator's senior counsel was absent at the debate before the Lord Ordinary, in consequence of which it was continued; and the advocator's agent seems to have made out a new memorial, instructing him as to what had taken place in his absence, and given both counsel fresh fees along with it (they having been previously fully instructed.) Such a proceeding is certainly contrary to the usual practice; and it must be obvious that, if it were to receive the sanction of the Court, it would be

No. 189. productive of a great increase of the expense of litigation. It was for
this reason that the articles were disallowed as a charge against the
losing party.
July 19, 1845.
Trencher v.
Galloway.

THE COURT approved of the auditor's report, and found the respondent's entitled to the expenses of discussing the objections to it, which they modified to £4, 4s.

JOHN CULLEN, W.S.—ANDREW DUNN, W.S.—Agents,

INDEX OF MATTERS

IN

VOLUME VII.

(*Second Series.*)

ABANDONMENT OF ACTION.

See *Expenses*, 24—*Process*, VII. 1—XI. 9, 19, 23.

ACCRETION.

See *Superior and Vassal*, 1, (5.)

ADMINISTRATION, LETTERS OF.

See *Agent and Principal*, 2.

ADVOCATE.

See *Expenses*, 6, 7—*Auditor's Report*, 2, (2.)

ADVOCATION.

See *Process*, VI.

AFFIDAVIT.

See *Bankruptcy*, 4, 18.

AGENT AND CLIENT.

1. An action for payment of a law-agent's account, being resisted by the defender on the ground that the business charged for had not been authorized,—Circumstances deposed to by the defender, on reference to his oath, which held to establish employment, on his part, of the law-agent. *Grant*, Jan. 17, 1845, p. 274.
2. Circumstances in which simple interest at 4 per cent was allowed on an agent's business account, from the last article in each account till citation in the action, and thereafter 5 per cent till payment. *M'Lelland*, Dec. 6, 1844, p. 179.
3. A law-agent who had a hypothec over certain documents in his possession, for a business-account due to him by his employer, the pursuer of a jury cause,—appointed to produce them, without payment or reservation, under a diligence obtained by the defender, but found that the pursuer could not use them at the trial without paying his agent's (the haver's) account. *Montgomerie*, May 1, 1845, p. 553.

AGENT AND CLIENT (Continued.)

4. A judgment having been pronounced in the Court of Session, by which a party was found entitled to expenses, and an extract decree therefor allowed to go out in the name of her agent; and this judgment having been reversed on appeal;—Held, that the appellant was entitled to obtain repayment from the agent, of the sums which had been paid to him in terms of the judgment reversed. *Cormack*, June 3, 1845, p. 812.

See *Process*, IV. (2.)

AGENT AND PRINCIPAL.

1. In a suspension of a decree of removing—Held that a state of rents due by the tenant, rendered by the factor to the landlord, and retained by him, was competent evidence in favour of the tenant; and that the landlord having failed to produce it, being required, parole evidence of its contents was competent. *Mitchell*, Feb. 4, 1845, p. 382.
2. Instructions were given to a mercantile firm in Bombay to take out letters of administration in the Court of Bombay to the estate of a person who had died there, but instead of doing so they obtained payment of the funds, which they remitted to this country, by granting a bond of indemnity to the Registrar of the Court, who had taken possession of them in his official capacity: In a multiplepointing raised for the distribution of the estate, a claim was made by the Bombay firm, that the parties preferred to the fund *in medio* should give them security against liability under the bond for indemnity:—The Court refused the claim. *Forbes*, July 17, 1845, p. 1068.

See *Public Officer*, 1, (2.)—*Process*, III. 14, (1.)

ALIMENT.

1. Circumstances in which the Lord Ordinary refused a note of suspension and liberation presented by an imprisoned debtor, upon the ground that, after having been liberated for want of aliment, he had been immediately re-incarcerated on the same diligence. *Denovan*, Feb. 1, 1845, p. 378.
2. Annuity of £60 awarded to a widow against the heir-at-law of her husband, the free rental of the estate being £240;—Question raised, but not decided, whether such annuity should continue during viduity only? *Hobbs*, Feb. 22, 1845, p. 492.
3. Where the annual income of a lunatic's estate amounted to £150, and the rate of board, paid for him at the asylum where he was kept, to £40, the Court, considering this allowance to be too small, directed that it should be increased to £70, so as to provide him with additional luxuries and comforts. *Myers*, June 19, 1845, p. 886.

AMENDMENT OF LIBEL.

See *Process*, I. 3, 4.

APPEAL.

1. Where the Lord Ordinary had sustained a defence to an action, and found the defender entitled to expenses, but the Inner House had altered, reserving expenses, and the House of Lords, on appeal, had remitted to the Court with directions to adhere to the interlocutor of the Lord Ordinary, "and to proceed further as shall be just and consistent with this judgment."—Held, in conformity with *Stewart v. Scott*, 11th March 1836, that as the judgment of the House of Lords exhausted the cause, it was not competent for the Court to award the expenses incurred subsequent to the Lord Ordinary's interlocutor, prior to appeal, with regard to which it was silent. *Purves*, May 31, 1845, p. 810.
- 2.—(1.) Where an appeal had been delayed, with the view of allowing a party to bring up before the House of Lords a subsequent decree which had been pronounced in the process, and which had been allowed to become final and be extracted through inadvertence in allowing the reclaiming days to expire—the Court, holding that the process had been taken out of Court by the extract, refused to entertain a reclaiming note, under the provisions of 45 Geo. III. c. 151, § 16, without a remit being made by the House of Lords.

PPREAL (Continued.)

(2.) Question, Whether the provisions of the above section are applicable to final extracted decrees? Alexander, June 17, 1845, p. 884.

PPROBATE AND REPROBATE.

1. Question whether the doctrines of approbate and reprobate, and homologation, applied to a deed vitiated by erasure in *substantialibus*. Robertson, Dec. 20, 1844, p. 236.
2. Trustees were directed to realize the trustor's personal property, and invest the proceeds in land; and on the recovery or death of the trustor's only child—a lunatic—to execute a strict entail thereof, along with the trustor's other lands; but no direction was given as to the profits of the personal estate or rents of the heritage prior to the execution of the entail,—Held, that these belonged to the lunatic, independently of the trust, as heir-at-law, and that his curator did not approbate the trust by claiming them. Cowan, June, 13, 1845, p. 872.

See *Bankruptcy*, 5, (2.)

RBITRATION.

An arbiter, to whom disputes as to a contract for building a ship had been submitted, having gone out of the contract, and decreed for more than the contract price,—Held that the decret-arbital was *ultra vires* and reducible, in respect that the contract, which had been disregarded, was the basis of the submission. Napier, Nov. 29, 1844, p. 166.

RESTMENT.

RSIGNATION.

- The trustee on a sequestrated estate and the bankrupt, with consent of the commissioners, assigned the whole sequestrated estates to certain trustees, to be applied in payment of the composition; the bankrupt was thereafter discharged; a sum of money, which had belonged to the bankrupt before the sequestration, and had remained in a bank in his name for a number of years after his discharge, having been arrested by the creditor in a debt contracted after the discharge;—Held, in a competition between him and the trustees, that the whole estate of the bankrupt having been conveyed to the latter by the trustee in the sequestration, when he was in full right to do so, no right to the fund in question emerged, at the close of the sequestration, to the bankrupt or his subsequent creditors; and that the bankrupt having been previously divested by statute, it was not necessary, in order to perfect the right of the trustees, as in a question with him or his creditors, that the assignation in their favour should have been intimated to the bank; and that they were, therefore, entitled to be preferred to the fund. Adam, Jan. 17, 1845, p. 276.
- A tenant, with the consent of his landlord, made over his whole rights under his lease to assignees, but he still thereafter remained in the personal occupation of the farm; shortly before the expiry of the lease, he came under an obligation to the landlord to remove without warning or process of law;—Circumstances in which held, that the assignees were the tenants in the farm, and that the former tenant had no power, in the character of manager or overseer for them, to grant the obligation to remove; and that therefore the assignees, not having themselves received any warning, were entitled to possess the farm by tacit relocation for a year after the expiry of the lease. Bett, Feb. 14, 1845, p. 447.

See *Stamp*, 1, 4.

SYTHMENT.

- (1.) In an action of assythment and damages by the children of a party who had been killed by a stage-coach accident, against the proprietors of the coach, in which the pursuers had set forth that they had been deprived of the paternal care and support, and had been grievously injured in their feelings,—Diligence granted to the defenders for recovery of documents, to instruct that the deceased did not support his family, but had been separated from them in

ASSYTHMENT (Continued.)

consequence of his habits, and of an illicit intercourse he carried on ; and, *inter alia*, for recovery of a correspondence alleged to have passed between the deceased and the party with whom he had the illicit intercourse.

2. Observed that in granting such diligence, the Court were disposing of the general question of the admissibility (in the event of a jury-trial) of the evidence sought to be recovered. Brash, Feb. 27, 1845, p. 539.

ATTORNEY'S CERTIFICATE.

See *Process*, IV. (2.)

AUDITOR'S REPORT.

1.—(1.) A party who had lodged objections to the auditor's report at the time it was made, held not entitled, at the distance of two years and a half thereafter, to lodge new and extended special objections to the report.

(2.) Rule adopted by the auditor of Court in taxing the defender's account of expenses, in actions of divorce at the instance of a husband against a wife. King, Feb. 26, 1845, p. 36.

2. The Court, approving of the auditor's report, disallowed to the successful party,

(1.) The expense of printing certain documents, with a view to debate in the Outer-House, written copies of which, for counsel, had been charged for and allowed ; and the opposite party, as the reclamer, having printed them for the Inner-House :

(2.) A charge for a new memorial to senior counsel, after a partial debate in the Outer-House, which was continued in consequence of his absence, informing him of what had taken place, and for fresh fees to both counsel, both having been previously instructed. Treacher, July 19, 1845, p. 1099.

BANKRUPTCY.

1. Where there is good reason to suspect that a party applying for *cessio*, is fraudulently concealing funds or effects from his creditors, the proper course is to refuse his application for *cessio*, *hoc statu*. Mauson, Nov. 27, 1844, p. 159.

2. A creditor who had drawn a dividend on an open account in a sequestration, raised action of constitution in the Sheriff-court against the bankrupt, concluding for payment of his whole debt, "under deduction of whatever sums the defender may be able to instruct he has paid to account," and for expenses generally. The bankrupt defended, pleading that the action was incompetent, and if not, claiming certain deductions from the debt, which were consented to. Decree passed against him for the balance and for expenses ;—The charge for expenses suspended, on the ground that the defender was entitled to appear and claim the deductions which had been allowed, and also to oppose the conclusion for expenses, which, in an action of constitution, ought to be in the event of opposition only. Opinion, that drawing a dividend in a sequestration does not bar a creditor from obtaining at his own expense decree of constitution against the bankrupt, where he can instruct a proper object for doing so. Rutherford, Nov. 28, 1844, p. 162.

3.—(1.) Special circumstances in which the Court, on the application of certain of the creditors on a sequestrated estate, ordered another creditor to produce, and to be examined with regard to, a "pass-book" between him and the bankrupt, (which it was alleged would throw light upon the bankrupt's affairs,) although the pass-book also related to the creditor's own claim.

(2.) Question whether, under sections 68 and 69 of the existing Bankrupt Act, a creditor can competently be examined on matters relating to his own claim ? Pollock, Dec. 3, 1844, p. 172.

4. A creditor in a sequestration gave in three affidavits to three separate debts, which affidavits bore no reference to each other, and in none of which was the amount of the whole sum, for which the creditor claimed to vote, specified ;—Held, in conformity with the opinion of the majority of the whole Judges, and departing from the case of *Black v. Dixon*, (*ante*, V., 1077.)

BANKRUPTCY (Continued.)

that the creditor was entitled to vote for the cumulo amount of the whole three affidavits. *Wilson*, Dec. 21, 1844, p. 249.

5. (1.) Held that a person was liable to sequestration for a personal debt, unconnected with trade, contracted while he was a trader, though he had ceased to be so, without owing any trading debts prior to the date of the bill which he granted for that debt, upon which the application for sequestration was founded.

(2.) Circumstances in which held that a creditor was not barred from applying for sequestration of his debtor's estate, though he had agreed, in acceding to a trust, to suspend all diligence till the final conclusion of an action, which it was the object of the trust to have tried for behoof of the creditors, and that action, though finally decided in the Court of Session, was still open to be appealed. *Jopp*, Dec. 22, 1844, p. 260.

3. In an application under the Bankrupt Act, § 4, for sequestration of the estate of a deceased debtor,—Held that upon consignation of the debt of the applicant by a judicial factor on the estate, (who had raised a reduction of the ground of debt,) sequestration ought to be refused. *Alexander*, Jan. 14, 1845, p. 264.

7. The trustee on a sequestered estate and the bankrupt, with consent of the commissioners, assigned the whole sequestered estates to certain trustees, to be applied in payment of the composition; the bankrupt was thereafter discharged; a sum of money, which had belonged to the bankrupt before the sequestration, and had remained in a bank in his name for a number of years after his discharge, having been arrested by the creditor in a debt contracted after the discharge;—Held, in a competition between him and the trustees, that the whole estate of the bankrupt having been conveyed to the latter by the trustee in the sequestration, when he was in full right to do so, no right to the fund in question emerged, at the close of the sequestration, to the bankrupt or his subsequent creditors; and that the bankrupt having been previously divested by statute, it was not necessary, in order to perfect the right of the trustees, as in a question with him or his creditors, that the assignation in their favour should have been intimated to the bank; and that they were, therefore, entitled to be preferred to the fund. *Adam*, Jan. 17, 1845, p. 276.

A debtor in a certain debt, who held counter-claims against his creditor, having for a long period failed to constitute them, the trustees of the creditor (he having become bankrupt) enforced payment of the debt from a party who was cautioner therefor;—Held that the debtor was not entitled to claim from the bankrupt estate the full amount of his counter-claims, on the ground that payment of the debt had been improperly enforced from his cautioner in disregard of these counter-claims, but that he was only entitled to a dividend rateably with the other creditors. *Hamilton*, Jan. 24, 1845, p. 295.

A claim in a sequestration having been rejected by the trustee, upon the ground that the bill on which it was founded was vitiated by erasure;—the claimant was held not entitled to support his debt by other documents which were afterwards produced as additional vouchers of the debt, but not till within two months of the period fixed for payment of the first dividend, to the effect of entitling him to a share of that dividend, but he was allowed a proof of the circumstances under which the erasures were made, in support of the bill originally produced with his affidavit. *Ker*, Feb. 8, 1845, p. 400.

Held that a debtor was well cited under the Bankrupt Act by leaving a copy of the petition and deliverance thereon with his father, as the messenger's execution bore—"within his said father's dwelling-house in Newburgh, with whom he lives and resides when not at sea." *Brown*, Feb. 14, 1845, p. 428.

Ashley, without value, accepted a bill drawn on him by *Izat*, and *Izat*, without value, indorsed it to *Reid*, who discounted it in bank and drew the proceeds: both *Izat* and *Reid* became bankrupt before the bill fell due, and *Ash-*

BANKRUPTCY (Continued.)

- ley retired it:—Held that Ashley was entitled to be ranked for the amount of the bill on both sequestrated estates to the effect of drawing full payment. Opinion,
- (1st,) That an obligation granted by Reid to Izat to provide for the bill when due was available to Ashley;
- (2d,) That Izat was not entitled to be ranked on Reid's estate. Ashley, Feb. 25, 1845, p. 524.
12. Where the trustee in a sequestration had become insane, after his report of the resolution of creditors to accept an offer of composition had been prepared, but before it was signed, the Court allowed the report, signed by the commissioners for him, to be received and approved of. Guthrie, May 21, 1845, p. 637.
 13. A sequestrated bankrupt, while still undischarged, recommenced business, and was sequestrated a second time,—Held, that the creditors in the first sequestration were entitled to claim under the second, and be ranked *pari passu* with the creditors in it. Fiske, June 7, 1845, p. 842.
 14. At the second meeting of the creditors in a sequestration, held for the purpose of deciding upon an offer of composition made by the bankrupt, an offer different from that which had been made and entertained at the first meeting was accepted, and the bankrupt was discharged by the Sheriff, whose deliverance was confirmed by the Lord Ordinary, without objections being stated by any of the creditors: the offer, as adopted by the second meeting, contained a provision, not entertained at the first, that the funds (which were inadequate for payment of the whole composition) should be paid by the trustee to the creditors, *primis venientibus*, till they were exhausted: no notice whatever of the provision was given to the creditors, nor were certain other alterations which had been made upon the offer as originally entertained, intimated to them in the Gazette notice calling the second meeting, although specified in circular letters by the trustee: in a reduction of the discharge, which certain of the creditors who had not received their share of the composition instituted, upon the proceedings of the second meeting coming to their knowledge—Held (repelling a plea that the deliverance of the Sheriff and Lord Ordinary constituted *res judicata* against them) that the proceedings at the second meeting were irregular and incompetent under the statute, and decree of reduction of the discharge pronounced. Observed, that concealment, or defective representations, in the "abstract of the state of the affairs and valuation of the estate," required by § 115 of the Bankrupt Statute to be sent by the trustee to the creditors, in order to enable them to judge of an offer of composition, was a relevant ground of reduction of a discharge, where it could be shown that the creditors had been thereby misled, and induced to form an erroneous view of their interests in regard to the offer. Miln, June 19, 1845, p. 888.
 15. Held, that, under the 53d section of the Bankrupt Act, an interim factor had a claim for his advances, and the remuneration awarded him by the creditors, out of the first money which came into the hands of the trustee, preferable to that of the trustee for expenses incurred by him in the business of the sequestration after his own election. Anderson, June 28, 1845, p. 947.
 16. A composition having been accepted by the creditors of a bankrupt, and judicially confirmed, along with an arrangement under which a sum of money was borrowed by the bankrupt on his heritable property, with consent of the trustee upon the sequestrated estate, in whose favour a security over said estate had been granted for payment of the composition in terms of the arrangement, and which sum was placed in his (the trustee's) hands, for the payment of the composition;—Held, that the trustee was bound to administer the estate vested in him, including the loan, for the equal and rateable benefit of all the creditors interested in the composition. Aitken, July 8, 1845, p. 596.

BANKRUPTCY (Continued.)

17. Where a wife gave up to her husband certain paraphernal jewels, and he granted to her an obligation, pledging himself that, in the event of the jewels being disposed of, "the amount thereof should be inserted as codicil to his will as her own private property, and that she should be entitled to such amount at his death:"—Held that the wife was entitled, in respect of this obligation, to rank as an onerous creditor upon her deceased husband's estate. *Montgomery*, July 17; 1845, p. 1081.
18. Objections were stated to sequestration of the estates of a deceased debtor being awarded, that the petitioning creditor had not in his oath specified certain securities, which it was alleged (but disputed) that he held over the estate of the deceased—that while he claimed interest upon his debt, he had not specified the amount, and the accumulated sum of principal and interest claimed as due—and that upon an adjustment of the mutual claims of the parties, he was not a creditor of the deceased;—these objections repelled. *Learmonth*, July 18, 1845, p. 1094.

See *Expenses*, 19.

BILL OF EXCHANGE.

1. The holder of a bill, within the years of prescription, raised an ordinary action in the Sheriff-court against the acceptor for payment, and this action having fallen asleep before judgment, he, beyond the years of prescription, extracted the protest, and charged and imprisoned the acceptor thereon;—Note of suspension and liberation passed on the ground of *lis alibi pendens*. *Denovan*, Feb. 1, 1845, p. 378.
2. Terms of a letter held to fall, within the meaning of the Stamp Act, to be considered as an order for the payment of money out of a particular fund which might or might not be available, and being delivered to the payees named therein, liable as such to stamp duty. *Taylor*, Feb. 13, 1845, p. 420.
3. A claim in a sequestration having been rejected by the trustee, upon the ground that the bill on which it was founded was vitiated by erasure;—the claimant was not entitled to support his debt by other documents which were afterwards produced as additional vouchers of the debt, but not till within two months of the period fixed for payment of the first dividend, to the effect of entitling him to a share of that dividend, but he was allowed a proof of the circumstances under which the erasures were made, in support of the bill originally produced with his affidavit. *Ker*, Feb. 8, 1845, p. 400.
4. Ashley, without value, accepted a bill drawn on him by Izat, and Izat, without value, indorsed it to Reid, who discounted it in bank and drew the proceeds: both Izat and Reid became bankrupt before the bill fell due, and Ashley retired it:—Held that Ashley was entitled to be ranked for the amount of the bill on both sequestrated estates to the effect of drawing full payment. Opinion,
 (1st.) That an obligation granted by Reid to Izat to provide for the bill when due was available to Ashley;
 (2d.) That Izat was not entitled to be ranked on Reid's estate. *Ashley*, Feb. 25, 1845, p. 524.

See *Process*, II. 1.

BURGH.

1. Where a portion of burgh property was sold by public roup, under 3 Geo. IV. c. 91, and pursuant to advertisement as required by that Act; and the advertisement was referred to in the articles of roup and the disposition:—Held, in the circumstances, that it was competent to refer to the advertisement, to explain an ambiguity in the terms used for describing the boundaries of the subject in the disposition to the purchaser. *Davidson*, Jan. 28, 1845, p. 342.
2. In an action by the Ministers of Edinburgh against the Magistrates and Town-Council for arrears of annuity-tax, which were alleged to have been rendered irrecoverable by the culpable neglect of the latter in failing to appoint stent-

BURGH (Continued.)

masters in terms of the statutes thereanent;—Held, that the performance of this duty was imposed upon the Magistrates and Council as a body of statutory commissioners, and not upon the burgh itself, through them, as its representatives and administrators; and that the property of the Incorporation could not be subjected to liability for acts done by them when not acting in their proper official capacity. *Ministers of Edinburgh*, May 28, 1845, p. 663.

3. Terms of royal charters and grants ratified by Parliament in favour of a royal burgh, which being followed by possession, were held to give the magistrates a title to levy certain dues upon all goods, &c., carried through the territory of the burgh, and passing across a river, within the prescribed limits by the charters and grants, by means of a railway, sanctioned by Act of Parliament, except where, in the latter case, a right of free passage could be proved to have existed for forty years. *Magistrates of Linlithgow*, July 17, 1845, p. 1071.

CASH CREDIT.

See *Curator Bonis*, 1.

CAUTIONER.

1. By antenuptial contract, the husband bound himself and his heirs to invest a sum for behoof of the wife in life rent in the event of her survivorship, and the children of the marriage in fee, so soon as he or they should be called on to do so by certain trustees; and by relative bond of caution, his brother, one of the trustees, bound himself to pay these provisions in the event of the husband failing to implement his obligation in regard to them. The husband having died insolvent, without having implemented the obligation, or having been called upon by the trustees to do so;—Held,
 - (1st.) That the brother was liable upon the bond; and
 - (2d.) That the wife had a good title to sue upon it, without the concurrence of the marriage trustees. *Wilson*, Nov. 16, 1844, p. 125.
2. A sheriff's-officer, who had been employed to do diligence upon a bill, committed an error in his charge, which led to an action of damages and other legal proceedings being instituted against his employer and him; the employer, at an early stage of the case, had served a notarial protest upon the officer, holding him and his cautioners liable for the damage and expense he might sustain in consequence of the irregularity in the charge; but he did not intimate the institution of the legal proceedings, or his claim of relief, to the cautioners, till after the litigation had gone on for some years: In an action by the employer against a cautioner of the officer, for relief from the expenses incurred by him in the matter,—Held that the want of intimation was not of itself sufficient to liberate the defender from liability as cautioner. *Struthers*, Feb. 14, 1845, p. 436.
3. In an action by a bank on a letter of guarantee,—Held, That it was competent to prove by parole that the bank had paid a sum of money on an order, subsequent to and on the faith of the guarantee. *Grant*, Feb. 7, 1845, p. 390.
4. Verdict returned under an issue whether a party had been induced to subscribe a bond of caution by undue concealment or deception,—set aside as not warranted by the evidence, and a new trial granted. *Raiton*, May 30, 1845, p. 748.
5. Terms of a letter recommending a purchaser to a seller, which, in the circumstances of the case, were held not to constitute a guarantee. *Johnstone*, July 15, 1845, p. 1046.

CESSIO BONORUM.

1. Where there is good reason to suspect that a party applying for cessio is fraudulently concealing funds or effects from his creditors, the proper course is to refuse his application for cessio, *hoc statu*. *Mason*, Nov. 27, 1844, p. 159.

CASSIO BONORUM (Continued.)

2. Where the pursuer of a *cassio*, after instituting the process, had sold a part of his property, and paid away the proceeds to some of his creditors, the Court refused him the benefit of *cassio hoc statu*. Galloway, Feb. 8, 1845, p. 403.
3. Where a reclaiming note from a judgment of the Sheriff in a *cassio* which had come before the Lord Ordinary on the bills during recess, and had not been disposed of by him before the commencement of the session, was not boxed to the Judges for a fortnight after the sitting of the Court,—Objection repelled in the circumstances of the case, that it was too late under the Act of Sederunt, which provides that it shall be boxed “on the meeting of the Court.” Galloway, Jan. 28, 1845, p. 355.

CHURCH.

See *Prescription*, (Long,) 1—*Burgh*, 2.

CHURCHYARD.

See *Interdict*, 3.

CITATION.

1. Held that a debtor was well cited under the Bankrupt Act by leaving a copy of the petition and deliverance thereon with his father, as the messenger's execution bore—“within his said father's dwelling-house in Newburgh, with whom he lives and resides when not at sea.” Brown, Feb. 14, 1845, p. 428.
2. In an action against a widow, the summons and citation stated her maiden name to be “Martha Reid,” whereas it was “Martha Hood.” She was otherwise correctly designed by her residence, and the name and designation of her deceased husband. A preliminary defence, founded upon the error, repelled. Muir, July 10, 1845, p. 1009.

CLAUSE.

1. The estate of A was entailed in a marriage contract upon the heirs of the marriage and their heirs, heirs-male being called before heirs-female, under this provision, that in the event of there being only one son “of this present marriage” who shall succeed to the estate of B, his second son, and failing a second son, his eldest daughter, should succeed to the estate of A; but in the event of there being two sons “of this present marriage,” that the second should succeed to A if the eldest should succeed to B; and that the succession to A, in case any of the heirs “of this marriage” shall succeed to B, “shall take place according as is above mentioned, in all time coming.” An only son of the marriage succeeded to both estates, and on his death was succeeded in both by his only child, a daughter. On her death, leaving children,—Held, in conformity with the opinions of a majority of the whole Judges,
 - (1st.) That the provision and exclusion in the entail of A did not apply to her eldest son, even though he had *succeeded* to B; but,
 - (2d.) That having acquired right to B during his mother's life, under a transaction, sanctioned by Parliament, whereby it was given in lieu of an English estate to which he had an indefeasible right of succession, he had not *succeeded* thereto in the meaning of the provision and exclusion in the entail; on each of which grounds he was preferred in a competition for the succession under the entail with his eldest sister, and with his second son and eldest daughter. The Marquis of Hastings, Nov. 12, 1844, p. 1.
- 2.—(1.) Where a subject was disposed as bounded by “the harbour, with the pier intervening, upon the west;” and the extent of the “pier” was disputed: proof allowed, to ascertain what was the extent of the “pier.”
 - (2.) Where a portion of burgh property was sold by public roup, under 3 Geo. IV. c. 91, and pursuant to advertisement as required by that Act; and the advertisement was referred to in the articles of roup and the disposition:—Held, in the circumstances, that it was competent to refer to the advertisement, to explain an ambiguity in the terms used for describing the bound-

CLAUSE (Continued.)

- daries of the subject in the disposition to the purchaser. Davidson, Jan. 28, 1845, p. 342.
3. An entail prohibited the heirs "to sell, alienate, impignorate, or dispose the said lands and estate, or any part thereof, either redeemably or under reversion;" the prohibition was duly fenced with irritant and resolutive provisions;—Held that the heir was not prohibited from making absolute and irredeemable sales, and was entitled to apply the price received for the lands sold, at his pleasure. Earl of Eglinton, Feb. 14, 1845, p. 425.
 4. Held that a will executed by a Scotchman at St Kitts, written by himself in ordinary popular language, must, even with regard to a bequest of funds in Scotland, be interpreted, and the testator's intention judged of, according to the law of England. Gowan, Feb. 14, 1845, p. 433.
 5. A party, in fulfilment of a bargain between him and his former wife, from whom he had been separated by divorce, and as a part of the consideration for her having conveyed certain lands belonging to her, to him and the children of the marriage in their order, granted a bond of provision to the younger children of the marriage nominatim, binding himself to make payment to them equally among them and the heirs of their respective bodies, and the survivors and survivor of them, of £4000, at the first term after the decease of the longest liver of him and his said former wife: the bond further bore to have been instantly delivered for the use and benefit of the grantees: the father having died, and having been survived by the mother of the children, —Held, on a construction of the above, and other provisions and clauses contained in the bond, that the children's interest in the bond had vested in them at their father's death. Allardice, Jan. 31, 1845, p. 362.
 6. Held that the words "acts and deeds" in the irritant clause of an entail included debts, though in the resolutive clause which followed, the words "acts, deeds, or debts," were used. M'Grigor, Feb. 28, 1845, p. 532.
 7. The tolls of a road having been found insufficient to pay the interest of the debt upon it, and certain of the road trustees who were liable for the debt being less interested in the road than the others, it was agreed that "a loss of about £130 per annum," should be made up by these other trustees paying their several proportions thereof according to their respective valuations;—Held,
 - (1.) That this agreement did not import an obligation to pay an average loss of £130 per annum in a series of years, but only an obligation to pay the loss not exceeding that sum, in each year as it occurred.
 - (2.) That the obligants not being liable singuli in solidum, were not liable for the loss occasioned by the insolvency of one of their number.
 - (3.) That one of the obligants having sold his property, was not thereby relieved of his obligation. Duke of Montrose, May 30, 1845, p. 759.
 8. Terms of a clause of destination in a settlement which was held to be a conditional institution, and not a substitution. Allan, June 20, 1845, p. 908.
- See *Harbour*, 1, 3—*Property*, 1, 3.

COLLATION.

A father disposed certain heritable subjects to his daughter and her husband "in conjunct fee and liferent, and the longer liver of them," and to their eldest son nominatim, his heirs or assignees whatsoever, heritably and irredeemably, in fee; the disposition bore to be granted for love and favour, but by a subsequent deed the husband bound himself to pay a price for the subjects, which was considerably less than their value; the wife survived;—Held that the fee was vested in the husband, and that as the son was his heir *alioquin successurus* in these subjects, and did not obtain them by singular title from his grandfather, he was bound to collate them with his brothers. Fisher's Trustees, Nov. 19, 1844, p. 129.

COMPENSATION.

1. Where a party had obtained a verdict for damages, and the verdict had been

COMPENSATION (Continued.)

applied,—Circumstances in which the Court refused, on a motion by the party against whom the damages had been awarded, to supersede extract till the result of an action of count and reckoning at his instance, then in dependence, so as to enable him to constitute certain counter claims, and compensate them with the damages. *Lawson*, Nov. 21, 1844, p. 153.

- 2 A debtor in a certain debt, who held counter-claims against his creditor, having for a long period failed to constitute them, the trustees of the creditor (he having become bankrupt) enforced payment of the debt from a party who was cautioner therefor :—Held that the debtor was not entitled to claim from the bankrupt estate the full amount of his counter-claims, on the ground that payment of the debt had been improperly enforced from his cautioner in disregard of these counter-claims, but that he was only entitled to a dividend rateably with the other creditors. *Hamilton*, Jan. 24, 1845, p. 295.

COMPETITION.

1. By the articles of roup of a judicial sale it was declared that Martinmas 1843 should be the purchaser's term of entry, and that he should have right to the rents "falling due from and after the said term ;"—Held,
 (1st,) That the purchaser was not entitled to the rents payable at Whitsunday and Candlemas 1844, for crop and year 1843.
 (2d,) That it was incompetent to control or modify the construction of the articles of roup by production of correspondence between the common agent and judicial factor, or by any declaration as to the meaning thereof. *Stevenson*, Feb. 12, 1845, p. 418.
2. Legacy to A, his heirs, executors, or assignees, in the event of B, who life-rented the subject of it, dying without issue :—A predeceased B, having assigned the legacy : B afterwards died without issue : in a competition between the executor and the assignee of A, the executor was preferred, in conformity with the opinion of a majority of the whole Judges. *Bell*, May 21, 1845, p. 614.
3. Circumstances in which a factor upon a trust-estate was appointed on the joint application of two claimants of the residue of the estate, during the dependence of a process raised for the reduction of the titles of the heir-at-law, who was in possession of the heritage of the truster, and maintained that the trust had lapsed, and was ineffectual. *Brown*, May 29, 1845, p. 745.

COMPOSITION.

See *Superior and Vassal*, 2, (2.)

CONDITION.

Legacy to A, his heirs, executors, or assignees, in the event of B, who life-rented the subject of it, dying without issue :—A predeceased B, having assigned the legacy : B afterwards died without issue : in a competition between the executor and the assignee of A, the executor was preferred, in conformity with the opinion of a majority of the whole Judges. *Bell*, May 21, 1845, p. 614.

CONDITIONAL INSTITUTE.

See *Clause*, 8.

CONSIGNATION.

1. Where a party had raised an action for implement of an agreement to grant him a lease of certain farms, and alternatively for damages, and to secure his claim for implement had used inhibition on the dependence ;—Held that the defender was not entitled to have the inhibition recalled, merely on consignation of the sum claimed as damages. *Seaforth Trustees*, Dec. 1844, p. 180.
2. Motion for an order upon the defender in an action of count and reckoning, to consign a sum, over which he claimed a right of retention,—refused, without deciding upon that right, on the ground that the sum was arrested on the dependence in bank, where it had been lodged by the defender in his own name. *Scott*, Feb. 22, 1845, p. 493.

CONTRACT.

1. Held, (1.) That an agreement between a depute and assistant clerk of Session, whereby the latter was, for a certain consideration, to perform the whole duties of the office to which they were both attached, was *pactum illicitum*.
 (2.) That, if legal, it came to an end on the resignation of the depute, without the necessity of notice, notwithstanding a stipulation that the party putting an end to it should give six months' notice to the other. *Mason*, Nov. 28, 1844, p. 160.
2. A party ordered a cargo of goods of a stipulated quality, and, on receiving them, intimated to the vender that they were of an inferior quality, and that they had been deposited in a bonded warehouse at his risk; thereafter he removed from the warehouse, without legal warrant, and appropriated to his own use the greater part of the goods:—Held,
 (1.) That he was liable for the contract-price of the remainder.
 (2.) That he could not maintain an action against the vender for fraudulent breach of contract. *Ransan*, June 3, 1845, p. 813.

CORPORATION.

Certain lands were acquired by an hospital by disposition in 1735 to its office-bearers and their successors in office, in which they were intef base; after a considerable period (subsequent to the death of the office-bearers in whose names infestment had passed) the hospital, as a corporation, sold the superiority of the lands, assigning to the purchaser the unexecuted procuratory, and excepting from the conveyance the base infestment as a right of property belonging to the hospital in its corporate capacity: In a declarator of non-entry, brought by the superior,—Held,

- (1.) That the superior was not entitled to challenge the base infestment as not constituting the hospital the vassal in its corporate capacity, because the right of the hospital to the property in that character was expressly saved and reserved in gremio of the superior's own title; and as the superiority title itself was derived from the hospital as a corporation, the superior could not challenge its right as a corporation under the disposition 1735, without thereby impugning his own title.
- (2.) That the lands having been disposed to the office-bearers of the hospital and their successors in office, the superior was not entitled, on their decease, to insist for a composition as on the entry of a singular successor. *Gardner*, Jan. 23, 1845, p. 286.

See *Burgh*.

CROWN.

The right to a patronage, which had been possessed by a party and his authors upon personal titles for more than the prescriptive period, having been challenged by the Crown on the grounds,

- (1.) That the patronage had formed part of the annexed property of the Crown, and had never been separated from it by any act of dissolution or conveyance; and,
- (2.) That the patronage having been feudalized in the person of the Crown, (its right being equivalent to one completed by seisin,) no prescriptive possession could follow on an adverse personal title;—Held, that prescription having run in favour of the possessor of the patronage, upon a title *ex facie* sufficient, these grounds of challenge, and all enquiry into his older titles and the origin of his rights, was excluded; and that the positive prescription operates against the annexed property of the Crown;—Observed, that a patronage does not necessarily become feudalized by being vested in the Crown; and that the rule, that when a patronage has once been feudalized, its subsequent transmissions ought to be in feudal form, has only reference to a competition between parties deriving right from the same author, in which, as in the case of other heritable rights, a right completed by seisin is preferable to a personal title. *Her Majesty's Advocate*, Dec. 10, 1844, p. 183.

CURATOR BONIS.

1. A and B had granted an heritable bond over subjects held by them, as pro indiviso proprietors, to certain parties, in relief of a cautionary obligation undertaken by them to a bank, for a cash credit to a firm of which B was partner, on which bond the cautioners were infest. The bond for the cash credit having been retired by the firm, the principal obligants, it became necessary that the security in relief should be discharged by the cautioners. For effecting this, it was requisite that the heir of one of the cautioners who was dead, should be entered by A and B, the superiors of the subjects over which the security was granted. An application was made by the curator bonis to A, craving power from the Court, in conjunction with B, to enter the heir of the cautioner:—Intimation having been ordered to B, and the cautioners consenting, the prayer of the petition was granted. Grant, Dec. 7, 1844, p. 182.
2. Where a person, who was of imbecile mind, had presented a petition and complaint for the removal of a party who had been appointed her curator bonis, the Court refused to appoint a curator ad litem, intimating that the proper course was to present a regular petition for the appointment of an interim curator bonis for the purpose of insisting in the application. Mackenzie, Jan. 21, 1845, p. 283.
3. A curator bonis removed from his office, in respect of his not having lodged his accounts, in compliance with the provisions of the Act of Sederunt, 13th February 1730. Mackenzie, March 1, 1845, p. 560.
4. Where the Lord Ordinary on the bills had, during vacation, made an interim appointment of a curator bonis, on a petition addressed to him, the Court, on an application being made for a renewal of the appointment under the same petition, ordered a supplementary petition to be lodged, addressed to the Court. Scott, May 22, 1845, p. 638.
5. Circumstances in which held, that a *curator bonis* to a lunatic, who had assisted himself as pursuer of an action in his room, was not personally liable for the expenses found due to the defender who gained the cause. Observed, that personal liability of a *curator bonis* so assisting himself, is the exception to the general rule, and where proper, ought to be found in the original action in which the expenses are incurred. Forbes, June 10, 1845, p. 853.
6. Circumstances in which held, that a married woman, living separate from her husband, and engaged in the management of her own heritable property, with the assistance of a *curator bonis*, could be competently sued in an action of damages founded upon an act performed by her in the course of her management. Ritchie, June 5, 1845, p. 819.
- 7—(1.) Circumstances in which held, that a *curator bonis* to a lunatic was not bound to make, on behalf of his ward, an election between legitim and a testamentary provision.

(2.) Trustees were directed to realize the trustor's personal property, and invest the proceeds in land; and on the recovery or death of the trustor's only child—a lunatic—to execute a strict entail thereof, along with the trustor's other lands; but no direction was given as to the profits of the personal estate or rents of the heritage prior to the execution of the entail.—Held, that these belonged to the lunatic, independently of the trust, as heir-at-law, and that his curator did not approbate the trust by claiming them. Cowan, June 13, 1845, p. 872.

See *Judicial Factor*.

CURATOR AD LITEM.

A woman, during the dependence of an action of damages at her instance against A for defamation, raised a declarator of marriage against B, who defended. A moved that the pursuer's husband should be cited as a party to the action of damages. The Court appointed the pursuer's agent her curator ad litem, *valeat quantum valere potest*. Hogg, March 6, 1845, p. 594.

See *Curator Bonis*, 2.

CUSTOMS.

See *Burgh*, 3.

DEBTOR AND CREDITOR.

A customer of a banking company, shortly after the death of a partner, signed a docket at the end of his account in the company's books, which bore that the account was settled, and the balance in his favour paid to him; the balance was not in reality paid to him, but he received at the time a credit receipt from the banking company for the amount;—

(1.) Held that he had discharged the old company, dissolved by the partner's death, and consequently had no claim against the deceased partner's estate.

(2.) Circumstances held to import knowledge of the death of a partner equivalent to intimation. *Ker*, Feb. 22, 1845, p. 494.

DELIVERY.

A party, in fulfilment of a bargain between him and his former wife, from whom he had been separated by divorce, and as a part of the consideration for her having conveyed certain lands, belonging to her, to him and the children of the marriage in their order, granted a bond of provision to the younger children of the marriage nominatim, binding himself to make payment to them equally among them and the heirs of their respective bodies, and the survivors and survivor of them, of £4000, at the first term after the decease of the longest liver of him and his said former wife: the bond further bore to have been instantly delivered for the use and benefit of the grantees: the father having died, and having been survived by the mother of the children,—Held, on a construction of the above, and other provisions and clauses contained in the bond, that the children's interest in the bond had vested in them at their father's death. *Allardice*, Jan. 31, 1845, p. 362.

DILIGENCE.

A *meditatione fugæ* warrant, granted in respect of a debt not exceeding £8 : 6 : 8, is illegal under 5 and 6 Will. IV. c. 70. *Marshall*, Dec. 18, 1844, p. 232.

DISCHARGE.

1. In an application for the discharge of a factor *loco absentis*, where the factor's principal, who was the only party having interest, had examined and docketed his accounts, and was satisfied with their accuracy, the Lord Ordinary reported to the Court to that effect, without making a remit to an accountant to examine them. *Mackenzie*, Jan. 31, 1845, p. 361.
2. Circumstances which were held to afford no evidence that the creditor of a company, after its dissolution, had substituted the sole liability of the partner continuing to carry on the business, instead of the liability of the company; and that certain transactions of the creditor with that partner did not infer *novatio debiti*. *Campbell*, Feb. 27, 1845, p. 548.
3. At the second meeting of the creditors in a sequestration, held for the purpose of deciding upon an offer of composition made by the bankrupt, an offer different from that which had been made and entertained at the first meeting was accepted, and the bankrupt was discharged by the Sheriff, whose deliverance was confirmed by the Lord Ordinary, without objections being stated by any of the creditors: the offer, as adopted by the second meeting, contained a provision, not entertained at the first, that the funds (which were inadequate for payment of the whole composition) should be paid by the trustee to the creditors, *primis venientibus*, till they were exhausted: no notice whatever of the provision was given to the creditors, nor were certain other alterations which had been made upon the offer as originally entertained, intimated to them in the Gazette notice calling the second meeting, although specified in circular letters by the trustee: in a reduction of the discharge, which certain of the creditors who had not received their share of the composition instituted, upon the proceedings of the second meeting coming to their knowledge—Held (repelling a plea that the deliverance of the Sheriff

DISCHARGE (Continued.)

and Lord Ordinary constituted *res judicata* against them) that the proceedings at the second meeting were irregular and incompetent under the statute, and decree of reduction of the discharge pronounced. Observed, that concealment, or defective representations, in the "abstract of the state of the affairs and valuation of the estate," required by § 115 of the Bankrupt Statute to be sent by the trustee to the creditors, in order to enable them to judge of an offer of composition, was a relevant ground of reduction of a discharge, where it could be shown that the creditors had been thereby misled, and induced to form an erroneous view of their interests in regard to the offer. Miln, June 19, 1845, p. 888.

4. A party who had become liable for arrears of rent due by a tenant, having, in answer to a demand by the landlord for a certain half-year's rent as in arrear, produced a receipt for the rent claimed, and a series of consecutive receipts for each term for the thirteen succeeding years, during which time no intimation had been made to him by the landlord that this portion of the rent remained unpaid;—Held that the landlord was not entitled to object to his own receipt, and to prove that the rent claimed had been paid by a bank draft which had been dishonoured, and that it was still resting-owing; the delay in giving intimation of non-payment being taken into consideration as a material element. Duke of Buccleuch, June 25, 1845, p. 927.

See *Entail*, 10.

DIVORCE.

See *Husband and Wife*, 4, 6, 7.

DOMICILE.

See *Jurisdiction*, 2, 3.

ENTAIL.

1. The estate of A was entailed in a marriage contract upon the heirs of the marriage and their heirs, heirs-male being called before heirs-female, under this provision, that in the event of there being only one son "of this present marriage" who shall succeed to the estate of B, his second son, and failing a second son, his eldest daughter, should succeed to the estate of A; but in the event of there being two sons "of this present marriage," that the second should succeed to A if the eldest should succeed to B; and that the succession to A, in case any of the heirs "of this marriage" shall succeed to B, "shall take place according as is above mentioned, in all time coming." An only son of the marriage succeeded to both estates, and on his death was succeeded in both by his only child, a daughter. On her death, leaving children,—Held, in conformity with the opinions of a majority of the whole Judges,

(1st,) That the provision and exclusion in the entail of A did not apply to her eldest son, even though he had *succeeded* to B; but,

(2d,) That having acquired right to B during his mother's life, under a transaction, sanctioned by Parliament, whereby it was given in lieu of an English estate to which he had an indefeasible right of succession, he had not *succeeded* thereto in the meaning of the provision and exclusion in the entail; on each of which grounds he was preferred in a competition for the succession under the entail with his eldest sister, and with his second son and eldest daughter. The Marquis of Hastings, Nov 12, 1844, p. 1.

2. The three statutory prohibitions of an entail were introduced by the words "And further providing, as it is hereby expressly provided and declared;" the irritant and resolute clauses which followed immediately after, were introduced by the words, "which *provision* immediately above written, if any of the forenamed persons or heirs, male or female, hereby appointed to succeed to the said lands and estate, shall happen to contravene," and they provided that the heirs so contravening should forfeit their right of succession, and declared "all such facts, deeds, debts, or obligations, in contravention of the foresaid provision," to be *ipso facto* void and null:—Held, by a major-

ENTAIL (Continued.)

- city of the whole Judges, that the irritant and resolute provisions applied to the whole of the three prohibitions, and were not limited to the last of them. Preston, Jan. 28, 1845, p. 305.
3. Held that the 6 and 7 Will. IV. c. 42, does not authorise the sale of entailed lands for payment of debts of an institute heir, contracted before the recording of the entail in the register of tailzies, but applies only to debts contracted by the entailor. Scott, Feb. 14, 1845, p. 445.
 4. An entail prohibited the heirs "to sell, alienate, impignorate, or dispose the said lands and estate, or any part thereof, either redeemably or under reversion;" the prohibition was duly fenced with irritant and resolute provisions;—Held that the heir was not prohibited from making absolute and irredeemable sales, and was entitled to apply the price received for the lands sold, at his pleasure. Earl of Eglinton, Feb. 14, 1845, p. 425.
 - 5.—(1.) Held that the words "acts and deeds" in the irritant clause of an entail included debts, though, in the resolute clause which followed, the words "acts, deeds, or debts," were used.
(2.) Question, whether an heir of entail can plead the entail against an adjudication for his own debt? McGrigor, Feb. 28, 1845, p. 532.
 - 6.—(1.) Where the prohibitory clauses in an entail were introduced with the expression, "with and under this restriction and limitation, as it is hereby conditioned and provided," and the resolute clause was thus expressed, "and with and under this condition and provision," that in case the heirs should contravene "the *other* before written conditions and provisions, restrictions and limitations herein contained, or any of them," they should forfeit all right, &c.—Objection repelled, that the use of the term "*other*" in the resolute clause, rendered it vague and ambiguous, and defective in the necessary legal precision.
(2.) In a charter of resignation, which proceeded upon the procuratory in a deed of entail, a substitution, which in the entail had stood to "heirs whatsoever of the body," was changed to "heirs whatsoever;"—Held, that the destination in the charter was not an alteration of that in the entail, but that "heirs whatsoever" was a flexible term, which was to be construed by the terms of the entail upon which the charter proceeded as its warrant and to which it referred.
(3.) Objection, that a Crown charter of resignation was not capable of being recorded in the register of tailzies under the statute 1685, c. 22, in respect of its not being the "original tailzie," or (holding it to be so) in respect it was not granted by one of "his Majesty's subjects,"—Held to be obviated by the authority given to record it in a private Act of Parliament.
(4.) Observed, that a destination in an entail to "heirs whatsoever," in the event of that destination coming into operation, would not render the entail inoperative against the heir in possession, if the succession of heirs-portioners were excluded. Stirling, May 28, 1845, p. 640.
 7. The proprietrix of an entailed estate obtained decree of valuation of her teinds, on the footing of the rent paid to her under an existing lease of her lands; to this process the Officers of State and the tacksmen of the teinds had been made parties, and it had been objected by the latter, that this lease having been granted by a predecessor in diminution of the rental and for grassum, afforded no criterion of the value of the lands; the proprietrix having subsequently reduced the lease on these grounds, as in contravention of the entail, the Officers of State brought a reduction of the decree of valuation;—which action in the circumstances dismissed. Officers of State, Feb. 27, 1845, p. 542.
 8. A party directed his trustees to execute and record an entail of certain lands in favour of a series of heirs; the trustees executed the entail, but neglected to record it, and the first heir in possession granted a security, in contravention of the entail, to one of the trustees; the next heir of entail, who had incurred

ENTAIL (Continued.)

- a general representation of the contravener, having become bankrupt, the trustee on his sequestered estate brought a reduction of the security, on the grounds that it was a contravention of the entail, and that the creditor by accepting it had violated his duty as trustee :—Held, that he had no title to pursue the action, and the reasons of reduction repelled. Brock, June 10, 1845, p. 858.
9. A proprietor executed a deed of strict entail of his estate, reserving power to himself to alter or revoke ; the deed was duly recorded, and a title completed under it by charter of resignation, and sasine thereon : the entailor thereafter executed a new deed, proceeding on the narrative of the first, and a desire to alter it, whereby he conveyed the same estate, and all other lands which he had acquired or might acquire, to a new series of heirs, and made certain modifications of the provisions and conditions ; this second deed referred to the prohibitory, irritant, and resolutive clauses of the first, and provided that the heirs should take only under these, but no such clauses were contained in itself ; it was duly recorded, and a title completed under it by charter of resignation, and sasine thereon, in which were set forth at length the prohibitory, irritant, and resolutive clauses contained in the first deed of entail, and referred to in the second :—Held, that the second deed was a new entail superseding the first, and that, as it did not contain within itself the foresaid clauses, it was not effectual to protect the lands against third parties. Paterson, July 1, 1845, p. 950.
10. An heir of entail in possession obtained an Act of Parliament, authorizing him to apply to the Court to have an account taken of the debts owing by the entailor at the time of his death, and to have as much of the estate sold as would be sufficient to discharge them, and he accordingly presented a petition to the Court with this view ; this petition was not then insisted in, and, in the mean time, the heir paid off a number of the entailor's debts, in some cases taking assignations to them, and in others merely taking a simple discharge. In a question between this party's trustees, after his death, and the succeeding heir of entail,—held that the trustees were entitled to claim out of the entailed estate those debts which had been paid, without assignations having been taken to them, as well as those where this had been done. Caddell, July 11, 1845, p. 1014.
11. Circumstances in which the heir in possession of an estate, held under an entail which had been found to be ineffectual against creditors, was held to be personally liable, as representing his father, the preceding heir, for a provision granted by the latter to his daughter in his marriage-contract. Sinclair, July 18, 1845, p. 1085.

ERASURE.

(1.) Held that erasures in the names and designations of three out of seven trustees, in favour of whom, and the survivors or survivor of them, the major part alive and accepting being a quorum, the trust was conceived, were not in *substantialibus*.

(2.) Held that a statement in a deed, that it was holograph of the granter, was *prima facie* evidence that it was so, and threw the burden of proving the contrary upon the challenger, but that such statement afforded no presumption that words written upon erasures were also holograph.

(4.) Opinion that erasures in *substantialibus* did not vitiate a holograph deed, if proved that the writing superinduced was also holograph. Robertson, December 20, 1844, p. 236.

EXECUTOR.

See *Jurisdiction*, 1.

EXPENSES.

1. In a question as to the sufficiency of the mandatary of a person furth of the kingdom, it is enough if he be solvent, and of the same station with the mandant, and it is not relevant to enquire whether he may be able to pay the expenses of process. Railton, Nov. 13, 1844, p. 105.

EXPENSES (Continued.)

2. A party having appeared and proposed to sist himself as defender in a process, and having failed to do so, the Court found him liable in the expense he had thereby caused to the pursuer. *Jarvis*, Nov. 19, 1844, p. 128.
3. The pursuer of a possessory action in an inferior Court, after proof but before judgment, brought a declarator of property, and advocated the inferior Court process *ob contingentiam*, having succeeded in the conjoined processes, and been found entitled to expenses;—Held that it was no ground for modifying expenses, that a case for a possessory judgment against him had been made out in the inferior Court. *Wilson*, Nov. 15, 1844, p. 113.
4. In the administration of a testamentary trust, the trustee made payment to certain of the special legatees, and also to the residuary legatees, of part of their provisions under the settlement; a special legatee, who had not been paid to the same extent as the others, brought an action for the amount of her provisions; this action the trustee resisted, on the ground that, till the trust's debts were paid, there could be no claim for a legacy; eventually, however, he agreed to pay her rateably with the others, and to pay her expenses of of process. In a question, whether the trustee was entitled to state the expense of this action against the trust estate, or whether he was personally liable therefor,—Circumstances in which held, that he could not so state it as in a question with the legatee, pursuer of the action, but that having acted in bona fide, he was entitled to do so as with the other special and the residuary legatees, it being understood that, if there were funds to pay the special legatees in full, and also a residue, the expenses would fall to be paid out of the residuary fund.
5. Rule adopted by the auditor, in taxing accounts of expenses, given effect to, viz.—That where the expense of making written copies of the summons for service amounts nearly to the expense of printing it, parties ought to print the summons at once, and that charges for copies, and also for printing, will not both be allowed. *Wood*, Dec. 10, 1844, p. 212.
6. In a jury-trial which had lasted a day and a half, and in which a number of documents had been produced in evidence, the Court (on an objection to the auditor's report) sustained a charge for fees paid to three counsel in the special circumstances of the case. *Gallie*, Dec. 19, 1844, p. 235.
7. The pursuer of a jury cause having been successful,—in considering the auditor's report of his account of expenses; 1st, Charge of his Edinburgh agent going to London, to attend examination of witnesses there before a commissioner, on adjusted interrogatories, disallowed; and £10 allowed as the expense which would have been incurred by employing a London solicitor, as the opposite party had done. 2d, Charge for precognosing the defender's witnesses, whose names appeared in the proceedings in the cause, and who had actually been examined at the trial, allowed as being necessary for the pursuer's cross-examination, and so part of his proof. 3d, Of the fees to counsel passed by the auditor, only those allowed which had actually been paid. *Lumsden*, Jan. 25, 1845, p. 300.
8. In a reference to oath, the agent of the party referring, having refused to proceed with the examination on the day fixed by the commissioner, on account of his client's absence—Circumstances in which the Court remitted to the commissioner to fix a new diet, upon the party referring paying £10, 10s. of expenses. *Wighton*, Dec. 20, 1844, p. 235.
9. Question, Whether it was competent to found upon the Act 1696, c. 33, (requiring slaps for the passage of fish to be made in all dam-dykes in rivers,) said Act not being libelled on? The Court allowed an amendment of the libel introducing the Act, but found the pursuer liable in the expenses of a previous discussion thereby rendered unnecessary, and of such alterations in the defences and record as might in consequence be necessary. *Munro*, Jan. 31, 1845, p. 358.
- 10.—(1.) A party who had lodged objections to the auditor's report at the time

EXPENSES (Continued.)

it was made, held not entitled, at the distance of two years and a-half thereafter, to lodge new and extended special objections to the report.

(2.) Rule adopted by the auditor of Court in taxing the defender's account of expenses, in actions of divorce at the instance of a husband against a wife. King, Feb. 26, 1845, p. 536.

11. Where the Lord Ordinary, in awarding expenses, had modified them to a certain sum, the Court on the reclaiming note, considering the modification to be too small, allowed an account of the expenses incurred to be given in. Harvey, March 11, 1845, p. 604.
12. In an action regarding the property of a tract of ground, the pursuer, in the course of a jury-trial, took an objection to the defender's title to prove possession; the objection having been sustained, a verdict was returned in the pursuer's favour, but it was subsequently overruled on a bill of exceptions, and a new trial was granted; at the second trial the pursuer was successful; in disposing of the question of expenses—
 - (1.) Held, that the objection to title should have been pressed by the pursuer to a decision before the trial, and that the defender was therefore not liable in the expenses of the first trial, though he was not entitled to payment of them.
 - (2.) Held, that neither was the defender liable in the expenses of the bill of exceptions, in which he had been successful, but as his success on the question of title was fruitless, he was not entitled to claim payment of these expenses. Carnegie, June 5, 1845, p. 826.
13. In an action where certain of the defenders, after proceeding for some time with the case, consented to decree being pronounced in terms of the conclusions of the libel, the pursuer taking no finding of expenses against them, and the remaining defender continued to resist the action, but was unsuccessful;—in disposing of the pursuer's claim for expenses, the Court deducted one-half, (exclusive of the expenses specially applicable to the appearance of the defenders who had compromised,) as the sum of which the other defender would have been relieved by his co-defenders, had the pursuer not passed from his claim for expenses against them. Magistrates of Campbellton, June 5, 1845, p. 828.
14. Where the Lord Ordinary had sustained a defence to an action, and found the defender entitled to expenses, but the Inner House had altered, reserving expenses, and the House of Lords, on appeal, had remitted to the Court with directions to adhere to the interlocutor of the Lord Ordinary, "and to proceed further as shall be just and consistent with this judgment,"—Held, in conformity with *Stewart v. Scott*, 11th March 1836, that as the judgment of the House of Lords exhausted the cause, it was not competent for the Court to award the expenses incurred subsequent to the Lord Ordinary's interlocutor, prior to appeal, with regard to which it was silent. Purves, May 31, 1845, p. 810.
15. In a multiplepounding as to a trust-fund, expenses, in the particular case, refused to be allowed out of the fund; and Observed, that when parties attack a trust-fund, they do so at their own risk. Allan, June 20, 1845, p. 908.
16. In this case the Court, on an objection to the auditor's report, allowed an extrajudicial correspondence between the agents to be charged against the losing party, in respect of the special circumstances of the case—observing, at the same time, that this sort of correspondence was not, in the common case, a charge which ought to be so allowed. Harvey, June 28, 1845, p. 950.
17. Circumstances in which held, that a curator bonis to a lunatic, who had sisted himself as pursuer of an action in his room, was not personally liable for the expenses found due to the defender who gained the cause. Observed, that personal liability of a curator bonis so sisting himself, is the exception to the

EXPENSES (Continued.)

- general rule, and, where proper, ought to be found in the original action in which the expenses are incurred. Forbes, June 10, 1845, p. 853.
18. Circumstances in which held, that where a party had lodged a minute abandoning a process of sequestration for rent, and consigned a sum of money to meet the expenses of the opposite party, which were ultimately found to be less than the sum consigned, a second application for sequestration was competent, though made prior to the consignment in the first. Lawson, July 1, 1845, p. 960.
 19. An interlocutor by the Lord Ordinary in a sequestration containing a general finding for "expenses," includes the expenses incurred before the Sheriff, as well as those in the Court of Session. Kerr, May 31, 1845, p. 909.
 20. A judgment having been pronounced in the Court of Session, by which a party was found entitled to expenses, and an extract decree therefor allowed to go out in the name of her agent; and this judgment having been reversed on appeal;—Held, that the appellant was entitled to obtain repayment from the agent of the sums which had been paid to him in terms of the judgment reversed. Cormack, June 3, 1845, p. 812.
 21. Held, that the Lord Ordinary is imperatively required by the Judicature Act, on permitting an addition to be made to a record, after it has been closed, *res noviter*, to find the party liable in "such expenses as he may deem reasonable." White, June 19, 1845, p. 886.
 22. Observed, (subsequent to advising,) that a correspondence which had taken place between the agents after the cause of action had arisen, extending to about 100 pages, and which had been boxed to the Court, ought not to have been printed, and the expense thereof ought to be disallowed by the auditor. Miln. June 19, 1845, p. 888.
 23. In an action of damages, laid at £500, for "illegal, unwarrantable, oppressive, and injurious" conduct, in causing the pursuer to be apprehended and tried in a police court on a false charge of creating a disturbance, the defender, denying that the pursuer had a well-founded claim to any extent, tendered £5 and previous costs, which was refused: the case went to a jury, who found for the pursuer, with one shilling damages;—Held that the defender was entitled to expenses subsequent to the date of his tender. Strachan, July 5, 1845, p. 998.
 24. A pursuer abandoning an action, in terms of the act 6 Geo. IV. c. 120, § 10, is liable for expenses as between party and party only. Lockhart, July 15, 1845, p. 1045.
 25. The Court, approving of the auditor's report, disallowed to the successful party, with a view to debate in the Outer-House,
 - (1.) The expense of printing certain documents, written copies of which had been charged for, and allowed, and the opposite party, as the reclaimers, having printed them for the Inner-House.
 - (2.) A charge for a new memorial to senior counsel, after a partial debate in the Outer-House, which was continued in consequence of his absence, informing him of what had taken place, and for fresh counsel, both having been previously instructed.

See *Process*, XI. 27.

FACTOR.

Circumstances in which a factor upon a trust-estate was appointed on application of two claimants of the residue of the estate, in consequence of a process raised for the reduction of the title, and the factor was in possession of the heritage of the trustor, and the process had lapsed, and was ineffectual. Brown, May 29, 1845, p. 1045.

See *Curator Bonis*—*Judicial Factor*.

FREE AND LIFERENT.

1. A father disposed certain heritable subjects to his son, "in conjunct fee and liferent, and the longer term."

FEE AND LIFERENT (Continued.)

est son *nominatim*, his heirs or assignees whatsoever, heritably and irredeemably, in fee; the disposition bore to be granted for love and favour, but by a subsequent deed the husband bound himself to pay a price for the subjects, which was considerably less than their value; the wife survived;—Held that the fee was vested in the husband, and that as the son was his heir *aliocui succensus* in these subjects, and did not obtain them by singular title from his grandfather, he was bound to collate them with his brothers. Fisher's Trustees, Nov. 19, 1844, p. 129.

2. Terms of a conveyance of heritable subjects by a husband to himself and his wife, and their heirs, under which held, that after the death of the husband the wife had a fee in one-half of the subjects, with a power of disposal. Baine, June 8, 1845, p. 845.

See *Testament*, 2, 4.

FISHINGS.

Question,

(1.) Whether a party had a title to complain of the erection of a dam-dyke in a river in which he had no property, in respect of being proprietor of stell-fishings in the sea at the mouth of it, which were thereby injured?

(2.) Whether it was competent to found upon the Act 1696, c. 33, (requiring slaps for the passage of fish to be made in all dam-dykes in rivers,) said Act not being libelled on?

The Court, to avoid this last question, allowed an amendment of the libel introducing the Act, but found the pursuer liable in the expenses of a previous discussion thereby rendered unnecessary, and of such alterations in the defences and record as might in consequence be necessary. Munro, Jan. 31, 1845, p. 358.

FOREIGN.

1. An executor under an Indian will was confirmed in this country, where part of the executory funds were;—Held, that an action against him with reference to these funds, preceded by arrestment thereof, *jurisdictionis fundandæ causa*, was competent in the Court of Session, though he was resident in London. M'Morine, Jan. 16, 1845, p. 270.
2. A party who had concurred in a judicial remit to a barrister at New York, with regard to a point in the law of South Carolina—held not entitled, upon an unfavourable opinion being returned, to have a new remit made to lawyers in South Carolina, on the allegation that the practice of that state differed from that stated in the opinion of the New York lawyer. Welsh, Dec. 12, 1844, p. 213.
- 3.—(1.) Held that a will executed by a Scotchman at St Kitts, written by himself in ordinary popular language, must, even with regard to a bequest of funds in Scotland, be interpreted, and the testator's intention judged of, according to the law of England.
(2.) Opinion indicated, that, by the law of Scotland, a condition adjoined to a bequest must be given effect to, though it appears to have been adjoined from a mistaken notion on the part of the testator as to the extent of his power. Gowan, Feb. 14, 1845, p. 438.
4. A party who had been domiciled in Spain came to Scotland, where he married a Scotchwoman, and, a few months thereafter, returned with her to Spain: the parties lived together there for some years, when they returned to this country: on their arrival at Belfast the husband left his wife there, stating his intention of not again living with her, and returned to Spain, where he continued subsequently to be domiciled: the wife proceeded to Scotland, where she afterwards resided;—Held that the Court had no jurisdiction to entertain an action of adherence at her instance against her husband. A B, March 1, 1845, p. 556.

FRAUD.

A party ordered a cargo of goods of a stipulated quality, and, on receiving

FRAUD (Continued.)

them, intimated to the vender that they were of an inferior quality, and that they had been deposited in a bonded warehouse at his risk; thereafter he removed from the warehouse, without legal warrant, and appropriated to his own use the greater part of the goods:—Held,

- (1.) That he was liable for the contract price of the remainder.
- (2.) That he could not maintain an action against the vender for fraudulent breach of contract. Ransan, June 3, 1845, p. 813.

GAMING.

Where a written agreement between parties to fight cocks, founded on a process, was not stamped,—The Court refused to dismiss a reclaiming note, on the objection that the agreement not being stamped could not be looked at, but allowed time to have it stamped. Harvey, Feb. 7, 1845, p. 396.

GUARANTEE.

See *Cautioner*.

HARBOUR.

1. In construing a grant of free port to a royal burgh, in these terms,—*Unacum libero portu marino in lacu de Campbeltowne nunc et in omni tempore futura nuncupando Port-Campbell vel in ulla alia parte seu partibus infra limites dicti lacus prout illis magis conveniens videbitur*;—Held that this was a grant of free seaport and harbour over the whole space of water called the Loch of Campbeltown. Magistrates of Campbeltown, Dec. 14, 1844, p. 220.
2. The Magistrates of the burgh of Campbelton, who had a grant of free-seaport over the loch of that name, brought an action against a proprietor who had built a pier upon his lands within the limits of their grant, to have it found that they were entitled to levy there the dues and customs set forth in certain minutes of Council and relative tables of dues. By these tables, a lesser rate of dues was imposed upon certain articles when brought to the quays of the burgh, than when shipped or landed at other parts of the loch. It having been found by the verdict of a jury, that the dues exigible at the burgh quays had been levied by the Magistrates there for forty years from the date of the tables, and that they had from time to time asserted their right to levy at the defender's pier;—Held, that the defender not having established in his own favour a prescriptive immunity from dues, and the Magistrates having levied at their head-port the dues exigible there, this entitled them to levy these dues at the defender's pier, and over the whole precincts of their grant; but that, having failed in their proof of a continuous use to levy the higher dues in the tables applicable to the defender's pier, they were not entitled to claim them. Magistrates of Campbelton, Feb. 21, 1845, p. 482.
3. In a declarator at the instance of the magistrates of a burgh of barony for determining the property of an open space of ground adjoining the harbour of the burgh, and situated between it and the town,—A grant to the bailies, council, feuars, and inhabitants of the haven and harbour, with customs, &c., and the common lones, gaites, wynds, vennels, and common passages, to and from the town and haven, held to be a sufficient title to the open space. Magistrates and Town-Council of St Monance, March 5, 1845, p. 582.

HERITABLE AND MOVEABLE.

See *Succession*.

HOLOGRAPH.

- 1.—(1.) Held that a statement in a deed, that it was holograph of the grantor, was *prima facie* evidence that it was so, and threw the burden of proving the contrary upon the challenger, but that such statement afforded no presumption that words written upon erasures were also holograph.
- (2.) Opinion that erasures in *substantialibus* did not vitiate a holograph deed, if proved that the writing superinduced was also holograph. Robertson, Dec. 20, 1844, p. 236.
2. Ruled, that where the grantor of a holograph deed bearing a certain date was

HOLOGRAPH (Continued.)

proved to have become insane at a period subsequent thereto, and died insane, there is no legal presumption that the deed was executed during insanity; but the party founding on the document is bound to support or adiminiculate its date, which he may do by facts and circumstances of an indirect nature; and the deed itself, and the date expressed in it, are not to be thrown out of consideration. Waddel, May 13—16, 1845, p. 605.

HOMOLOGATION.

Question whether the doctrines of approbate and reprobate, and homologation, applied to a deed vitiated by erasure in *substantialibus*. Robertson Dec. 20, 1844, p. 236.

HUSBAND AND WIFE.

1. The trustees under an antenuptial contract were directed, out of the wife's estates, to set aside a certain sum annually for behoof of the younger children of the marriage. Instead of doing so, they for many years paid this sum over to the husband. Having at length claimed repetition, the husband borrowed the money, and along with his wife and the trustees, granted security over her estates. He died leaving the debt unpaid, and a burden upon his wife's estates;—Held that she was entitled to rank therefor upon his estate, though insufficient to meet the claims of the younger children under his obligation by the contract to pay certain sums for their behoof out of his own estates. Williams, Nov. 15, 1844, p. 110.
2. By antenuptial contract, the husband bound himself and his heirs to invest a sum for behoof of the wife in liferent in the event of her survivance, and the children of the marriage in fee, so soon as he or they should be called on to do so by certain trustees; and by relative bond of caution, his brother, one of the trustees, bound himself to pay these provisions in the event of the husband failing to implement his obligation in regard to them. The husband having died insolvent, without having implemented the obligation, or having been called upon by the trustees to do so;—Held, 1st, That the brother was liable upon the bond; and 2d, That the wife had a good title to sue upon it, without the concurrence of the marriage trustees, Wilson, Nov. 16, 1844, p. 125.
3. Annuity of £60 awarded to a widow against the heir-at-law of her husband, the free rental of the estate being £240;—Question raised, but not decided, whether such annuity should continue during viduity only? Hobbs, Feb. 22, 1845, p. 492.
4. Interim aliment and expenses allowed to a wife in an action of divorce for adultery, although the husband alleged that he was in destitute circumstances, and was applying to be admitted to the poor's-roll. Baxter, May 28, 1845, p. 639.
5. Rule adopted by the auditor of Court in taxing the defender's account of expenses, in actions of divorce at the instance of a husband against a wife. King, Feb. 26, 1845, p. 536.
6. A party who had been domiciled in Spain came to Scotland, where he married married a Scotch-woman, and, a few months thereafter, returned with her to Spain: the parties lived together there for some years, when they returned to this country: on their arrival at Belfast the husband left his wife there, stating his intention of not again living with her, and returned to Spain, where he continued subsequently to be domiciled: the wife proceeded to Scotland, where she afterwards resided;—Held that the Court had no jurisdiction to entertain an action of adherence at her instance against her husband. A. B. March 1, 1845, p. 556.
7. In this case, which was an action of divorce by a husband against his wife, the Lord Ordinary had ordered him to pay £8, to enable her to conduct her defence. The husband being unable to pay this sum, presented an application for a remit to the reporters on the *probabilis causa*, with a view to being admitted on the poor's-roll. The Court granted the application, on condition of his undertaking to have his wife put on the poor's roll also at his own expense. Gibson, March 4, 1845, p. 581.

HUSBAND AND WIFE (Continued.)

8. Circumstances in which held, that a married woman, living separate from her husband, and engaged in the management of her own heritable property, with the assistance of a *curator bonis*, could be competently sued in an action of damages founded upon an act performed by her in the course of her management. Ritchie, June 5, 1845, p. 819.

See *Bankruptcy*, 17—*Fee and Liferent*.

HYPOTHEC, (LAW-AGENT'S.)

A law-agent who had a hypothec over certain documents in his possession for a business-account due to him by his employer, the pursuer of a jury cause, appointed to produce them, without payment or reservation, under a diligence obtained by the defender, but found that the pursuer could not see them at the trial without paying his agent's (the haver's) account. Montgomerie, May 1, 1845, p. 553.

(LANDLORD'S.)

Although a tenant was not *vergens ad inopiam*, held, that a landlord, under his right of hypothec, was entitled to interdict the sale and removal of the growing crop from a farm, until the tenant found caution for the current year's rent. Preston, June 26, 1845, p. 942.

INHIBITION.

Where a party had raised an action for implement of an agreement to grant him a lease of certain farms, and alternatively for damages, and to secure his claim for implement had used inhibition on the dependence;—Held that the defender was not entitled to have the inhibition recalled, merely on consignation of the sum claimed as damages. Seaforth Trustees, Dec. 7, 1844, p. 180.

INSANITY.

1. Where the trustee in a sequestration had become insane, after his report of the resolution of creditors to accept an offer of composition had been prepared, but before it was signed, the Court allowed the report, signed by the commissioners for him, to be received and approved of. Guthrie, May 21, 1845, p. 637.
2. Ruled, that where the granter of a holograph deed bearing a certain date was proved to have become insane at a period subsequent thereto, and died insane, there is no legal presumption that the deed was executed during insanity; but the party founding on the document is bound to support or adminiculate its date, which which he may do by facts and circumstances of an indirect nature; and the deed itself, and the date expressed in it, are not to be thrown out of consideration. Waddel, May 13—16, 1845, p. 605.
- 3.—(1.) Circumstances in which held, that a *curator bonis* to a lunatic was not bound to make, on behalf of his ward, an election between legitim and a testamentary provision.
(2.) Trustees were directed to realize the truster's personal property, and invest the proceeds in land; and on the recovery or death of the truster's only child—a lunatic—to execute a strict entail thereof, along with the truster's other lands; but no direction was given as to the profits of the personal estate or rents of the heritage prior to the execution of the entail,—Held, that these belonged to the lunatic, independently of the trust, as heir-at-law, and that his curator did not approbate the trust by claiming them. Cowan, June 13, 1845, p. 872.
4. Where the annual income of a lunatic's estate amounted to £150, and the rate of board paid for him at the asylum where he was kept to £40, the Court, considering this allowance to be too small, directed that it should be increased to £70, so as to provide him with additional luxuries and comforts. Myers, June 19, 1845, p. 886.

See *Process*, III. 14.

INSURANCE.

1. A loss having been incurred under a policy of insurance, the agent of the in-

INSURANCE (Continued.)

- ured granted a receipt upon the policy to the agent of the underwriters for a certain sum; the agent of the underwriters having become bankrupt,—Held, in an action against them upon the policy at the instance of the insured, that it was incompetent to set aside the effect of the receipt by parole evidence and correspondence between the agents, showing that no money had been paid. *Anderson*, Jan. 15, 1845, p. 268.
2. The proposal for a life insurance and relative declaration, which formed the basis of the contract in the policy subsequently granted, contained a declaration that the party had no disease, or symptom of disease, and was then in good health, and ordinarily enjoyed good health, and that no material circumstances or information touching health or habits of life, with which the insurers ought to be made acquainted, was withheld:—Held that this imported a warranty only to the effect that the declarant was and had been, according to her own knowledge and reasonable belief, free from any disease, or symptom of disease, material to the risk, and did not import a warranty against any latent imperceptible disease that could only be discovered by *post mortem* examination, or from symptoms disclosing themselves at an after period of time. *Hutchison*, Feb. 21, 1845, p. 467.

INTERDICT.

1. The Lord Ordinary, upon advising a note of suspension and answers, passed the note, but recalled the interim interdict, which had been granted when answers were ordered; the complainers reclaimed against the recal of the interdict, and applied to the Lord Ordinary to prohibit the issuing of a certificate of the recal:—The Court, upon his Lordship's verbal report, instructed him to do so. *Dundee Gas-Light Company*, Nov. 15, 1844, p. 109.
2. Circumstances in which a party was held to have committed a breach of interdict, and ordained at his own expense to restore matters to the state in which they were when the interdict was intimated, and found liable in expenses, but no punishment inflicted. *Blantyre*, Jan. 25, 1845, p. 299.
3. Note of suspension and interdict at the instance of proprietors in a burying-ground, against the erection therein of a monument to the memory of the Martyrs to Political Reform in 1793–4, (viz. certain persons who had then been convicted and punished for sedition,) refused. *Paterson*, March 4, 1845, p. 561.
4. Although a tenant was not *vergens ad inopiam*, held, that a landlord, under his right of hypothec, was entitled to interdict the sale and removal of the growing crop from a farm, until the tenant found caution for the current year's rent. *Preston*, June 26, 1845, p. 942.

INTEREST.

Circumstances in which simple interest at 4 per cent was allowed on an agent's business account, from the last article in each account till citation in the action, and thereafter 5 per cent till payment. *McLelland*, Dec. 6, 1844, p. 179.

INTRINSIC OR EXTRINSIC.

See *Oath on Reference*, 4.

ISSUE.

1. In an action for libel—

(1.) Held that a counter-issue was incompetent, proof of which did not amount to a justification of the whole or a distinct part of the libel; and observed, that by allowing a counter-issue (in such action,) the Court pronounced upon its relevancy as a justification.

(2.) Terms of counter-issues, which were disallowed in respect the facts proposed to be proved under them were therein too vaguely and loosely set forth. *Lowe*, Nov. 16, 1844, p. 117.

2. In an action of damages for "illegal, unwarrantable, oppressive, and injurious" conduct, in causing the pursuer to be apprehended and tried in a police court on a false charge of creating a disturbance,—Held that the pursuer did

ISSUE (Continued.)

not require to take an issue of malice or want of probable cause, the case not being privileged. Strachan, Feb. 8, 1845, p. 399.

See *Process*, III.

JOINT-STOCK COMPANY.

See *Partnership*, 3—*Judicial Factor*, 4.

JUDGE.

Upon a statement by the counsel for the defender, that the Lord Ordinary, before whom the pursuer had enrolled the cause, was an essential witness for the defender, the Court remitted to another Lord Ordinary. Clarke, Jan. 15, 1845, p. 268.

JUDICIAL EXAMINATION.

(1.) Special circumstances in which the Court, on the application of certain of the creditors on a sequestrated estate, ordered another creditor to produce, and to be examined with regard to, a "pass-book" between him and the bankrupt, (which it was alleged would throw light upon the bankrupt's affairs,) although the pass-book also related to the creditor's own claim.

(2.) Question whether, under sections 68 and 69 of the existing Bankrupt Act, a creditor can competently be examined on matters relating to his own claim? Pollock, Dec. 3, 1844, p. 172.

JUDICIAL FACTOR.

1. In an application for the discharge of a factor *loco absentis*, where the factor's principal, who was the only party having interest, had examined and docquetted his accounts, and was satisfied with their accuracy, the Lord Ordinary reported to the Court to that effect, without making a remit to an accountant to examine them. Mackenzie, Jan. 31, 1845, p. 361.
2. Circumstances in which a factor upon a trust-estate was appointed on the joint application of two claimants of the residue of the estate, during the dependence of a process raised for the reduction of the titles of the heir-at-law, who was in possession of the heritage of the truster, and maintained that the trust had lapsed, and was ineffectual. Brown, May 29, 1845, p. 745.
3. Judicial factor appointed to a party, who, being both deaf and blind, was incapable of managing his affairs. Mark, June 14, 1845, p. 882.
4. Circumstances in which the Court refused the petition of a minority of the shareholders of a subsisting solvent company, incorporated by Act of Parliament, for the appointment of a judicial factor to supersede the directors of the company, and wind up its affairs. Maxtone, July 9, 1845, p. 1006.

See *Curator Bonis*—*Trust*, 3.

JURISDICTION.

1. An executor under an Indian will was confirmed in this country, where part of the executry funds were;—Held, that an action against him with reference to these funds, preceded by arrestment thereof, *jurisdictionis fundande causa*, was competent in the Court of Session, though he was resident in London. M'Morine, Jan. 16, 1845, p. 270.
2. A defender in the Sheriff's Small-Debt Court objected to the Sheriff's jurisdiction, upon the ground that he (the defender) had no residence within the county; and the Sheriff, after hearing evidence, repelled the objection, and decerned against the defender;—Held, that the only competent court of appeal was the Circuit Court of Justiciary. Graham, Feb. 25, 1845, p. 515.
3. A party who had been domiciled in Spain came to Scotland, where he married a Scotchwoman, and, a few months thereafter, returned with her to Spain: the parties lived together there for some years, when they returned to this country: on their arrival at Belfast the husband left his wife there, stating his intention of not again living with her, and returned to Spain, where he continued subsequently to be domiciled: the wife proceeded to Scotland, where she afterwards resided;—Held that the Court had no jurisdiction to entertain

JURISDICTION (Continued.)

an action of adherence at her instance against her husband. A B, March 1, 1845, p. 556.

JURY-TRIAL.

See *Process*, III.

JUS TERTII.

In a declarator of non-entry—Held,

(1.) That where the pursuer had an *ex facie* title and was infeft in the superiority, and there was no competing claimant, the defender (the vassal) had no title or interest to object to the pursuer's title :

(2.) That the vassal could not object to, or call for production of the title of a party whom he or his author had once recognised as superior by taking an entry from him :

(3.) That it was *jus tertii* for the defender, not being an heir of entail, to plead the prohibitions of an entail against the validity of the conveyance by which the pursuer acquired right to the superiority. Innes, Nov. 20, 1844, p. 141.

LANDLORD AND TENANT.

1. A tenant, with the consent of his landlord, made over his whole rights under his lease to assignees, but he still thereafter remained in the personal occupation of the farm ; shortly before the expiry of the lease, he came under an obligation to the landlord to remove without warning or process of law ;—Circumstances in which held that the assignees were the tenants in the farm, and that the former tenant had no power, in the character of manager or overseer for them, to grant the obligation to remove ; and that therefore the assignees, not having themselves received any warning, were entitled to possess the farm by tacit relocation for a year after the expiry of the lease. Bett, Feb. 14, 1845, p. 447.

2. In a suspension of a decree of removing ;—

(1st.) Held that a state of rents due by the tenant, rendered by the factor to the landlord, and retained by him, was competent evidence in favour of the tenant ; and that the landlord having failed to produce it, being required, parole evidence of its contents was competent.

(2d.) Opinion that parole evidence of the payment of rent by sales under a transaction, whereby the landlord was allowed to sell and draw the price of certain sequestrated stock and crop, was competent. Mitchell, Feb. 4, 1845, p. 382.

3. Question, Whether the landlord has a direct action against a subtenant for rent? Laing, March 1, 1845, p. 556.

4. Although a tenant was not *vergens ad inopiam*, held, that a landlord, under his right of hypothec, was entitled to interdict the sale and removal of the growing crop from a farm, until the tenant found caution for the current year's rent. Preston, June 26, 1845, p. 942.

5. Circumstances in which held, that where a party had lodged a minute abandoning a process of sequestration for rent, and consigned a sum of money to meet the expenses of the opposite party, which were ultimately found to be less than the sum consigned, a second application for sequestration was competent, though made prior to the consignment in the first. Lawson, July 1, 1845, p. 960.

6. A party who had become liable for arrears of rent due by a tenant, having, in answer to a demand by the landlord for a certain half-year's rent as in arrear, produced a receipt for the rent claimed, and a series of consecutive receipts for each term for the thirteen succeeding years, during which time no intimation had been made to him by the landlord that this portion of the rent remained unpaid ;—Held that the landlord was not entitled to object to his own receipt, and to prove that the rent claimed had been paid by a bank draft which had been dishonoured, and that it was still resting-owing ; the delay in

LANDLORD AND TENANT (Continued.)

giving intimation of non-payment being taken into consideration as a material element. Duke of Buccleuch, June 25, 1845, p. 927.

7. A tenant, who had come under an obligation to remove from his farm without any warning, stated as defences to an action of removing, that he had received no warning, and that he possessed by tacit relocation;—Held, that these were not defences excluding the action, capable of being instantly verified, so as to exempt him from finding caution for violent profits under the A. S. 10th July 1839, c. 7, § 34. Johnstone, July 18, 1845, p. 1066.

See *Inhibition*.

LEASE.

See *Landlord and Tenant*.

LEGACY.

See *Testament*.

LEGITIM.

By antenuptial contract of marriage, the whole goods in communion were provided to the spouses, and the longest liver of them in liferent, and to the children in fee, but there was no express exclusion of the legitim: the wife having survived,—Held that the children were barred by the terms of the marriage-contract from claiming legitim as at their father's death. Fisher's Trustees, Nov. 19, 1844, p. 129.

LIEN.

LUNATIC.

See *Insanity*.

MANDATE.

MANDATARY.

In a question as to the sufficiency of the mandatory of a person furth of the kingdom, it is enough if he be solvent, and of the same station with the mandant, and it is not relevant to enquire whether he may be able to pay the expenses of process. Railton, Nov. 13, 1844, p. 105.

See *Process*, XI. 25.

MARRIAGE.

See *Husband and Wife*.

MARRIAGE-CONTRACT.

1. By antenuptial contract of marriage, the whole goods in communion were provided to the spouses, and the longest liver of them in liferent, and to the children in fee, but there was no express exclusion of the legitim: the wife having survived,—Held that the children were barred by the terms of the marriage-contract from claiming legitim as at their father's death. Fisher's Trustees, Nov. 19, 1844, p. 129.
2. A father bound himself in his second son's marriage-contract to pay him £1000, and further to "put him on an equal footing" with any of his younger children, by paying or bequeathing to the son the difference between that sum and any larger sum he might give or bequeath to any of them; by the subsequent marriage-contract of a daughter, the father bound himself to pay her an annuity of £200 for life, commencing with her marriage; in his settlement, he directed his trustees to divide the reversion of his estate among his children on the death of his wife, to whom he gave a liferent of the whole;—Held that the son, under his marriage-contract, was a creditor of his father to the effect of being immediately put on a footing of equality with his married sister; that the bequest to him of a share of the reversion, upon the death of his mother, the liferentrix, was not implement of the father's obligation; and that, in order to put him on an equality with his sister, he was entitled to draw from the trust estate immediately the amount of the sister's annuities already paid, and prospectively to the amount of such farther annuities, or share of reversion, as she might receive. Threshie, Feb. 11, 1845, p. 403.

See *Husband and Wife*.

MEDITATIONE FUGÆ WARRANT.

See *Diligence*.

MORA.

A party who had become liable for arrears of rent due by a tenant, having, in answer to a demand by the landlord for a certain half-year's rent as in arrear, produced a receipt for the rent claimed, and a series of consecutive receipts for each term for the thirteen succeeding years, during which time no intimation had been made to him by the landlord that this portion of the rent remained unpaid;—Held that the landlord was not entitled to object to his own receipt, and to prove that the rent claimed had been paid by a bank draft which had been dishonoured, and that it was still resting-owing; the delay in giving intimation of non-payment being taken into consideration as a material element. Duke of Buccleuch, June 25, 1845, p. 927.

NON-ENTRY.

See *Superior and Vassal*.

NOTARY.

Held that an objection to a notarial protest, on the ground that it bore to have been served at a certain house as the debtor's dwelling-place, which, in point of fact, was not so, could not be pleaded *ope exceptionis*, but requires a reduction. Telfer, Nov. 30, 1844, p. 170.

NOTICE OF TRIAL.

Where the pursuer of an issue has not given notice of trial at all,—Held incompetent for the defender to give notice of trial, although more than ten days have elapsed after the issue had been engrossed, signed, and lodged in the office in the Register-House. Angus, March 11, 1845, p. 603.

NOVATION.

1. Circumstances which were held to afford no evidence that the creditor of a company, after its dissolution, had substituted the sole liability of the partner continuing to carry on the business, instead of the liability of the company; and that certain transactions of the creditor with that partner did not infer *novatio debiti*. Campbell, Feb. 27, 1845, p. 548.

2. A customer of a banking company, shortly after the death of a partner, signed a docket at the end of his account in the company's books, which bore that the account was settled, and the balance in his favour paid to him; the balance was not in reality paid to him, but he received at the time a credit receipt from the banking company for the amount;—

(1.) Held that he had discharged the old company, dissolved by the partner's death, and consequently had no claim against the deceased's partner's estate.

(2.) Circumstances held to import knowledge of the death of a partner equivalent to intimation. Ker, Feb. 22, 1845, p. 494.

NUISANCE.

See *Interdict*, 3.

OATH IN LITEM.

OATH ON REFERENCE.

1. Held incompetent to refer the whole cause to the oath of a defender, where there were allegations set forth by the pursuer in the condescendence, which were not embraced within the media concludendi of the summons. Thomson, Nov. 13, 1844, p. 106.

2. An action for payment of a law-agent's account being resisted by the defender on the ground that the business charged for had not been authorized,—Circumstances deponed to by the defender, on reference to his oath, which held to establish employment, on his part, of the law-agent. Grant, Jan. 17, 1846, p. 274.

3. In a reference to oath, the agent of the party referring having refused to proceed with the examination on the day fixed by the commissioner, on account of his client's absence,—circumstances in which the Court remitted to the

OATH ON REFERENCE (Continued.)

commissioner to fix a new diet upon the party referring paying £10, 10s. of expenses. Wighton, Dec. 20, 1844, p. 235.

4. The acceptor of a bill who was sued upon it after prescription had run, qualified the admission of his acceptance on record, by the statement that the bill had been granted on the understanding and arrangement, that as soon as a heritable security was given for it by a co-acceptor, (which had been done,) his own obligation should thereby be extinguished :—Held that this qualification was intrinsic. Galloway, July 18, 1845, p. 1088.

OATH IN SUPPLEMENT.

It is incompetent to advocate from an interlocutory judgment of the Sheriff, finding that the pursuer of an action of filiation and aliment had established a *semiplena probatio*, and allowing her oath in supplement, such advocacy not coming within the meaning of § 36 of 50 Ge. III. c. 112, allowing advocacy from interlocutory judgments, on the ground of "legal objections with respect to the mode of proof." Murdoch, Nov. 26, 1844, p. 155.

OBLIGATION.

The tolls of a road having been found insufficient to pay the interest of the debt upon it, and certain of the road trustees who were liable for the debt being less interested in the road than the others, it was agreed that a "loss of about £130 per annum" should be made up by these other trustees paying their several proportions thereof according to their respective valuations ;—Held,

- (1.) That this agreement did not import an obligation to pay an average loss of £130 per annum in a series of years, but only an obligation to pay the loss not exceeding that sum, in each year as it occurred.
- (2.) That the obligants not being liable *singuli in solidum*, were not liable for the loss occasioned by the insolvency of one of their number.
- (3.) That one of the obligants having sold his property, was not thereby relieved of his obligation. Duke of Montrose, May 30, 1845, p. 759.

See *Bankruptcy*, 17.

PACTUM ILLICITUM.

1. Held, (1.) That an agreement between a depute and assistant clerk of Session, whereby the latter was, for a certain consideration, to perform the whole duties of the office to which they were both attached, was *pactum illicitum*.
(2.) That, if legal, it came to an end on the resignation of the depute, without the necessity of notice, notwithstanding a stipulation that the party putting an end to it should give six months' notice to the other. Mason, Nov. 28, 1844, p. 160.
2. A party brought an action for the price of potatoes, alleged in the summons to have been purchased from him "at the agreed on price of £20, 10s. per Scots acre, or £16, 8s. per imperial acre :—" on record the pursuer averred that the potatoes were purchased "at the agreed on price per acre, which, upon a strict construction, means the imperial acre," but that he restricted his claim to the price mentioned per Scots acre : on a proof he failed to establish either that the bargain had been made according to the imperial acre, or that any reference had been made to the standard measure ;—Held, that the bargain as libelled was legal under the Act 5 Geo. IV. c. 74, § 15, but that it had not been established. Alexander, June 24, 1845, p. 915.

PARAPHERNALIA.

See *Bankruptcy*, 17.

PARENT AND CHILD.

See *Provision to Wives and Children—Succession*.

PARISH.

See *Teinds*, 2—*Schoolmaster*.

PARTNERSHIP.

1. —(1.) In a multiplepinding, in which the question at issue was, whether the fund *in medio* belonged to a company, or was the property of one of the partners, certain of the company creditors lodged a claim at the commence-

PARTNERSHIP (Continued.)

ment of the process, but took no further step in the process: another body of the company creditors having proceeded with the case, and completed a record, in competition with the trustee on the sequestrated estate of the partner, succeeded in establishing, by the verdict of a jury, that the fund was company property, and were preferred upon it for the amount of their debts, having, before the trial, asked the first set of creditors if they would join in the trial, which they refused: the former body of creditors thereafter appeared, and claimed to be ranked upon a balance of the fund which remained over;—Circumstances in which the Court, holding these creditors to have abandoned their claim, found them not entitled to rank, and preferred the trustee to the balance.

(2.) Expenses as between agent and client awarded to the successful creditors out of the fund *in medio*. Gallie, Jan. 25, 1845, p. 301.

2. A customer of a banking company, shortly after the death of a partner, signed a docket at the end of his account in the company's books, which bore that the account was settled, and the balance in his favour paid to him; the balance was not in reality paid to him, but he received at the time a credit receipt from the banking company for the amount;—

(1.) Held that he had discharged the old company, dissolved by the partner's death, and consequently had no claim against the deceased partner's estate.

(2.) Circumstances held to import knowledge of the death of a partner equivalent to intimation. Kerr, Feb. 22, 1845, p. 494.

3. The directors of a cemetery company, after they had made a purchase of certain lands for the objects of the company, having come to be of opinion that they were not well adapted for the purpose, sold them with the concurrence of a majority of the shareholders: a shareholder, who alleged that he had purchased his shares on the faith of these lands being retained and used for the purposes of the company, having brought a suspension of the sale, on the ground that there was no power to sell under the contract of copartnership of the company;—Held, that the directors had power, and note of suspension refused. Fleming, June 25, 1845, p. 935.

PATRONAGE.

The right to a patronage, which had been possessed by a party and his authors upon personal titles for more than the prescriptive period, having been challenged by the Crown on the grounds,—

(1.) That the patronage had formed part of the annexed property of the Crown, and had never been separated from it by any act of dissolution or conveyance; and,

(2.) That the patronage having been feudalized in the person of the Crown, (its right being equivalent to one completed by seisin,) no prescriptive possession could follow on an adverse personal title;—Held, that prescription having run in favour of the possessor of the patronage, upon a title *ex facie* sufficient, these grounds of challenge, and all inquiry into his older titles and the origin of his rights, was excluded; and that the positive prescription operates against the annexed property of the Crown;—Observed, that a patronage does not necessarily become feudalized by being vested in the Crown; and that the rule, that when a patronage has once been feudalized, its subsequent transmissions ought to be in feudal form, has only reference to a competition between parties deriving right from the same author, in which, as in the case of other heritable rights, a right completed by seisin is preferable to a personal title. Her Majesty's Advocate, Dec. 10, 1844, p. 183.

PAYMENT.

See *Insurance*, 1.

POOR.

Circumstances in which two aged paupers (sisters) were held entitled to the sum of 3s. 6d. each per week from the heritors and kirk-session of the parish

POOR (Continued.)

for their needful sustentation, and not bound to accept an allowance of provisions, clothing, &c. instead of money. Halliday, July 16, 1845, p. 1057.

POOR'S ROLL.

1. In this case, which was an action of divorce by a husband against his wife, the Lord Ordinary had ordered him to pay £8, to enable her to conduct her defence. The husband being unable to pay this sum, presented an application for a remit to the reporters on the *probabilis causa*, with a view to being admitted on the poor's roll. The Court granted the application, on condition of his undertaking to have his wife put on the poor's-roll also at his own expense. Gibson, March 4, 1845, p. 581.
2. Application by a husband to be admitted on the poor's-roll, in order to raise and carry on an action of divorce against his wife—refused, *in hoc statu*, the applicant being in receipt of wages at the rate of £1 per week. King, Feb. 23, 1845, p. 499.

PRESBYTERY.

Circumstances in which held that a presbytery was bound to apply to the commissioners of supply to fill up a vacancy in the office of parish schoolmaster in terms of the act 43 Geo. III. c. 54, § 15. Belhaven, July 16, 1845, p. 1061.

PRESCRIPTION (TRIENNIAL.)

PRESCRIPTION (SEXENNIAL.)

(1.) The holder of a bill, within the years of prescription, raised an ordinary action in the Sheriff-court against an acceptor for payment, and this action having fallen asleep before judgment, he, beyond the years of prescription, extracted the protest, and charged and imprisoned the acceptor thereon;—Note of suspension and liberation passed, on the ground of *lis alibi pendens*.

(2.) Circumstances in which the Lord Ordinary refused a note of suspension and liberation presented by an imprisoned debtor, upon the ground that, after having been liberated for want of aliment, he had been immediately reincarcerated on the same diligence. Denovan, Feb. 1, 1845, p. 378.

See *Oath on Reference*, 4.

PRESCRIPTION (LONG.)

1. The right to a patronage, which had been possessed by a party and his authors upon personal titles for more than the prescriptive period, having been challenged by the Crown on the grounds:—
 - (1.) That the patronage had formed part of the annexed property of the Crown, and had never been separated from it by any act of dissolution or conveyance; and,
 - (2.) That the patronage having been feudalized in the person of the Crown, (its right being equivalent to one completed by seisin,) no prescriptive possession could follow on an adverse personal title;—Held, that prescription having run in favour of the possessor of the patronage, upon a title *ex facie* sufficient, these grounds of challenge, and all inquiry into his older titles and the origin of his rights, was excluded; and that the positive prescription operates against the annexed property of the Crown;—Observed, that a patronage does not necessarily become feudalized by being vested in the Crown; and that the rule, that when a patronage has once been feudalized, its subsequent transmissions ought to be in feudal form, has only reference to a competition between parties deriving right from the same author, in which, as is the case of other heritable rights, a right completed by seisin is preferable to a personal title. Her Majesty's Advocate, Dec. 10, 1844, p. 183.
2. The Magistrates of the burgh of Cambleton, who had a grant of free-seaport over the loch of that name, brought an action against a proprietor who had built a pier upon his lands within the limits of their grant, to have it found that they were entitled to levy there the dues and customs set forth in certain minutes of Council and relative tables of dues. By these tables, a lesser rate of dues was imposed upon certain articles when brought to the quays of

PRESCRIPTION (LONG) (Continued.)

the burgh, than when shipped or landed at other parts of the loch. It having been found by the verdict of a jury, that the dues exigible at the burgh quays had been levied by the Magistrates there for forty years from the date of the tables, and that they had from time to time asserted their right to levy at the defender's pier;—Held, that the defender not having established in his own favour a prescriptive immunity from dues, and the Magistrates having levied at their head-port the dues exigible there, this entitled them to levy these dues at the defender's pier, and over the whole precincts of their grant; but that, having failed in their proof of a continuous use to levy the higher dues in the tables applicable to the defender's pier, they were not entitled to claim them. Magistrates of Campheltoun, Feb. 21, 1845, p. 482.

- 3.—(1.) In a declarator at the instance of the magistrates of a burgh of barony for determining the property of an open space of ground adjoining the harbour of the burgh, and situated between it and the town,—A grant to the bailies, council, feuwers, and inhabitants of the haven and harbour, with customs, &c., and the common loane, gait, wynde, venuele, and common passages, to and from the town and haven, held to be a sufficient title to the open space.

(2.) A party with a bounding title, held to have acquired no right to a piece of ground beyond his boundary, by the possession of a building upon it, which had been unchallenged for more than forty years. Magistrates and Town Council of St Monance, March 5, 1845, p. 582.

See *Teinds*, 2.

PROCESS.

1. SUMMONS.

1. Held incompetent to refer the whole cause to the oath of a defender, where there were allegations set forth by the pursuer in the condescendence, which were not embraced within the media concludendi of the summons. Thomson, Nov. 13, 1844, p. 106.
2. In an action of damages for "illegal, unwarrantable, oppressive, and injurious" conduct, in causing the pursuer to be apprehended and tried in a police-court on a false charge of creating a disturbance, an objection to the relevancy of the summons, that it did not allege malice and want of probable cause, was repelled. Strachan, Dec. 5, 1844, p. 178.
3. Question, Whether it was competent to found upon the Act 1696, c. 33, (requiring slaps for the passage of fish to be made in all dam-dykes in rivers,) said Act not being libelled on? The Court, to avoid this question, allowed an amendment of the libel introducing the Act, but found the pursuer liable in the expenses of a previous discussion thereby rendered unnecessary, and of such alterations in the defences and record as might in consequence be necessary. Munro, Jan. 31, 1845, p. 358.
4. Held incompetent to allow an amendment of the libel after the record is closed. A, March 6, 1845, p. 595.
- 5.—(1.) Summons of damages against a procurator-fiscal, setting forth that he had applied for, and obtained a warrant of apprehension against the pursuer without sufficient ground or probable cause, held to be irrelevantly laid, in respect it did not also libel that this had been done maliciously.

(2.) In an action of damages against a procurator-fiscal, on the ground that, in the course of executing a criminal warrant, the officers to whom he had committed that duty had imprisoned the pursuer in a cruel and oppressive manner;—Held that, as it was not alleged that the wrongful act complained of had been done by the defender's instructions, or with his knowledge, or that the general directions he had given to the officers were other than proper and suitable in the circumstances, it was to be regarded as the individual act of the officers, which he could not in the circumstances have anticipated

PROCESS (Continued.)

I. SUMMONS.

- or guarded against, and for which he was not in law responsible. Munro, Feb. 25, 1845, p. 500.
6. In a case in which the record was closed, the Court refused to allow an amendment of the libel to be made, which changed the ground of action. Baird's Trustees, July 8, 1845, p. 1001.
 7. After a proof had been reported in an action of divorce, it was discovered that the summons had passed the signet, as in an ordinary action, instead of being signed by a clerk of Session, as required in consistorial causes by the Act 1 Will. IV. c. 69, § 40;—Held, that the error was fatal to the whole proceedings, and that the objection founded upon it could not be cured. Buxton, July 16, 1845, p. 1063.

See *Expenses*, 5—*Citation*, 2.

II. RECORD.

1. Where a party had, on a closed record, founded upon an instrument of protest of a bill as being a valid protest for non-acceptance and non-payment merely—Held that he was not entitled to have the cause delayed, in order that he might produce a protest for non-acceptance. Welsh, Dec. 12, 1844, p. 213.
2. Special circumstances in which the Court allowed a plea to be added to a closed record, in terms of section 11 of the Judicature Act, "as fit to be discussed in relation to the facts already set forth." Struthers, Feb. 14, 1845, p. 436.
3. Held incompetent to allow an amendment of the libel after the record is closed. A, March, 6, 1845, p. 595.
4. Held, that the Lord Ordinary is imperatively required by the Judicature Act, on permitting an addition to be made to a record, after it has been closed, as *res noviter*, to find the party liable in "such expenses as he may deem reasonable." White, June 19, 1845, p. 886.

See *supra* I. 4, 6.

III. JURY-TRIAL.

1. In interpreting the Act of Sederunt 16th February 1841, § 13—Held that the term "days" is to be construed as meaning sederunt days, not natural days. Railton, Nov. 20, 1841, p. 152.
2. Circumstances in which, on the motion of the defender, the Court changed the place of trial. Railton, Nov. 21, 1844, p. 153.
3. In an action for libel,
 - (1.) Held that a counter-issue was incompetent, proof of which did not amount to a justification of the whole or a distinct part of the libel; and observed, that by allowing a counter-issue (in such action) the Court pronounced upon its relevancy a justification.
 - (2.) Terms of counter-issues, which were disallowed in respect the facts proposed to be proved under them were therein too vaguely and loosely set forth. Lowe, Nov. 16, 1844, p. 117.
4. Where a verdict at a Jury trial proceeded in absence of one of the parties, after due notice of trial to the agents who had acted for that party, and after a motion had been made by one of them to delay the trial, and the verdict was subsequently applied, and decree extracted;—Held, that this was not, in the circumstances, to be considered as a decree in absence, and that it was incompetent to reduce it on the allegations—
 - (1.) That the pursuers had, from poverty, been unable to make appearance at the trial; and,
 - (2.) That no notice of trial had been given to a properly qualified agent on the pursuer's behalf, or to themselves personally, the party who conduct-

PROCESS (Continued.)

III. JURY-TRIAL.

- ed the case for them, and to whom notice had been given, not having taken out the attorney's certificate. Gilchrist, Dec. 13, 1844, p. 214.
5. Where a defender had given notice of trial by proviso under the 11th section of the A. S. 16th February 1841, and had countermanded;—Held that he was not entitled thereafter to retain the lead in the case, and that a second notice of trial by him was incompetent. Morton, Dec. 20, 1844, 248.
 - 6.—(1.) Where a jury had returned a special verdict, finding that certain facts had been proved,—Objection repelled, that the verdict did not exhaust the issue by returning an explicit affirmative or negative answer to it.
 (2.) Under an issue as to whether the pursuers had for forty years levied the shore dues set forth in certain schedules or tables of dues, the jury found that they had "from time to time" "in assertion" of their right, levied a lesser rate of dues than that in the tables, upon some of the articles specified therein,—Held that this was a verdict generally negative of the issue.
 (3.) The Judge at a trial having directed the jury as to the shape in which they should return their verdict, without any exception having been taken, and the jury having returned a verdict in terms of the charge,—Opinion, that it was incompetent for the party who had thus failed to except, to move for a new trial, on the ground that the verdict was not an answer to the issue. Magistrates of Campbeltown, Dec. 21, 1844, p. 255.
 7. A witness who had failed to appear at a jury-trial, to which he had been cited, was subsequently ordered by the Court to appear at the bar, when he alleged illness as his excuse; after a proof of his allegations,—The Court, holding that he had failed to substantiate any such indisposition as should have prevented his attendance, and that at all events he ought in the circumstances, to have intimated his inability to attend to the agent in the cause, fined him £20, and found him also liable to the party who had cited him, in the expense in regard to this proof. Donald, Jan. 17, 1845, p. 273.
 8. In an action of damages for "illegal, unwarrantable, oppressive, and injurious" conduct, in causing the pursuer to be apprehended and tried in a police court on a false charge of creating a disturbance,—Held that the pursuer did not require to take an issue of unallice or want of probable cause, the case not being privileged. Strachan, Feb. 8, 1845, p. 399.
 9. Verdict returned under an issue whether a party had been induced to subscribe a bond of caution by undue concealment or deception,—set aside as not warranted by the evidence, and a new trial granted. Railton, May 30, 1845, p. 748.
 10. Where two parties, who were pursuing actions of damages against one another, had each applied to have the other's action dismissed, in respect that no notice of trial had been given within a year after issues were adjusted,—The Court dismissed both actions, repelling a plea which was stated for one of the pursuers, that the processes being conjoined, and the action by the other party being the first and leading action, he was not in default, as he was not entitled of his own authority to disjoin them, and force his own case to trial. Gordon, June 17, 1845, p. 883.
 11. In an action regarding the property of a tract of ground, the pursuer, in the course of a jury-trial, took an objection to the defender's title to prove possession; the objection having been sustained, a verdict was returned in the pursuer's favour, but it was subsequently overruled on a bill of exceptions, and a new trial was granted; at the second trial the pursuer was successful; in disposing of the question of expenses—
 (1.) Held, that the objection to title should have been pressed by the pursuer to a decision before the trial, and that the defender was therefore not liable in the expenses of the first trial, though he was not entitled to payment of them.

PROCESS (Continued.)

III. JURY-TRIAL.

- (2.) Held, that neither was the defender liable in the expenses of the bill of exceptions, in which he had been successful, but as his success on the question of title was fruitless, he was not entitled to claim payment of these expenses. *Carnegie*, June 5, 1845, p. 826.
12. Testamentary trustees, who, by the trust-deed, were specially exempted from liability for the insolvency of factors, or for omissions, and declared liable each only for his own actual intrusions, were called to account by a beneficiary for a loss arising from the bankruptcy of a factor, whom they had allowed to retain, without security, a large sum uplifted by him on the part of the trust. An issue was sent to trial, whether the trustees had allowed the sum to pass into and remain in the factor's hands "wrongfully, and in contravention of their duty as trustees;" and the Judge directed the jury, that they were liable only if proved to have been guilty of "gross and culpable negligence:"—An exception against this direction disallowed. Question, Whether the ground on which an exception is taken must be stated at the trial, and appear on the face of the bill? *Home*, July 10, 1845, p. 1010.
13. Held, that a motion to amend or alter a signed bill of exceptions, so as to make it consistent and in conformity with the notes taken by the presiding Judge at the trial, was incompetent. *Pollok*, July 2, 1845, p. 973.
- 14.—(1.) In the reduction of a settlement on the ground of insanity, certain letters written by the wife of the testator, shortly before the execution of the deed under challenge, and containing directions purporting to be from him upon matters of business, were tendered in evidence by the defenders as his "act and letter;"—Circumstances in which held (on a bill of exceptions) that these letters had been properly rejected by the Judge at the trial, on the ground of want of evidence of their having been written by authority of the testator, or of his having been cognisant of their contents.
- (2.) Also held, that it was the province of the Judge to decide upon the admissibility of the letters, and that he would have acted erroneously had he, by allowing them to go to the jury, left it with them to determine whether there was evidence of their being the act and letter of the testator. *Pollok*, July 4, 1845, p. 973.
15. Circumstances in which a motion for a new trial was refused. *Pollok*, July 4, 1845, 974.
16. In the reduction of a codicil, on the ground that the testator was of unsound mind,—Verdict of jury set aside as against evidence, and new trial granted. *Waddel*, July 12, 1845, p. 1017.
17. Held, that the pursuer of a jury cause has the exclusive power, under the Act of Sederunt, 16th February 1841, § 10, of giving notice of trial, except in the case provided for in § 11. *Burgess*, July 18, 1845, p. 1065.

See *Expenses*, 6, 7, 23—*Notice of Trial*.

IV. JUDGMENT, DECREE.

Where a verdict at a jury-trial proceeded in absence of one of the parties, after due notice of trial to the agents who had acted for that party, and after a motion had been made by one of them to delay the trial, and the verdict was subsequently applied, and decree extracted;—Held, that this was not, in the circumstances, to be considered as a decree in absence, and that it was incompetent to reduce it on the allegations—

(1.) That the pursuers had, from poverty, been unable to make appearance at the trial; and,

(2.) That no notice of trial had been given to a properly qualified agent on the pursuers' behalf, or to themselves personally, the party who conducted

PROCESS (Continued.)

IV. JUDGMENT, DECREE.

the case for them, and to whom notice had been given, not having taken out the attorney's certificate. Gilchrist, Dec. 13, 1844, p. 214.

V. RECLAIMING NOTE.

1. Where a reclaiming note from a judgment of the Sheriff in a cessio, which had come before the Lord Ordinary on the bills during recess, and had not been disposed of by him before the commencement of the session, was not boxed to the Judges for a fortnight after the sitting of the Court,—Objection repelled in the circumstances of the case, that it was too late under the Act of Sederunt, which provides that it shall be boxed "on the meeting of the Court." Galloway, Jan. 28, 1845, p. 355.

2. Where a written agreement between parties to fight cocks, founded on in a process, was not stamped,—The Court refused to dismiss a reclaiming note, on the objection that the agreement not being stamped could not be looked at, but allowed time to have it stamped. Harvey, Feb. 7, 1845, p. 398.

3. Objection to the competency of a reclaiming note, on the ground that a party had not intimated his intention to reclaim to the Lord Ordinary, repelled. McLaurin, May 29, 1845, p. 744.

4.—(1.) Where an appeal had been delayed, with the view of allowing a party to bring up before the House of Lords a subsequent decree which had been pronounced in the process, and which had been allowed to become final and be extracted through inadvertence in allowing the reclaiming days to expire—the Court, holding that the process had been taken out of Court by the extract, refused to entertain a reclaiming note, under the provisions of 48 Geo. III. c. 151, § 16, without a remit being made by the House of Lords.

(2.) Question, Whether the provisions of the above section are applicable to final extracted decrees? Alexander, June 17, 1845, p. 884.

5. A reclaiming note against an interlocutor of a Lord Ordinary, pronounced in consequence of a remit from the Inner-House, held competent, to the effect of enabling the Court to determine whether the interlocutor had been pronounced in terms of the remit or not, but to no other. Munro, July 15, 1845, p. 1045.

6. Objection to the competency of a reclaiming note against a decree in respect of non-appearance at the debate, on the ground that the party had previously been reponed against a decree in absence, repelled. Craikshank, July 18, 1845, p. 1084.

VI. ADVOCATION.

1. It is incompetent to advocate from an interlocutory judgment of the Sheriff, finding that the pursuer of an action of filiation and aliment had established a *semiplena probatio*, and allowing her oath in supplement, such advocacy not coming within the meaning of § 86 of 50 Geo. III. c. 112, allowing advocacy from interlocutory judgments, on the ground of "legal objection with respect to the mode of proof." Murdoch, Nov. 26, 1844, p. 155.

2. Held that an advocacy by a pauper, of a finding of the heritors and kirk-session of a parish, was incompetent, in respect that a certificate of caution was not lodged with the note of advocacy when received and marked by the clerk in the Outer-House, in terms of the Act 1 and 2 Vict. c. 81, § 2. Weir, May 24, 1845, p. 638.

VII. MULTIPLEPOINDING.

(1.) In a multiplepoinding, in which the question at issue was, whether the fund *in medio* belonged to a company, or was the property of one of the partners, certain of the company creditors lodged a claim at the commencement of the process, but took no further step in the process: another body of the company creditors having proceeded with the case, and completed a record, in competition with the trustee on the sequestrated estate of the partner, succeeded in establishing, by the verdict of a jury, that the fund was company property and were preferred upon it for the amount of their debts; having, before the

PROCESS (Continued.)

VII. MULTIPLEPOINDING.

trial, asked the first set of creditors if they would join in the trial, which they refused: the former body of creditors thereafter appeared, and claimed to be ranked upon a balance of the fund which remained over:—Circumstances in which the Court, holding these creditors to have abandoned their claim, found them not entitled to rank, and preferred the trustee to the balance.

(2.) Expenses as between agent and client awarded to the successful creditors out of the fund *in medio*. Gallie, Jan. 25, 1845, p. 301.

2. Instructions were given to a mercantile firm in Bombay to take out letters of administration in the Court of Bombay to the estate of a person who had died there, but instead of doing so they obtained payment of the funds, which they remitted to this country, by granting a bond of indemnity to the Registrar of the Court, who had taken possession of them in his official capacity: In a multiplepounding raised for the distribution of the estate, a claim was made by the Bombay firm, that the parties preferred to the fund *in medio* should give them security against liability under the bond for indemnity:—The Court refused the claim. Forbes, July 17, 1843, p. 1068.

VIII. RANKING AND SALE.

1. By the articles of roup of a judicial sale, it was declared that Martinmas 1843 should be the purchaser's term of entry, and that he should have right to the rents "falling due from and after the said term;"—Held,
 - (1st.) That the purchaser was not entitled to the rents payable at Whitsunday and Candlemas 1844, for crop and year 1843:
 - (2d.) That it was incompetent to control or modify the construction of the articles of roup by production of correspondence between the common agent and judicial factor, or by any declaration as to the meaning thereof. Stevenson, Feb. 12, 1845, p. 418.
2. In a ranking and sale, where proof had been led of the value of a property, and thereafter, pending the ranking, a number of years had elapsed during which the property had been changed in its character, the Court allowed additional proof. Ranking and Sale of Kennoway, July 10, 1845, p. 1014.

IX. SUSPENSION AND INTERDICT.

The Lord Ordinary, upon advising a note of suspension and answers, passed the note, but recalled the interim interdict, which had been granted when answers were ordered; the complainers reclaimed against the recall of the interdict, and applied to the Lord Ordinary to prohibit the issuing of a certificate of the recall;—The Court, upon his Lordship's verbal report, instructed him to do so. Dundee Gas-Light Company, Nov. 15, 1844, p. 109.

X. REDUCTION.

1. Held that an objection to a notarial protest, on the ground that it bore to have been served at a certain house as the debtor's dwelling-place, which, in point of fact, was not so, could not be pleaded *ope exceptionis*, but requires a reduction. Telfer, Nov. 30, 1844, p. 170.
2. Where the defender in a reduction had consented to decree being pronounced in terms of the libel, rather than incur the expense of a Jury-trial,—Circumstances in which the Court refused to allow a party having an interest to support the deed under challenge, to appear and defend the action. Chanter, Feb. 20, 1845, p. 465.
3. The proprietrix of an entailed estate obtained decree of valuation of her teinds, on the footing of the rent paid to her under an existing lease of her lands; to this process the Officers of State and the tacksman of the teinds had been made parties, and it had been objected by the latter, that this lease having been granted by a predecessor in diminution of the rental and for a grassum, afforded no criterion of the value of the lands; the proprietrix having subsequently reduced the lease on these grounds, as in contravention of the entail, the Officers of State brought a reduction of the decree of valuation;—which action, in the circumstances, dismissed. Officers of State, Feb. 27, 1845, p. 542.

PROCESS (Continued.)

XI. MISCELLANEOUS.

1. Observed, that a remit to an accountant is not of the character of a quasi reference, but that parties are entitled to object to all grounds on which he forms his opinion. Cameron, Nov. 12, 1844, p. 92.
2. A party having appeared and proposed to sist himself as defender in a process, and having failed to do so, the Court found him liable in the expense he had thereby caused to the pursuer. Jarvis, Nov. 19, 1844, p. 128.
3. Where there is good reason to suspect that a party applying for cessio is fraudulently concealing funds or effects from his creditors, the proper course is to refuse his application for cessio, *hoc statu*. Manson, Nov. 27, 1844, p. 159.
4. In a question as to the sufficiency of the mandatary of a person furth of the kingdom, it is enough if he be solvent, and of the same station with the mandant, and it is not relevant to enquire whether he may be able to pay the expenses of process. Raiton, Nov. 13, 1844, p. 105.
5. Held incompetent to refer the whole cause to the oath of a defender, where there were allegations set forth by the pursuer in the condescendence, which were not embraced within the media concludendi of the summons. Thomson, Nov. 13, 1844, p. 106.
6. In a reference to oath, the agent of the party referring having refused to proceed with the examination on the day fixed by the commissioner, on account of his client's absence—circumstances in which the Court remitted to the commissioner to fix a new diet upon the party referring paying £10, 10s. of expenses. Wighton, Dec. 20, 1844, p. 235.
7. Upon a statement by the counsel for the defender, that the Lord Ordinary, before whom the pursuer had enrolled the cause, was an essential witness for the defender, the Court remitted to another Lord Ordinary. Clarke, Jan. 15, 1845, p. 268.
8. Where a person, who was of imbecile mind, had presented a petition and complaint for the removal of a party who had been appointed her curator bonis, the Court refused to appoint a curator ad litem, intimating that the proper course was to present a regular petition for the appointment of an interim curator bonis for the purpose of insisting in the application. Mackenzie, Jan. 21, 1845, p. 283.
9. In an action where the record had been closed, and the Lord Ordinary had reported the cause to the Court upon cases, the pursuer and all the parties who had entered appearance having craved leave to abandon the case, the Court refused to allow a party who had been called as a defender, but had not originally appeared, to enter appearance. Gordon, Jan. 29, 1845, p. 357.
10. Decree of transference refused to be pronounced against the widow of a deceased defender, who had received a liferent of his heritable property and a bequest of certain moveables, his heir and executor having both entered to his succession respectively. Clelland, Feb. 18, 1845, p. 461.
11. Where the defender in a reduction had consented to decree being pronounced in terms of the libel, rather than incur the expense of a jury-trial,—Circumstances in which the Court refused to allow a party having an interest to support the deed under challenge, to appear and defend the action. Chanter, Feb. 20, 1845, p. 465.
12. The holder of a bill, within the years of prescription, raised an ordinary action in the Sheriff-court against the acceptor for payment, and this action having fallen asleep before judgment, he, beyond the years of prescription, extracted the protest, and charged and imprisoned the acceptor thereon;—Note of suspension and liberation passed on the ground of *lis alibi pendens*. Denovan, Feb. 1, 1845, p. 378.
13. Circumstances in which certain defenders were allowed to withdraw from an action depending in the Outer House, under reservation that they should be liable for their share of the previous expenses, if such were ultimately awarded to the pursuer, and that he should be entitled to take decree against them therefor in that action. Livingstone, March 1, 1845, p. 554.

PROCESS (Continued.)

XI. MISCELLANEOUS.

14. A woman, during the dependence of an action of damages at her instance against A for defamation, raised a declarator of marriage against B, who defended. A moved that the pursuer's husband should be stated as a party to the action of damages. The Court appointed the pursuer's agent her curator *ad litem, valeat quantum valere potest*. Hogg, March 6, 1845, p. 594.
15. A law-agent who had a hypothec over certain documents in his possession for a business-account due to him by his employer, the pursuer of a jury cause, appointed to produce them, without payment or reservation, under a diligence obtained by the defender, but found that the pursuer could not see them at the trial without paying his agent's (the haver's) account. *Montgomery*, May 1, 1845, p. 553.
16. Where the Lord Ordinary on the bills had, during vacation, made an interim appointment of a curator bonis, on a petition addressed to him, the Court, on an application being made for a renewal of the appointment under the same petition, ordered a supplementary petition to be lodged, addressed to the Court. *Scott*, May 22, 1845, p. 638.
17. A party who had lodged objections to the auditor's report at the time it was made, held not entitled, at the distance of two years and a half thereafter, to lodge new and extended special objections to the report. *King*, Feb. 26, 1845, p. 536.
18. A party who had raised a reduction of certain bills, and marked it as a First Division process, afterwards suspended a charge upon one of the bills, but neglected to mark the Division to which the suspension was to belong; the respondent, in the suspension, marked it as belonging to the Second Division, and reclaimed against an interlocutor of the Lord Ordinary passing the note, to that Division of the Court, who adhered; the actions of reduction and suspension were afterwards conjoined by the Lord Ordinary, and declared to belong to the Second Division of the Court; but the Court altered, and declared that the conjoined processes belonged to the First Division. *Currie*, May 30, 1845, p. 746.
19. Circumstances in which held, that where a party had lodged a minute shandoning a process of sequestration for rent, and consigned a sum of money to meet the expenses of the opposite party, which were ultimately found to be less than the sum consigned, a second application for sequestration was competent, though made prior to the consignation in the first. *Lawson*, July 1, 1845, p. 960.
20. An interlocutor by the Lord Ordinary in a sequestration containing a general finding for "expenses," includes the expenses incurred before the Sheriff, as well as those in the Court of Session. *Kerr*, May 31, 1845, p. 809.
21. Where a correspondence and other papers which had passed between the agents in a cause, in reference to an extrajudicial settlement not carried into effect, had been printed as an appendix, the Court ordered them to be withdrawn. *Williamson*, June 6, 1845, p. 842.
22. Observed, that a correspondence which had taken place between the agents after the cause of action had arisen, extending to about 100 pages, and which had been boxed to the Court, ought not to have been printed, and the expense thereof ought to be disallowed by the auditor. *Mills*, June 19, 1845, p. 888.
23. Where the pursuers of an action had given in a minute consenting to decree of absolvitor with expenses, on the footing that the expenses should be imputed in extinction of certain liquid claims which they held against the defender, and the Lord Ordinary had acquiesced in terms of the minute, the Court, on a reclaiming note, recalled the interlocutor, in respect the minute had not been agreed to by the defender. *Anderson*, June 20, 1845, p. 913.
24. A procurator-fiscal obtained the conviction of a party before a Justice of Peace Court, under the Act 1 and 2 Will. IV. c. 68: the party was imprisoned in terms of the sentence pronounced by the Justices, but, on presenting a bill of suspension and liberation to the Court of Justiciary, the

PROCESS (Continued.)

XI. MISCELLANEOUS.

sentence was set aside, and he was liberated from prison: he then raised an action of damages against the procurator-fiscal, but neglected to give him notice of the action a month before its commencement, in terms of § 17 of the Act;—Held that the action was incompetent. Russell, June 25, 1845, p. 919.

25. Circumstances in which (altering the Lord Ordinary's interlocutor) additional time was allowed for receiving a mandate from a defender who was abroad. Murray, July 8, 1845, p. 1000.
26. In an action against a widow the summons and citation stated her maiden name to be "Martha Reid," whereas it was "Martha Hood." She was otherwise correctly designed by her residence, and the name and designation of her husband. A preliminary defence, founded upon the error, repelled. Moir, July 10, 1845, p. 1009.
27. A pursuer abandoning an action, in terms of the Act 6 Geo. IV. c. 120, § 10, is liable for expenses as between party and party only. Lockhart, July 15, 1845, p. 1045.

See *Appeal—Expenses—Notary—Title to Pursue or Defend.*

PROCURATOR-FISCAL.

See *Public Officer.*

PROOF.

I. WRITTEN.

1. A loss having been incurred under a policy of insurance, the agent of the insured granted a receipt upon the policy to the agent of the underwriters for a certain sum; the agent of the underwriters having become bankrupt,—Held, in an action against them upon the policy at the instance of the insured, that it was incompetent to set aside the effect of the receipt by parole evidence and correspondence between the agents, showing that no money had been paid. Anderson, Jan. 15, 1845, p. 268.
2. In a suspension of a decree of removing, held that a state of rents due by the tenant, rendered by the factor to the landlord, and retained by him, was competent evidence in favour of the tenant; and that the landlord having failed to produce it, being required, parole evidence of its contents was competent. Mitchell, Feb. 4, 1845, p. 382.
3. In an action by a bank on a letter of guarantee,—Held,
 - (1.) That it was competent to prove by parole that the bank had paid a sum of money on an order, subsequent to and on the faith of the guarantee.
 - (2.) That the order on the bank might be used in evidence, although it was altered and vitiated in its date, and no explanation of the alteration was given. Grant, Feb. 7, 1845, p. 390.
4. By the articles of roup of a judicial sale, it was declared that Martinmas 1843 should be the purchaser's term of entry, and that he should have right to the rents "falling due from and after the said term;"—Held,
 - (1st.) That the purchaser was not entitled to the rents payable at Whitsunday and Candlemas 1844, for crop and year 1843.
 - (2d.) That it was incompetent to control or modify the construction of the articles of roup by production of correspondence between the common agent and judicial factor, or by any declaration as to the meaning thereof. Stevenson, Feb. 12, 1844, p. 418.

See *Process, III. 14.*

II. PAROLE.

1. Opinion, that parole evidence of the payment of rent by sales under a transaction, whereby the landlord was allowed to sell and draw the price of certain sequestrated stock and crop, was competent. Mitchell, Feb. 4, 1845, p. 382.
2. In an action for the price of certain goods as having been sold out and out to

PROOF (Continued.)

II. PAROLE.

the defender, who alleged that he had merely received them on sale and return, and with leave to return such as were unsaleable;—Circumstances in which the Court allowed a proof, before answer, of an alleged verbal agreement entered into before the course of dealing began, that the goods were to be sent on the terms stated by the defender. Woodrow, Feb. 7, 1845, p. 385.

3. A party who had become liable for arrears of rent due by a tenant, having, in answer to a demand by the landlord for a certain half-year's rent as in arrear, produced a receipt for the rent claimed, and a series of consecutive receipts for each term for the thirteen succeeding years, during which time no intimation had been made to him by the landlord that this portion of the rent remained unpaid;—Held that the landlord was not entitled to object to his own receipt, and to prove that the rent claimed had been paid by a bank draft which had been dishonoured, and that it was still resting owing; the delay of giving intimation of non payment being taken into consideration as a material element. Duke of Buccleuch, June 25, 1845, p. 927.
4. A father, who had granted to his daughters a conveyance of heritage *ex facie* absolute, proceeding on an admittedly false narrative of a price paid, raised a declarator to have it found that it was truly one in trust; and averred that its real nature was set forth in a back-letter delivered to him by the grantees, but which had been lost or abstracted by them from his repositories.—Held, that trust could be established only by the production, or a proving of the tenor of the back-letter, or by the writ or oath of the grantees.—Observed, that facts and circumstances admitted on record may be sufficient to prove a trust. Chalmers, June 13, 1845, p. 865.

III. OATH.

See *Oath*.

IV. MISCELLANEOUS.

1. Where a defender had made a qualified judicial admission, circumstances in which the Court held that the qualification did not prevent their looking to the evidence in process, and disposing of the case as one on proof. Miller, Jan. 21, 1845, p. 283.
- 2.—(1.) Where a subject was disposed as bounded by “the harbour, with the pier intervening, upon the west;” and the extent of the “pier” was disputed: proof allowed, to ascertain what was the extent of the “pier.”
(2.) Where a portion of burgh property was sold by public roup, under S. G. O. IV. c. 91, and pursuant to advertisement as required by that Act; and the advertisement was referred to in the articles of roup and the disposition:—Held, in the circumstances, that it was competent to refer to the advertisement, to explain an ambiguity in the terms used for describing the boundaries of the subject in the disposition to the purchaser. Davidson, Jan. 28, 1845, p. 342.
- 3.—(1.) In an action of assythment and damages by the children of a party who had been killed by a stage-coach accident, against the proprietors of the coach, in which the pursuers had set forth that they had been deprived of the paternal care and support, and had been grievously injured in their feelings,—Diligence granted to the defenders for recovery of documents, to instruct that the deceased did not support his family, but had been separated from them in consequence of his habits, and of an illicit intercourse he carried on; and, *inter alia*, for recovery of a correspondence alleged to have passed between the deceased and the party with whom he had the illicit intercourse.
(2.) Observed, that in granting such diligence the Court were disposing of the general question of the admissibility (in the event of a jury trial) of the evidence sought to be recovered. Braash, Feb. 27, 1845, p. 539.

PROPERTY.

1. The titles to a certain field described it as being "enclosed by a ditch and seal dyke," and as being bounded on the north by the "loan at the march-stones set betwixt the town of Cupar and the heritor of Carslogie,"—the loan and stones having in course of time disappeared;—Held, in a question as to the boundary between Carslogie and the field,
 - (1st,) Upon the titles, that the ditch and dyke at that part, with a hedge and trees which had been planted on the dyke, belonged in property to the proprietor of the field; and,
 - (2d,) Upon the proof, that there had been no contrary possession sufficient to change the right under the titles. *Wilson*, Nov. 15, 1844, p. 113.
2. Note of suspension and interdict at the instance of proprietors in a burying-ground, against the erection therein of a monument to the memory of the Martyrs of Political Reform in 1793-4, (viz. certain persons who had then been convicted and punished for sedition,) refused. *Paterson*, March 4, 1845, p. 561.
- 3.—(1.) In a declarator at the instance of the magistrates of a burgh of barony for determining the property of an open space of ground adjoining the harbour of the burgh, and situated between it and the town,—A grant to the bailies, council, feuars, and inhabitants of the haven and harbour, with customs, &c., and the common lones, gaits, wynds, vennels, and common passages to and from the town and haven, held to be a sufficient title to the open space.
 - (2.) A party with a bounding title, held to have acquired no right to a piece of ground beyond his boundary, by the possession of a building upon it, which had been unchallenged for more than forty years. *Magistrates and Town-Council of St Monance*, March 5, 1845, p. 582.

PROVISION TO WIVES AND CHILDREN.

1. By antenuptial contract, the whole goods in communion were provided to the spouses, and the longest liver of them in liferent, and to the children in fee, but there was no express exclusion of the legitim: the wife having survived,—Held that the children were barred by the terms of the marriage contract from claiming legitim as at their father's death. *Fisher's Trustees*, Nov. 19, 1844, p. 129.
2. By antenuptial contract, the husband bound himself and his heirs to invest a sum for behoof of the wife in liferent in the event of her survivance, and the children of the marriage in fee, so soon as he or they should be called on to do so by certain trustees; and by relative bond of caution, his brother, one of the trustees, bound himself to pay these provisions in the event of the husband failing to implement his obligation in regard to them. The husband having died insolvent, without having implemented the obligation, or having been called upon by the trustees to do so;—Held,
 - (1st,) That the brother was liable upon the bond; and,
 - (2d,) That the wife had a good title to sue upon it, without the concurrence of the marriage trustees. *Wilson*, Nov. 16, 1844, p. 125.

See *Husband and Wife—Marriage-Contract*.

PUBLIC OFFICERS.

- 1.—(1.) Summons of damages against a procurator-fiscal, setting forth that he had applied for, and obtained a warrant of apprehension against the pursuer without sufficient ground or probable cause, held to be irrelevantly laid, in respect it did not also libel that this had been done maliciously.
 - (2.) In an action of damages against a procurator-fiscal, on the ground that, in the course of executing a criminal warrant, the officers to whom he had committed that duty had imprisoned the pursuer in a cruel and oppressive manner;—Held that, as it was not alleged that the wrongous act complained of had been done by the defender's instructions, or with his knowledge, or that the general directions he had given to the officers were other than proper and suitable in the circumstances, it was to be regarded as the indivi-

PUBLIC OFFICER (Continued.)

dual act of the officers, which he could not in the circumstances have anticipated or guarded against, and for which he was not in law responsible. *Munn*, Feb. 25, 1845, p. 500.

2. A procurator-fiscal obtained the conviction of a party before a Justice of Peace Court, under the Act 1 and 2 Will. IV. c. 68: the party was imprisoned in terms of the sentence pronounced by the Justices, but, on presenting a bill of suspension and liberation to the Court of Justiciary, the sentence was set aside, and he was liberated from prison: he then raised an action of damages against the procurator-fiscal, but neglected to give him notice of the action a month before its commencement, in terms of § 17 of the Act,—Held, that the action was incompetent. *Russell*, June 25, 1845, p. 918.

See *Pactum Illicitum*, 1.

RANKING.

See *Bankruptcy*, 11.

RECLAIMING NOTE.

See *Process*, V.

RECORD.

See *Process*, II.

REDUCTION.

See *Process*, X.

REMUNERATION.

See *Entail*, 10.

REPARATION.

1. In an action of damages for "illegal, unwarrantable, oppressive, and injurious" conduct, in causing the pursuer to be apprehended and tried in a police court on a false charge of creating a disturbance, an objection to the relevancy of the summons, that it did not allege malice and want of probable cause, was repelled. *Strachan*, Dec. 5, 1844, p. 178.
2. In an action of damages for "illegal, unwarrantable, oppressive, and injurious" conduct, in causing the pursuer to be apprehended and tried in a police court on a false charge of creating a disturbance,—Held that the pursuer did not require to take an issue of malice or want of probable cause, the case not being privileged. *Strachan*, Feb. 8, 1845, p. 399.
- 3.—(1.) Summons of damages against a procurator-fiscal, setting forth that he had applied for, and obtained a warrant of apprehension against the pursuer without sufficient ground or probable cause, held to be irrelevantly laid, in respect it did not also libel that this had been done maliciously.
 (2.) In an action of damages against a procurator-fiscal, on the ground that, in the course of executing a criminal warrant, the officers to whom he had committed that duty had imprisoned the pursuer in a cruel and oppressive manner;—Held that, as it was not alleged that the wrongful act complained of had been done by the defender's instructions, or with his knowledge, or that the general directions he had given to the officers were other than proper and suitable in the circumstances, it was to be regarded as the individual act of the officers, which he could not in the circumstances have anticipated or guarded against, and for which he was not in law responsible. *Munn*, Feb. 25, 1845, p. 500.
- 4.—(1.) In an action of assythment and damages by the children of a party who had been killed by a stage-coach accident, against the proprietors of the coach, in which the pursuers had set forth that they had been deprived of the paternal care and support, and had been grievously injured in their feelings,—Diligence granted to the defenders for recovery of documents, to instruct that the deceased did not support his family, but had been separated from them in consequence of his habits, and of an illicit intercourse he carried on; and, inter alia, for recovery of a correspondence alleged to have passed between the deceased and the party with whom he had the illicit intercourse.
 (2.) Observed, that in granting such diligence, the Court were disposing

REPARATION (Continued.)

of the general question of the admissibility (in the event of a jury-trial) of the evidence sought to be recovered. *Brash*, Feb. 27, 1845, p. 539.

RES JUDICATA.

See *Bankruptcy*, 14.

REVIEW.

See *Process*, V.

RIVER.

Question, (1.) Whether a party had a title to complain of the erection of a dam-dyke in a river in which he had no property, in respect of being proprietor of stell-fishings in the sea at the mouth of it, which were thereby injured?

(2.) Whether it was competent to found upon the Act 1696, c. 33, (requiring slaps for the passage of fish to be made in all dam-dykes in rivers,) said Act not being libelled on? The Court, to avoid this last question, allowed an amendment of the libel introducing the Act, but found the pursuer liable in the expenses of a previous discussion thereby rendered unnecessary, and of such alterations in the defences and record as might in consequence be necessary. *Munro*, Jan. 31, 1845, p. 358.

ROAD.

The tolls of a road having been found insufficient to pay the interest of the debt upon it, and certain of the road trustees who were liable for the debt being less interested in the road than the others, it was agreed that "a loss of about £130 per annum" should be made up by these other trustees paying their several proportions thereof according to their respective valuations;—Held,

(1.) That this agreement did not import an obligation to pay an average loss of £130 per annum in a series of years, but only an obligation to pay the loss not exceeding that sum, in each year as it occurred.

(2.) That the obligants not being liable *singuli in solidum*, were not liable for the loss occasioned by the insolvency of one of their number.

(3.) That one of the obligants having sold his property, was not thereby relieved of his obligation. *Duke of Montrose*, May 30, 1845, p. 759.

SALE.

1. By the articles of roup of a judicial sale, it was declared that Martinmas 1843 should be the purchaser's term of entry, and that he should have right to the rents "falling due from and after the said term;"—Held,

(1st.) That the purchaser was not entitled to the rents payable at Whitsunday and Candlemas 1844, for crop and year 1843.

(2d.) That it was incompetent to control or modify the construction of the articles of roup by production of correspondence between the common agent and judicial factor, or by any declaration as to the meaning thereof. *Stevenson*, Feb. 12, 1845, p. 418.

2. In an action for the price of certain goods as having been sold out and out to the defender, who alleged that he had merely received them on sale and return, and with leave to return such as were unsaleable;—Circumstances in which the Court allowed a proof, before answer, of an alleged verbal agreement entered into before the course of dealing began, that the goods were to be sent on the terms stated by the defender. *Woodrow*, Feb. 7, 1845, p. 385.

3. A party ordered a cargo of goods of a stipulated quality, and, on receiving them, intimated to the vender that they were of an inferior quality, and that they had been deposited in a bonded warehouse at his risk; thereafter he removed from the warehouse, without legal warrant, and appropriated to his own use the greater part of the goods;—Held,

(1.) That he was liable for the contract price of the remainder.

(2.) That he could not maintain an action against the vender for fraudulent breach of contract. *Ranson*, June 3, 1845, p. 813.

4.—A party brought an action for the price of potatoes, alleged in the sum-

SALE (Continued.)

mons to have been purchased from him "at the agreed on price of £20, 10s. per Scots acre, or £16, 8s. per imperial acre;" on record the pursuer averred that the potatoes were purchased "at the agreed on price per acre, which, upon a strict construction, means the imperial acre," but that he restricted his claim to the price mentioned per Scots acre: on a proof he failed to establish either that the bargain had been made according to the imperial acre, or that any reference had been made to the standard measure; —Held, that the bargain as libelled was legal under the Act, 5 Geo. IV. c. 74, § 15, but that it had not been established. Alexander, June 24, 1845, p. 915.

SCHOOLMASTER.

Circumstances in which held, that a presbytery was bound to apply to the Commissioners of Supply to fill up a vacancy in the office of parish schoolmaster, in terms of the Act 43 Geo. III. c. 54, § 15. Lord Belhaven, July 16, 1845, p. 1061. #

SLANDER.

In an action for libel—

(1.) Held that a counter-issue was incompetent, proof of which did not amount to a justification of the whole or a distinct part of the libel; and observed, that by allowing a counter-issue (in such action) the Court pronounced upon its relevancy as a justification.

(2.) Terms of counter-issues, which were disallowed in respect the facts proposed to be proved under them were too vaguely and loosely set forth. Lowe, Nov. 16, 1844, p. 117.

SMALL DEBT COURT.

See *Jurisdiction*, 2.

STAMP.

1.—(1.) Held by the Lord Ordinary, and acquiesced in, that an assignation of a bill and diligence for a consideration must be written upon a deed stamp of £1, 15s.

(2.) Held by the Court that the subsequent stamping of such assignation validated diligence which had proceeded in virtue of it while unstamped. King, Dec. 18, 1844, p. 228.

2. Terms of a letter held to fall within the meaning of the Stamp Act, to be considered as an order for the payment of money out of a particular fund which might or might not be available, and being delivered to the payees named therein, liable as such to stamp duty. Taylor, Feb. 13, 1845, p. 420.

3. Where a written agreement between parties to fight corks, founded on in a process, was not stamped,—the Court refused to dismiss a reclaiming note, on the objection that the agreement not being stamped could not be looked at, but allowed time to have it stamped. Harvey, Feb. 7, 1845, p. 398.

4. A transfer was written on paper, bearing a stamp-duty of sufficient amount but on which another deed had been previously engrossed, though never executed. The testing clause of the transfer bore, that all the words on the sheet other than those contained in the transfer should be "held *pro non scripto*, and as erased;"—Held that the transfer was valid. Longmore, July 19, 1845, p. 1098.

STANDARD MEASURE.

See *Sale*, 4.

STATUTE, CONSTRUCTION OF.

Clauses of a local act, and circumstances under which held,

(1.) That the trustees appointed by it, who were empowered to acquire certain lands for the improvement of the navigation of the river Clyde, were not entitled, by means of the compulsitors conferred by the Act, to take possession of part only of the ground belonging to certain proprietors included in the plan referred to in the Act, but were bound to take the whole.

STATUTE, CONSTRUCTION OF, (Continued.)

(2.) That an offer by the trustees to purchase certain subjects for the purposes of the Act, was a taking of them under it, which entitled the proprietors to have them valued by a jury. Connell, June 6, 1845, p. 829.

SUCCESSION.

1. A father disposed certain heritable subjects to his daughter and her husband "in conjunct fee and liferent, and the longer liver of them," and to their eldest son *nominatim*, his heirs or assignees whatsoever, heritably and irredeemably, in fee; the disposition bore to be granted for love and favour, but by a subsequent deed the husband bound himself to pay a price for the subjects, which was considerably less than their value; the wife survived;—Held that the fee was vested in the husband, and that as the son was his heir *aliquali successurus* in these subjects, and did not obtain them by singular title from his grandfather, he was bound to collate them with his brothers. Fisher's Trustees, Nov. 19, 1844, p. 129.

2. Decree of transference refused to be pronounced against the widow of a deceased defender, who had received a liferent of his heritable property and a bequest of certain moveables, his heir and executor having both entered to his succession respectively. Clelland, Feb. 18, 1845, p. 461.

3. A father bound himself in his second son's marriage contract to pay him £1000, and further to "put him on an equal footing" with any of his younger children, by paying or bequeathing to the son the difference between that sum and any larger sum he might give or bequeath to any of them; by the subsequent marriage contract of a daughter, the father bound himself to pay her an annuity of £200 for life, commencing with her marriage; in his settlement, he directed his trustees to divide the reversion of his estate among his children on the death of his wife, to whom he gave a liferent of the whole;—Held that the son, under his marriage contract, was a creditor of his father to the effect of being immediately put on a footing of equality with his married sister; that the bequest to him of a share of the reversion, upon the death of his mother, the liferentrix, was not implement of the father's obligation; and that, in order to put him on an equality with his sister, he was entitled to draw from the trust estate immediately the amount of the sister's annuities already paid, and prospectively to the amount of such further annuities, or share of reversion, as she might receive. Threshie, Feb. 11, 1845, p. 403.

—(1.) In a charter of resignation, which proceeded upon the procuratory in a deed of entail, a substitution, which in the entail had stood to "heirs whatsoever of the body," was changed to "heirs whatsoever;—Held, that the destination in the charter was not an alteration of that in the entail, but that "heirs whatsoever" was a flexible term; which was to be construed by the terms of the entail upon which the charter proceeded as its warrant, and to which it referred.

(2.) Observed, that a destination in an entail to "heirs whatsoever," in the event of that destination coming into operation, would not render the entail inoperative against the heir in possession, if the succession of heirs-portioners were excluded. Stirling, May 28, 1845, p. 640.

COMMONS.

See Process, I.

SUPERIOR AND VASSAL.

In a declarator of non-entry—Held,

(1.) That where the pursuer had an *ex facie* title and was infeft in the superiority, and there was no competing claimant, the defender (the vassal) had no title or interest to object to the pursuer's title:

(2.) That the vassal could not object to, or call for production of the title of a party whom he or his author had once recognised as superior by taking an entry from him.

(3.) That it was *jus tertii* for the defender, not being an heir of entail, to

SUPERIOR AND VASSAL (Continued.)

plead the prohibitions of an entail against the validity of the conveyance by which the pursuer acquired right to the superiority.

(4.) That a title to a specified feu-duty payable "out of certain land belonging in property to A B of Barra, with the right of superiority of the said lands out of which the said feu-duty is payable," was, in the circumstance, a sufficient title to the superiority of Barra;—and circumstances in which this held:

(5.) That a procuratory of resignation granted by a party uninfest was, with the title made upon it, validated *accretione* by the subsequent infestment of the granter. Innes, Nov. 20, 1844, p. 141.

2. Certain lands were acquired by an hospital by disposition in 1735 to its office-bearers and their successors in office, in which they were infest base; after a considerable period (subsequent to the death of the office-bearers in whose names infestment had passed) the hospital, as a corporation, sold the superiority of the lands, assigning to the purchaser the unexecuted procuratory, and excepting from the conveyance the base infestment as a right of property belonging to the hospital in its corporate capacity: In a declarator of non-entry, brought by the superior,—Held,

(1.) That the superior was not entitled to challenge the base infestment as not constituting the hospital the vassal in its corporate capacity, because the right of the hospital to the property in that character was expressly saved and reserved in gremio of the superior's own title; and as the superiority itself was derived from the hospital as a corporation, the superior could not challenge its right as a corporation under the disposition 1735, without thereby impugning his own title.

(2.) That the lands having been disposed to the office-bearers of the hospital and their successors in office, the superior was not entitled, on their decease, to insist for a composition as on the entry of a singular successor. Gardner, Jan. 23, 1845, p. 286.

3. A and B had granted an heritable bond over subjects held by them, as pro indiviso proprietors, to certain parties, in relief of a cautionary obligation undertaken by them to a bank, for a cash-credit to a firm of which B was partner, on which bond the cautioners were infest. The bond for the cash credit having been retired by the firm, the principal obligants, it became necessary that the security in relief should be discharged by the cautioners. For effecting this, it was requisite that the heir of one of the cautioners who was dead, should be entered by A and B, the superior of the subjects over which the security was granted. An application was made by the carter bonia to A, craving power from the Court, in conjunction with B, to enter the heir of the cautioner:—Intimation having been ordered to B, and the cautioners consenting, the prayer of the petition was granted. Grant, Dec. 7, 1844, p. 182.
4. Objection, that a Crown charter of resignation was not capable of being recorded in the register of tailies under the statute 1685, c. 22, in respect of its not being the "original tailzie," or (holding it to be so) in respect it was not granted by one of "his Majesty's subjects,"—Held to be obviated by the authority given to record it in a private Act of Parliament. Stirling, May 28, 1845, p. 640.

TEINDS.

1. The proprietrix of an entailed estate obtained decree of valuation of her teinds, on the footing of the rent paid to her under an existing lease of her lands; to this process the Officers of State and the tackman of the teinds had been made parties, and it had been objected by the latter, that this lease having been granted by a predecessor in diminution of the rental and for a grassum, afforded no criterion of the value of the lands; the proprietrix having subsequently reduced the lease on these grounds, as in contravention of the entail, the Officers of State brought a reduction of the decree of valuation;—which

TEINDS (Continued)

action, in the circumstances, dismissed. Officers of State, Feb. 27, 1845, p. 542.

2. Circumstances in which held, that the payment for 200 years of "two and a-half bolls parsonage," from certain lands in one parish to the titular of another parish, did not give him a right to the whole teinds of these lands, on the ground that they were rental bolls, in a question with the titular of the teinds of the parish in which the lands were actually situated, and who was proved to have also drawn teinds from the lands. College of Glasgow, July 2, 1845, p. 965.

TESTAMENT.

- 1.—(1.) In the administration of a testamentary trust, the trustee made payment to certain of the special legatees, and also to the residuary legatees, of part of their provisions under the settlement; a special legatee, who had not been paid to the same extent as the others, brought an action for the amount of her provisions; this action the trustee resisted, on the ground that, till the trustor's debts were paid, there could be no claim for a legacy; eventually, however, he agreed to pay her rateably with the others, and to pay her expenses of process. In a question, whether the trustee was entitled to state the expense of this action against the trust estate, or whether he was personally liable therefor,—Circumstances in which held, that he could not so state it as in a question with the legatee, pursuer of the action, but that having acted in bona fide, he was entitled to do so as with the other special and the residuary legatees, it being understood that, if there were funds to pay the special legatees in full, and also a residue, the expenses would fall to be paid out of the residuary fund.

(2.) A trustee, who, it was declared, should not be liable for omissions or neglect of diligence, but only for his own intromissions, held not liable for arrears of rent caused by the want of due care, and by failure to do diligence on the part of the factor on the trust-estate. Cameron, Nov. 12, 1844, p. 92.

2. A testator directed his trustees to hold his whole succession for the life of his wife, should she survive him, with power to her to test on it to a certain extent; and on her death, or on his own, should he survive her, to divide the residue into two equal shares, and out of the first to pay a legacy of £200 to his niece, and the balance to his nephew, and to hold the second for the life of certain parties, and, on the death of the longest liver, to divide it among the children then surviving of one of them;—Held that the legacy to the nephew vested in him by his survival of the testator, though he predeceased his wife the life-rentrix. Kilgour, Feb. 14, 1845, p. 451.

- 3.—(1.) Held that a will executed by a Scotchman at St Kitts, written by himself in ordinary popular language, must, even with regard to a bequest of funds in Scotland, be interpreted, and the testator's intention judged of, according to the law of England.

(2.) Opinion indicated, that, by the law of Scotland, a condition adjoined to a bequest must be given effect to, though it appears to have been adjoined from a mistaken notion on the part of the testator as to the extent of his power. Gowan, Feb. 14, 1845, p. 433.

4. Legacy to A, his heirs, executors, or assignees, in the event of B, who life-rented the subject of it, dying without issue:—A predeceased B, having assigned the legacy; B afterwards died without issue; in a competition between the executor and the assignee of A, the executor was preferred, in conformity with the opinion of a majority of the whole Judges. Bell, May 21, 1845, p. 614.

TITLE TO PURSUE OR DEFEND.

1. By antenuptial contract, the husband bound himself and his heirs to invest a sum for behoof of the wife in life-rent in the event of her survival, and the

TITLE TO PURSUE OR DEFEND (Continued.)

children of the marriage in fee, so soon as he or they should be called on to do so by certain trustees; and by relative bond of caution, his brother, one of the trustees, bound himself to pay these provisions in the event of the husband failing to implement his obligation in regard to them. The husband having died insolvent, without having implemented the obligation, or having been called upon by the trustees to do so;—Held,

(1st,) That the brother was liable upon the bond; and,

(2d,) That the wife had a good title to sue upon it, without the concurrence of the marriage trustees. Wilson, Nov. 16, 1844, p. 125.

2. A creditor who had drawn a dividend in a sequestration, raised action in the Sheriff-court against the bankrupt, concluding for payment of his whole debt, "under deduction of whatever sums the defender may be able to instruct he has paid to account," and for expenses generally. The bankrupt defended, pleading that the action was incompetent, and if not, claiming certain deductions from the debt, which were consented to. Decree passed against him for the balance and for expenses;—The charge for expenses suspended, on the ground that the defender was entitled to appear and claim the deductions which had been allowed, and also to oppose the conclusion for expenses, which, in an action of constitution, ought to be in the event of opposition only. Opinion, that drawing a dividend in a sequestration does not bar a creditor from obtaining at his own expense decree of constitution against the bankrupt, where he can instruct a proper object for doing so. Rutherford, Nov. 28, 1844, p. 162.
3. Certain lands were acquired by an hospital by disposition in 1735 to its office-bearers and their successors in office, in which they were infest base; after a considerable period (subsequent to the death of the office-bearers in whose names infestment had passed) the hospital, as a corporation, sold the superiority of the lands, assigning to the purchaser the unexecuted procuratory, and excepting from the conveyance the base infestment as a right of property belonging to the hospital in its corporate capacity; In a declarator of non-entry, brought by the superior,—Held, that the superior was not entitled to challenge the base infestment as not constituting the hospital the vassal in its corporate capacity, because the right of the hospital to the property in that character was expressly saved and reserved in gremio of the superior's own title; and as the superiority title itself was derived from the hospital as a corporation, the superior could not challenge its right as a corporation under the disposition 1735, without thereby impugning his own title. Gardner, Jan. 23, 1845, p. 286.
4. Question, Whether a party had a title to complain of the erection of a dam-dyke in a river in which he had no property, in respect of being proprietor of stell-fishings in the sea at the mouth of it, which were thereby injured?—Monro, Jan. 31, 1845, p. 358.
5. A party directed his trustees to execute and record an entail of certain lands in favour of a series of heirs; the trustees executed the entail, but neglected to record it, and the first heir in possession granted a security, in contravention of the entail, to one of the trustees; the next heir of entail, who had incurred a general representation of the contravener, having become bankrupt, the trustee on his sequestered estate brought a reduction of the security, on the grounds that it was a contravention of the entail, and that the creditor by accepting it had violated his duty as trustee;—Held, that he had no title to pursue the action, and the reasons of reduction repelled. Brock, June 10, 1845, p. 858.
6. In an action regarding the property of a tract of ground, the pursuer, in the course of a jury-trial, took an objection to the defender's title to prove possession; the objection having been sustained, a verdict was returned in the pursuer's favour, but it was subsequently overruled on a bill of exceptions, and a new trial was granted: at the second trial the pursuer was successful; in disposing of the question of expenses—

TITLE TO PURSUE OR DEFEND (Continued.)

(1.) Held, that the objection to title should have been pressed by the pursuer to a decision before the trial, and that the defender was therefore not liable in the expenses of the first trial, though he was not entitled to payment of them.

(2.) Held, that neither was the defender liable in the expenses of the bill of exceptions, in which he had been successful, but as his success on the question of title was fruitless, he was not entitled to claim payment of these expenses. *Carnegie*, June 5, 1845, p. 826.

TRUST.

1. In the administration of a testamentary trust, the trustee made payment to certain of the special legatees, and also to the residuary legatees, of part of their provisions under the settlement; a special legatee, who had not been paid to the same extent as the others, brought an action for the amount of her provisions; this action the trustee resisted, on the ground that, till the trust's debts were paid, there could be no claim for a legacy; eventually, however, he agreed to pay her rateably with the others, and to pay her expenses of process. In a question, whether the trustee was entitled to state the expense of this action against the trust estate, or whether he was personally liable therefor,—Circumstances in which held, that he could not so state it as in a question with the legatee, pursuer of the action, but that having acted in bona fide, he was entitled to do so as with the other special and the residuary legatees, it being understood that, if there were funds to pay the special legatees in full, and also a residue, the expenses would fall to be paid out of the residuary fund.

(2.) A trustee, who, it was declared, should not be liable for omissions or neglect of diligence, but only for his own intromissions, held not liable for arrears of rent caused by the want of due care, and by failure to do diligence on the part of the factor on the trust estate. *Cameron*, Nov. 12, 1844, p. 92.

2.—(1.) Where trustees had powers to sell heritable subjects either publicly or privately, and at such prices as they thought fit, but no special power to transact or compromise;—Held, in an action of count and reckoning, at the instance of a legatee under the trust, that the sale of a heritable debt below its nominal value was unchallengeable, the trustees having acted *bona fide* and beneficially for the trust-estate; and their actings being approved of by all concerned, except the pursuer, who had a very subordinate interest in the trust.

(2.) Question, Whether the power of trustees to enter into a transaction, can be tried in an action of count and reckoning at the instance of a beneficiary, or whether a reduction of the transaction is necessary. *Clelland*, Nov. 20, 1844, p. 147.

3. The whole trustees named in a disposition for behoof of married parties and their children, which contained a power of sale, having died, the Court, on the application, or with consent, of all the parties beneficially interested, appointed trustees under the disposition, "with the whole powers thereby conferred on the original trustees now deceased, they always finding caution before extract, in terms of the A.S. anent factors." *Glasgow*, Dec. 6, 1844, p. 178.

4.—(1.) Terms of a clause in a trust-deed, by which a party not named in the dispositive clause along with the other trustees, was held validly nominated a trustee.

(2.) Held that erasures in the names and designations of three out of seven trustees, in favour of whom, and the survivors or survivor of them, the major part alive and accepting being a quorum, the trust was conceived, were not in *substantialibus*. *Robertson*, Dec. 20, 1844, p. 236.

5. Circumstances in which a factor upon a trust-estate was appointed on the joint application of two claimants of the residue of the estate, during the de-

TRUST (Continued.)

pendence of a process raised for the reduction of the titles of the heir-at-law, who was in possession of the heritage of the truster, and maintained that the trust had lapsed, and was ineffectual. Brown, May 29, 1845, p. 745.

6. A father, who had granted to his daughters a conveyance of heritage *ex facie* absolute, proceeding on an admittedly false narrative of a price paid, raised a declarator to have it found that it was truly one in trust; and averred that its real nature was set forth in a back-letter delivered to him by the grantees, but which had been lost or abstracted by them from his repositories.—Held, that trust could be established only by the production, or a proving of the tenor of the back-letter, or by the writ or oath of the grantees.—Observed, that facts and circumstances admitted on record may be sufficient to prove a trust. Chalmers, June 13, 1845, p. 865.
7. In a multipoleinding as to a trust-fund, expenses, in the particular case, refused to be allowed out of the fund; and Observed, that it was a common conception that all parties who attack a trust-fund were to get their expenses out of it, but that they do so at their own risk. Allan, June 20, 1845, p. 908.
8. Testamentary trustees, who, by the trust-deed, were specially exempted from liability for the insolvency of factors, or for omissions, and declared liable each only for his own actual intromissions, were called to account by a beneficiary for a loss arising from the bankruptcy of a factor, whom they had allowed to retain, without security, a large sum uplifted by him on the part of the trust. An issue was sent to trial, whether the trustees had allowed the sum to pass into and remain in the factor's hands "wrongfully, and in contravention of their duty as trustees;" and the Judge directed the jury, that they were liable only if proved to have been guilty of "gross and culpable negligence;"—An exception against this direction disallowed. Home, July 10, 1845, p. 1010.

See *Bankruptcy*, 16.

TRUSTEE.

See *Bankruptcy*.

VALUATION.

See *Trusts*.

VESTING.

1. A party, in fulfilment of a bargain between him and his former wife, from whom he had been separated by divorce, and as a part of the consideration for her having conveyed certain lands, belonging to her, to him and the children of the marriage in their order, granted a bond of provision to the younger children of the marriage nominatim, binding himself to make payment to them equally among them and the heirs of their respective bodies, and the survivors and survivor of them, of £4000, at the first term after the decease of the longest liver of him and his said former wife: the bond further bore to have been instantly delivered for the use and benefit of the grantees; the father having died, and having been survived by the mother of the children.—Held, on a construction of the above, and other provisions and clauses contained in the bond, that the children's interest in the bond had vested in them at their father's death. Allardice, Jan. 31, 1845, p. 362.
2. A testator directed his trustees to hold his whole succession for the liferent use of his wife, should she survive him, with power to her to test on it to a certain extent; and on her death, or on his own, should he survive her, to divide the residue into two equal shares, and out of the first to pay a legacy of £200 to his niece, and the balance to his nephew, and to hold the second for the liferent use of certain parties, and, on the death of the longest liver, to divide it among the children then surviving of one of them;—Held that the legacy to the nephew vested in him by his survivance of the testator, though he predeceased his wife the liferentrix. Kilgour, Feb. 14, 1845, p. 451.

VESTING (Continued.)

3. Legacy to A, his heirs, executors, or assignees, in the event of B, who life-rented the subject of it, dying without issue :—A predeceased B, having assigned the legacy : B afterwards died without issue : in a competition between the executor and assignee of A, the executor was preferred, in conformity with the opinion of a majority of the whole Judges. Bell, May 21, 1845, p. 614.

WARRANTICE.

The proposal for a life insurance and relative declaration, which formed the basis of the contract in the policy subsequently granted, contained a declaration that the party had no disease, or symptom of disease, and was then in good health, and ordinarily enjoyed good health, and that no material circumstances or information touching health or habits of life with which the insurers ought to be made acquainted was withheld :—Held that this imported a warranty only to the effect that the declarant was and had been, according to her own knowledge and reasonable belief, free from any disease, or symptom of disease, material to the risk, and did not import a warranty against any latent imperceptible disease that could only be discovered by *post mortem* examination, or from symptoms disclosing themselves at an after period of time. Hutchison, Feb. 21, 1845, p. 467.

WITNESS.

A witness who had failed to appear at a jury-trial, to which he had been cited, was subsequently ordered by the Court to appear at the bar, when he alleged illness as his excuse ; after a proof of his allegations,—The Court, holding that he had failed to substantiate any such indisposition as should have prevented his attendance, and that at all events he ought, in the circumstances, to have intimated his inability to attend to the agent in the cause, fined him £20, and found him also liable to the party who had cited him, in the expense in regard to this proof. Donald, Jan. 17, 1845, p. 273.

WRIT.

- (1.) Terms of a clause in a trust-deed, by which a party not named in the dispositive clause along with the other trustees, was held validly nominated a trustee.
- (2.) Held that erasures in the names and designations of three out of seven trustees, in favour of whom, and the survivors or survivor of them, the major part alive and accepting being a quorum, the trust was conceived, were not *in substantialibus*.
- (3.) Held that a statement in a deed, that it was holograph of the granter, was *prima facie* evidence that it was so, and threw the burden of proving the contrary upon the challenger, but that such statement afforded no presumption that words written upon erasures were also holograph.
- (4.) Opinion that erasures *in substantialibus* did not vitiate a holograph deed, if proved that the writing superinduced was also holograph.
- (5.) Question whether the doctrines of approbate and reprobate, and homologation, applied to a deed vitiated by erasure *in substantialibus*. Robertson, Dec. 20, 1844, p. 236.
2. Ruled, that where the granter of a holograph deed bearing a certain date was proved to have become insane at a period subsequent thereto, and died insane, there is no legal presumption that the deed was executed during insanity ; but the party founding on the document is bound to support or adminiculate its date, which he may do by facts and circumstances of an indirect nature ; and the deed itself, and the date expressed in it, are not to be thrown out of consideration. Waddel, May 13—16, 1845, p. 605.

WRONGOUS IMPRISONMENT.

See *Reparation*.

Edinburgh: Printed by Ballantyne and Hughes, Paul's Work, Canongate.



